No. _____

In The
Supreme Court of the United States

FRANKLIN C. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erroneously exempted pre-indictment contact by a federal prosecutor with a person represented by counsel from binding ethical rules restricting such contact based on its own policy views contrary to federal statute, in conflict with the Second and Ninth Circuit?

2. Whether the Third Circuit erroneously held that suppression of statements obtained by unethical contact with a represented party was an improper remedy, in conflict with the Second and Tenth Circuits?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Franklin C. Brown was the defendant in the district court and the appellant in the Third Circuit.

Respondent the United States of America prosecuted the case in the district court and was the appellee in the Third Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Pennsylvania denying defendant's motion to suppress unethically-obtained recordings of conversations between defendant and a confidential government informant is published at 239 F. Supp.2d 535 and is attached at Appendix B1-B31. The opinion of the Third Circuit affirming petitioner's conviction is published at 595 F.3d 498 and is attached at Appendix A1-A58.

JURISDICTION

The Third Circuit issued its opinion on February 23, 2010. The Third Circuit denied rehearing and rehearing *en banc* on May 6, 2010. App. C1-C2. Justice Alito granted petitioner an extension of time to file this petition through September 3, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 3231.

STATUTE AND RULES INVOLVED

The McDade Amendment, 28 U.S.C. § 530B, provides, in relevant part:

> **§ 530B. Ethical standards for attorneys for the Government**
>
> **(a)** An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that at-

> torney's duties, to the same extent and in the same manner as other attorneys in that State.

At the time relevant to this petition, Pennsylvania Rule of Professional Conduct 4.2, known as the "no-contact rule," provided:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. [1]

Pennsylvania Rule of Professional Conduct 8.4(a) provides:

> It is professional misconduct for a lawyer to:
>
> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another * * *.

STATEMENT OF THE CASE

1. This case involves prosecutorial violation of binding professional ethics rules in connection with the investigation, trial, and conviction of petitioner Franklin Brown. The Assistant U.S. Attorney, through an undisclosed proxy armed with a false document, surreptitiously orchestrated and recorded multiple interviews of petitioner without the consent

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[1] On August 23, 2004, Rule 4.2 was amended to substitute "person" for "party" and "to do so by law or a court order" for "by law to do so." PENN. R. OF PROF'L CONDUCT 4.2, historical notes. That change merely clarified the existing interpretation of the Rule and does not affect the issues presented in this petition.

and outside the presence of petitioner's counsel. Such communications violate Pennsylvania Rules of Professional Conduct 4.2 and 8.4 and the federal McDade Amendment, 28 U.S.C. § 530B(a), which makes such rules binding on federal attorneys.

2. From 1968 through 1996, petitioner Brown was the Chief Legal Counsel and then from 1996 through 1999 Vice Chairman of the Board of Rite Aid Corporation. Following a substantial restatement of earnings by Rite Aid in July 2000 and the collapse of Rite Aid's stock prices, the SEC, the FBI, and the U.S. Attorney's Office for the Middle District of Pennsylvania initiated civil and criminal investigations into Rite Aid's accounting practices and into various of its officers, including petitioner. Petitioner thereafter retained counsel to represent him in connection with such investigations and so notified the government. App. A4.

As part of the investigation, Kim Douglas Daniel, the Assistant U.S. Attorney ("AUSA") for the Middle District of Pennsylvania leading the criminal investigation, contacted petitioner's attorney to schedule an interview with petitioner. After reviewing the proposed agenda for the meeting, counsel advised petitioner against the interview and cancelled the meeting with AUSA Daniel.

Notwithstanding Pennsylvania Rules of Professional Conduct 4.2 and 8.4, which forbid attorney contact, either directly or through a surrogate, with a represented party without the consent of that party's lawyer, AUSA Daniel enlisted the help of Rite Aid's former President and Chief Operating Officer, Timothy Noonan, to secretly act as his surrogate, to ques-

tion petitioner under false pretenses outside the presence of petitioner's attorney, and to record the conversations while the FBI videotaped the meetings from a distance. Noonan met with petitioner six times from March through May 2001. App. A5. AUSA Daniel directed Noonan regarding the topics to address in those conversations, and in one instance provided Noonan with a fictitious letter from the government to guide the discussion.

3. On June 21, 2002, petitioner and three other former Rite Aid officers were indicted on various counts charging fraud, false statements, and obstruction of justice in connection with Rite Aid's restatement of income and the subsequent investigations thereof.

