

**IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

UNITED STATES OF AMERICA,)	
)	
Appellee,)	
)	
v.)	Case No. 18-3058
)	
RANDELL G. SHELTON, JR.,)	
)	
Appellant.)	

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

COMES NOW *Amicus Curiae* National Association of Criminal Defense Lawyers, by and through counsel, and hereby moves this Honorable Court, pursuant to FRAP 29(a)(3), for leave to file a Brief of *Amicus Curiae* in support of Appellant Randell G. Shelton, Jr. In support of this motion, counsel states as follows:

1. The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit bar association founded in 1958 that works to ensure justice and due process for the accused. Its nationwide membership includes many thousands of private, public, and military defense counsel and law professors and judges. It frequently provides *amicus* input on issues of broad importance to the criminal justice system.

2. This case involves an important question of criminal law: Under the Due Process Clause of the United States Constitution, what is the appropriate remedy when a government agent acts in shocking bad faith, intentionally “wiping” his

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government-issued, undercover laptop computer instead of delivering it for a forensic evaluation as instructed? The Court below found that the agent acted in bad faith and violated Appellant’s due process rights, but nevertheless fashioned a remedy short of dismissal. The remedy given by the Court wasn’t nearly sufficient to (a) satisfy the defendant’s right to seek and discover potentially exculpatory evidence; (b) punish the government for wrongful conduct in this case, or (c) deter wrongful conduct in future cases by similarly situated government agents or entities. This issue strikes at the heart of the due process guarantee and the fairness of the justice system, so NACDL has a strong interest in the Court’s resolution of this matter.

3. NACDL, as *amicus curiae*, seeks to supply the Court with the attached briefing concerning the broader policy implications of the District Court’s ruling not fully or directly addressed in the Brief of Appellant, which was filed on June 12, 2019. Specifically, the brief focuses on the issue of whether a case with facts as egregious as this one should so shock the conscience of the Court that dismissal

is the only appropriate remedy to punish the Government's conduct in this case, and deter such conduct in the future.

4. NACDL is concerned that, in this case, the District Court's remedy for the serious violation of Appellant's due process rights did not fulfill the critical function

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of the courts to identify and sanction "outrageous or intolerable government conduct."

5. NACDL represents the consensus view of its members that the shocking bad faith act of destroying evidence in this case weighs in favor of vindicating the Constitutional rights of the individual accused over the rights of the public in seeing crime prosecuted without permitting the accused to examine all potentially useful evidence. For the foregoing reasons, the motion should be granted.

CONCLUSION

WHEREFORE, for all the foregoing reasons, NACDL respectfully prays that this Court enter an order permitting the filing of the attached Brief of *Amicus Curiae*.

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ J. Justin Johnston
*Counsel for Amicus Curiae National
Association of Criminal Defense Lawyers*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

I hereby certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 727 words.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 27(1)(E) and 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

/s/ J. Justin Johnston
*Counsel for Amicus Curiae National
Association of Criminal Defense Lawyers*

Dated: July 3, 2019

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No. 18-3058

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

UNITED STATES OF AMERICA,
Appellee,
vs.
RANDELL G. SHELTON, JR.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
(Fayetteville Division)

**BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT
RANDELL G. SHELTON, JR., REVERSAL, AND REMAND**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae National Association of Criminal Defense Lawyers states that it has no parent corporation and that no publicly held company holds more than 10% of its stock.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit bar association founded in 1958 that works to ensure justice and due process for the accused. Its nationwide membership includes many thousands of private, public, and military defense counsel and law professors and judges. It frequently provides *amicus* input on issues of broad importance to the criminal justice system.

This case involves an important question of criminal law: Under the Due Process Clause of the United States Constitution, what is the appropriate remedy when a government agent acts in shocking bad faith, intentionally “wiping” his government-issued, undercover laptop computer instead of delivering it for a forensic evaluation as instructed? The Court below found that the agent acted in bad faith and violated Appellant’s due process rights, but nevertheless fashioned a remedy short of dismissal. The remedy given by the Court wasn’t nearly sufficient to (a) satisfy the defendant’s right to seek and discover potentially exculpatory evidence; (b) punish the government for wrongful conduct in this case, or (c) deter wrongful conduct in future cases by similarly situated government agents or entities. This issue strikes at the heart of the due process guarantee and the fairness of the justice system, so NACDL has a strong interest in the Court’s resolution of this matter.

STATEMENT OF THE CASE

The following is a brief summary of the facts supporting dismissal, which are more fully set forth in the Memorandum Opinion (Doc. 297)¹ entered by the District Court on March 2, 2018.