4. Prior to the trial, petitioner and a co-defendant filed a motion to suppress the tapes of the Noonan conversations, arguing that the government had obtained them in violation of the 1998 McDade Amendment and Pennsylvania Rules of Professional Conduct 4.2 and 8.4, restricting contact with persons represented by counsel.[2] Rule 4.2 prohibits a lawyer from communicating with a person represented by another lawyer in a matter unless he has the consent of that lawyer or is "authorized by law" to communicate with that person. PENN. R. PROF. CONDUCT 4.2. Rule 8.4(a) prohibits a lawyer from violating the ethics rules "through the acts of another." PENN. R. PROF. CONDUCT 8.4. The McDade Amendment makes

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[2] Petitioner's co-defendants pled guilty and are no longer parties to this case. App. A6 n. 2.

state ethics rules binding on federal attorneys. 28 U.S.C. § 530B(a).

5. On January 13, 2003, the district court denied the motion to suppress, holding that the AUSA's contact with petitioner did not violate Rule 4.2 because it was "authorized by law" and that suppression was not an appropriate remedy in any event. App. B15-B16, B23.

The district court initially recognized that "it is beyond doubt that AUSA Daniel was bound by the Pennsylvania Rules of Professional Conduct at all times relevant to the instant motion." App. B10. The court also recognized that "AUSA Daniel could not avoid the dictates of Rule 4.2 by employing Noonan as his surrogate to accomplish what he himself could not do without violating the Rules of Professional Conduct." *Id.*

Looking to the Third Circuit's pre-McDade Amendment decision in *United States* v. *Balter,* 91 F.3d 427, 435-36 (CA3), *cert. denied*, 519 U.S. 1011 (1996), involving New Jersey's no-contact rule, the court further recognized that *Balter*'s primary ground for finding no violation of the rule – that prior to indictment the defendant there was not a "party" covered by the rule – was "inapplicable to the instant case." App. B11. Unlike New Jersey caselaw, which limited its no-contact rule to the period " 'after formal legal or adversarial proceedings have commenced,' " the court found that "there is no caselaw limiting application of the Pennsylvania no-contact rule to post-indictment contacts." App. B12 (citation omitted). Rather, the court found just the opposite in Pennsylvania, quoting the official comments to Pennsylva-

nia's Rule 4.2, which provided that "[t]his Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." PENN. R. PROF'L CONDUCT 4.2, official comment. The court thus found that "it is clear that, at the time of the recorded conversations, Defendants Grass and Brown were parties as that term is contemplated in Rule 4.2." App. B12.

Despite such recognitions, however, the district court relied on *Balter*'s alternate ground that " 'pre-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as "authorized by law." ' " App. B12 (quoting *Balter*, 91 F.3d at 436). Neither the district court nor *Balter*, however, identified any particular "law" actually authorizing contacts otherwise within the scope of the no-contact rule. Rather, both *Balter* and the district court relied on cases from other circuits holding that earlier no-contact rules in other States did not apply to pre-indictment communications, despite the broader scope of Rule 4.2. App. B13.

In the alternative, the court held that even assuming a violation of Rule 4.2, suppression was not the proper remedy. Incorrectly narrowing the interests protected by the no-contacts rule, the court erroneously held that "the primary purpose of the no-contact rule is to prevent an attorney from intentionally tricking an opposing party into waiving the protections of the attorney-client relationship; presumably the confidentiality of attorney-client communications and trial strategies." App. B26. Finding no injury to such confidentiality where defendant spoke to a non-lawyer, the court held that "the purpose behind

the no-contact rule – *i.e.* the protection of the confidential nature of the attorney-client relationship – would not be vindicated by suppression of the Noonan tapes." App. B28. The court also deemed the government's surreptitious contacts to have been in the good-faith belief that it did not violate Rule 4.2, and hence insufficiently egregious to trigger exclusion of the conversations. *Id.*

6. On September 25, 2003, the District Court empanelled petitioner's jury and the presentation of evidence began the next day. During the government's case-in-chief, it displayed to the jury a presentation consisting of a video display of portions of the recorded conversations, purportedly synchronized with the matching audio recordings and a rolling transcript of the conversation projected across the screen. The government also elicited testimony from its confidential informant, Noonan, regarding the content of his conversations with petitioner. App. A11, A27.[3]

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[3] Before, during, and after the trial, there was a substantial dispute regarding the authenticity of the recordings used by the government at trial and regarding whether the government had produced accurate and complete transcripts of those conversations. App. A9-A22. There were substantial indications of evidence tampering and withholding of exculpatory and impeaching information, but those issues are highly fact-bound and thus unfortunately not suitable for this Court's review. Cf. App. A26 ("While a different fact-finder might have reached a conclusion contrary to the one the Court reached, the record by no means compels a conclusion that the tapes were inauthentic."). The dispute, however, demonstrates that there was at least substantial evidence of government misconduct beyond the ethics of the AUSA's *ex parte* contacts with petitioner.

7. On October 17, 2003, petitioner was convicted on various counts of fraud, false statements, obstruction, and witness tampering. App. A6, A13.

8. On October 14, 2004, the district court sentenced then-76-year-old petitioner to ten years in prison followed by two years of supervised release. App. A2, A6. Judgment of conviction and sentence was entered the following day. Petitioner surrendered himself on March 3, 2005 and has spent over five years in prison.[4]

9. On February 22, 2008, the district court denied petitioner's Rule 33 motion for a new trial, which presented new evidence that the government tampered with the audio and video tapes of the Noonan conversations and withheld an audible copy of one of the tapes containing exculpatory material. App. A17-A22.

10. Petitioner appealed to the Third Circuit arguing, *inter alia*, that the district court erroneously denied his motion to suppress the audio and video recordings obtained in violation of the no-contact rule and the McDade Amendment.[5]

11. The Third Circuit affirmed petitioner's conviction, though it remanded for resentencing in light of

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[4] On August 16, 2010, due to health considerations, petitioner was temporarily released from prison and placed on home confinement pending resentencing. Resentencing is currently scheduled for September 29, 2010.

[5] Petitioner also appealed the denial of his motion for a new trial based on tampering with the tapes and withholding evidence, an issue concerning the court's treatment of an attempted plea agreement, and a sentencing issue. Those issues are not presented in this Petition.

United States v. *Booker,* 543 U.S. 220 (2005). App. A2-A3.

Regarding the motion to suppress for violation of the no-contact rule and the McDade Amendment, there was no dispute that AUSA Daniel was bound by Pennsylvania's no-contact rule as embodied in Rules 4.2 and 8.4 and that he used Noonan as a proxy to contact and question petitioner without defense counsel's consent. App. A30. The only issue, therefore, was whether such pre-indictment contact fell within the exception for contacts "authorized by law," a legal question that the court reviewed *de novo*. App. A29-30.

Relying on its pre-McDade Amendment decision in *Balter*, the court held that such pre-indictment contact was " 'exempted by the Rule as "authorized by law," ' " based on its own *policy* views regarding the advantages of allowing prosecutors to engage in such surreptitious contact with a represented party:

> "Prohibiting prosecutors from investigating an unindicted suspect who has retained counsel would serve only to insulate certain classes of suspects from ordinary pre-indictment investigation. Furthermore, such a rule would significantly hamper legitimate law enforcement operations by making it very difficult to investigate certain individuals."

App. A31-32 (quoting *Balter,* 91 F.3d at 435-36).

The court reached that conclusion despite acknowledging that there were no Pennsylvania cases exempting pre-indictment investigations from the no-contact rule and that the McDade Amendment was enacted, in part, for the very purpose of combating

abuse of the no-contact rule by federal prosecutors. App. A33-A34.

The court recognized the Second Circuit's contrary conclusion in *United States v. Hammad,* 858 F.2d 834, 839-40 (CA2 1988), *cert. denied*, 498 U.S. 871 (1990), "that a federal prosecutor overstepped the boundaries of legitimate pre-indictment investigation by preparing a false grand jury subpoena to aid a confidential informant elicit admissions from a represented suspect." App. A32. It declined to follow that precedent and instead stuck with its own precedent in *Balter*.

In a footnote the court also agreed with the district court that even if there was a violation of the no-contact rule, suppression of the unethically-obtained material would not be the proper remedy. App. A35 n. 23 (citing *Hammad,* 858 F.2d at 841-42).

After rejecting other challenges not at issue in this petition, and vacating petitioner's sentence in light of *Booker*, App. A7-A29, A35-A57, the court affirmed petitioner's conviction and remanded for resentencing.