On November 30, 2017, Assistant United States Attorney Aaron Jennen instructed Special Agent Robert Cessario to deliver his laptop to a forensic examiner in Little Rock, Arkansas named Timothy Whitlock. (Doc. 290, pp. 17-18; 31). Agent Cessario spoke with Agent Whitlock on December 1, 2017, and learned about what the examination would entail. (Doc. 289, p. 212). Soon thereafter, on December 4, 2017, Agent Cessario took the laptop to a computer service shop, and had the technician there “wipe” the hard drive. (Doc. 288, pp. 230-33; Doc. 290, pp. 19-20). Then, on the morning of December 7, 2017, Agent Cessario again wiped the laptop himself before personally delivering the laptop to Agent Whitlock, rather than giving it to another agent for delivery, as he had been instructed. (Doc. 289, pp. 218-19). He did not tell Agent Whitlock that he had wiped the hard drive (Doc. 288, pp. 297-98), and didn’t acknowledge wiping the

¹ References herein to documents and transcripts filed in the District Court docket shall be by docket number and page, and designated “Doc. *** at p. ***”.

drive to anyone until he was confronted with evidence of having done so. (Doc. 288, pp. 298-99; Doc. 289, pp. 221-22; Doc. 290, p. 19).

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When called to testify about his acts under oath, Agent Cessario lied several times to the District Court. (*See* Doc. 290, pp. 27-32; Doc. 290, pp. 8-12, 36-38). The District Court expressly stated its belief “that Agent Cessario lied to the Government’s attorneys and to Agent Whitlock,” and that he “lied on the stand” about his reasons for having made certain claims to them. (Doc. 297, p. 37).

Agent Cessario testified that he *knew* he might face consequences for obstructing justice for his decision to wipe the laptop hard drive. (*See* Doc. 290, p. 16). And yet, as the District Court noted, he wiped the data storage media anyway because “there was... something on that laptop that Agent Cessario was willing to risk his job, public reputation, and liberty to ensure that it never saw the light of day.” (Doc. 297, p. 39). In other words, Agent Cessario went forward with a deliberate plan to obstruct justice because he felt the contents of the laptop contained “something that posed an even greater risk to his job, public reputation, and liberty than was posed by his decision to wipe the laptop.” (Doc. 297, p. 39).

Ultimately, the District Court concluded that “we will probably never know” (Doc. 297, p. 39) what was stored on the laptop, but nevertheless engaged in a purely conjectural exercise as to what it could have been that would be material or relevant to the charges against the Defendants. Even while “grant[ing] the theoretical possibility that the laptop might have contained evidence of some sort of wrongdoing by Agent Cessario that relates to this case,” the Court stated that it “has been unable

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to come up with any plausible scenarios.” (Doc. 297, p. 41). In so doing, the District Court essentially asked the Defendants to sustain an impossible burden: to prove that the unknown, unexamined, and deliberately destroyed digital contents of the hard drive were material, and that their destruction was prejudicial.

After finding that Agent Cessario had indeed acted in bad faith and violated the Defendants’ due process rights, the District Court declined to dismiss the indictment because they could “not show prejudice.” (Doc. 297, p. 45). Despite the fact that the District Court found Agent Cessario’s actions to be “reprehensible,” it noted that “the public does not forfeit its interest in seeing crime prosecuted simply because one Government agent happened to engage in bad conduct along the way.” (*Id.* at pp. 45-46).

STATEMENT UNDER FRAP 29(a)(4)(E)

No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than NACDL, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT**I. Dismissal is the only remedy that will appropriately redress the Government's acts of bad faith and violations of Appellant's due process rights.**

As in any criminal case where the Defendant asks for the extraordinary remedy of dismissal, the District Court below was faced with a confounding task: balancing the important procedural and substantive rights of accused individuals embodied in the Fifth Amendment to the United States Constitution against the interest of the public in seeing crime prosecuted. The District Court determined, despite Agent Cessario's disgraceful acts of bad faith which violated Appellant's due process rights, that Appellant's failure – in the Court's estimation – to show prejudice or substantial risk of prejudice required a sanction less than dismissal.

The undersigned *amicus curiae* leave it to Appellant to argue whether the District Court erred in finding that Appellant did not show prejudice or a substantial risk of prejudice in the proceedings below. This brief instead focuses on the broader issue of whether a case with facts as egregious as this one should so shock the conscience of the Court that dismissal is the only appropriate remedy to punish the Government's conduct in this case, and deter such conduct in the future.

The law of criminal procedure serves many important functions, but at least one of those functions is to extensively regulate the conduct of various actors in the system, ranging from police officers and prosecutors, to defense attorneys and court personnel. Warren-era cases such as *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Miranda v. Arizona*, 384 U.S. 436 (1966), and many others like them, “tell police, prosecutors, the court system, and even defense lawyers what not to do, and what will happen if they do it.” *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 16-17 (1997). Indeed, “criminal procedure regulates much more than police investigation. A wide variety of constitutional doctrines aim to channel the conduct of some set of actors in the system in order to get them to behave in a way that will make the system as a whole function better.” *Id.* at 18-19 (describing bodies of law that govern grand jury and petit jury section, ineffective assistance of counsel, the exclusionary rule, and other doctrines.). And, when considering whether a particular remedy for violations of Constitutional rules of criminal procedure is appropriate, a Court should consider that “[t]he cost of the lost conviction, whether financial, political, or some combination thereof, is aimed at least in part at deterring future [Constitutional] violations.” *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 Colum. L. Rev. 1002, 1004 (May, 2010).

This case presents an opportunity for this Court to clearly define and enforce, with an appropriate case-specific remedy, the outer boundaries of acceptable conduct by Government agents concerning the protection and preservation of evidence which is “potentially useful” to defendants. The evidence presented below demonstrated that (1) Agent Cessario knew that Appellant wanted to examine the contents of his laptop for potentially relevant and possibly exculpatory evidence; (2) he nevertheless deliberately destroyed the evidence, in what the District Court could only surmise was out of fear that the contents of the laptop contained “something that posed an even greater risk to his job, public reputation, and liberty than was posed by his decision to wipe the laptop.” (Doc. 297, p. 39); (3) he concealed that he had destroyed the evidence until he was confronted about it; (4) he lied to other agents and prosecutors about his reasons for having destroyed the evidence; and (5) the District Court expressly found that he committed perjury when testifying about why he had destroyed the evidence.

It is well-settled in this Circuit that “[o]utrageous government conduct that shocks the conscience can require dismissal of a criminal charge, but only if it falls within the narrow band of the most intolerable government conduct.” *United States v. Morse*, 613 F.3d 787, 792 (8th Cir. 2010). “Whether particular government conduct was sufficiently outrageous to meet this standard is a question of law

which we review de novo.” *Id.* It is difficult to imagine a more outrageous set of facts

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showing conduct calculated to frustrate a defendant’s efforts to conduct a fair and full investigation of all facts that may be relevant to his guilt or innocence. If this case does not define the outer boundaries of what constitutes outrageous or intolerable government conduct, then there is no case which may do so.

The District Court in *Youngblood* acknowledged the implicit message delivered by government agents when they destroy “potentially useful evidence,” saying:

We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., *those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.*”

Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 337, L. Ed. 2d 281, 289 (1988) (emphasis added). With these words, the Supreme Court essentially recognized that by destroying “potentially useful evidence,” the police by their conduct tacitly admit that such evidence was likely exculpatory.

For these reasons, this Court should send a clear message that conduct like that of Agent Cessario will not be tolerated in this Circuit, and that a defendant's

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right to examine all potentially useful evidence is of such importance that a government agent's shocking bad faith act of destroying such evidence will weigh in favor of vindicating the Constitutional rights of the individual accused over the rights of the public in seeing crime prosecuted, however unfairly. This Court should reverse the decision of the District Court, and remand this case with instructions to dismiss the indictment.

CONCLUSION

The Court below found that Agent Cesario acted in "reprehensible" bad faith in destroying "potentially useful evidence," but fashioned a remedy short of dismissal, under circumstances where that remedy wasn't nearly sufficient to (a) vindicate the defendant's right to seek and discover potentially exculpatory evidence; (b) punish the government for wrongful conduct in this case, or (c) to deter wrongful conduct in future cases by similarly situated government agents or entities. Because a key function of criminal procedural law is to regulate behavior by actors in the system, to promote right conduct, and to punish and deter wrong conduct, this Court should reverse the decision of the District Court, and remand this case with instructions to dismiss the indictment.

Dated: July 3, 2019

Respectfully submitted,

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/s/ J. Justin Johnston
Counsel for Appellant

Certificate of Compliance with FRAP 32(a)(7)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 2513 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

/s/ J. Justin Johnston

Counsel for Appellant

Statement under Rule 28A(h)(2)

I hereby certify that this brief and addendum have been scanned for viruses, and the brief is virus-free.

/s/ J. Justin Johnston

Counsel for Appellant