12. On May 6, 2010, the Third Circuit denied Brown's petition for rehearing *en banc*. App. C1-C2.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari because the decision below erroneously resolves an important national issue that should be addressed by this Court and conflicts with decisions of the Second and Ninth Circuits.

I. The Third Circuit Erroneously Exempted Federal Prosecutors from Binding Ethics Rules Based on its Own Policy Views, in Conflict with the Second and Ninth Circuits.

Most States have long had ethics rules restricting attorneys from having direct or indirect contacts regarding a legal matter with a person represented by another lawyer in connection with such matter, without such other lawyer's consent. See Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GEORGIA ST. UNIV. L. REV. 395, 398-99 (2002) (hereinafter "*Regulating Federal Prosecutors*") (describing state adoption of the ABA Canons of Professional Ethics, Model Code of Professional Responsibility, and Model Rules of Professional Conduct); ABA, *Model Rules of Professional Conduct: Dates of Adoption*, available at www.abanet.org/cpr/mrpc/chron_states.html (viewed on Sept. 2, 2010) (listing dates of adoption of rules from 1988 through 2009 for 50 states and the District of Columbia). Such rules generally contain an exception for attorney contacts that are authorized by law. See, e.g., ALAB. R. PROF'L CONDUCT 4.2 ("unless the lawyer * * * is authorized by law to do so"); CALIF. R. PROF'L CONDUCT 2-100 (excluding "Communications otherwise authorized by law"); COLO. R. PROF'L CONDUCT 4.2 ("unless the lawyer * * * is authorized to do so by law or a court order."); ILL. R. PROF'L CONDUCT 4.2 (same).

The application of the no-contact rule to federal prosecutors has been the source of much controversy. Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment,* 113 HARV. L. REV.

2080, 2084 (2000) (hereinafter "*Federal Prosecutors*") ("The sharpest controversy concerning ethics rules and federal prosecutors has surrounded the application of Model Rule 4.2 and its predecessor, Model Code Disciplinary Rule 7-104 ('DR 7-104'), to preindictment contacts."). Federal prosecutors have routinely sought to evade such no-contact rules, typically in the context of pre-indictment investigations using confidential informants to obtain and record statements by represented targets of those investigations. The Department of Justice has variously claimed that state no-contact rules were not binding on federal attorneys, did not apply to pre-indictment investigations, and that DOJ practice and policy regarding the use of such informants satisfied the exception for contacts "authorized by law."[6] Such efforts were often, though not always, successful in the courts, but caused considerable controversy regarding the perceived ethical double standard applied to federal prosecutors.[7]

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[6] See *Federal Prosecutors*, 113 HARV. L. REV. at 2084-86 (discussing various DOJ opinions, memoranda, and regulations claiming exemption from no-contact rule); see also *United States* ex rel. *O'Keefe* v. *McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (CA8 1998) (rejecting DOJ regulations attempting to codify exemption from state ethics rules).

[7] Jerry Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203, 207 (1991) (questioning whether government attorneys were being judged by lower ethical standards than other bar members); Rep. Joseph M. McDade, Statement before the Subcomm. on Courts and Intellectual Property, Sept. 12, 1996, 1996 WL 520240 (Fed. Doc. Clearing House) ("We have to ask ourselves whether we want to permit the Attorney General to create ethics rules for prosecutors which demand less of prosecutors than of all other lawyers? The answer, of course, is no.

The controversy and dissatisfaction were so great that in 1998 Congress intervened and passed the McDade Amendment, 28 U.S.C. § 530B, effective April 19, 1999. While the McDade Amendment generally makes all state ethics rules binding on federal attorneys, it is widely recognized as a particular response to federal prosecutorial abuse of the no-contact rule in the course of criminal investigations. See Rep. Joseph M. McDade, Statement before the Subcomm. on Courts and Intellectual Property, Sept. 12, 1996, 1996 WL 520240 (Fed. Doc. Clearing House) (criticizing DOJ regulation "permitting its prosecutors to communicate directly with defendants who have lawyers" and noting that a "requirement in all 50 states and one of the American Bar Association's Model Rules of Professional Conduct (Rule 4.2) states that it is unethical to communicate directly with suspects in the absence of their lawyer."); *Federal Prosecutors,* 113 HARV. L. REV. at 2088 (McDade Amendment introduced to "restrain the perceived overzealousness of federal prosecutors and to prevent the DOJ from exempting its prosecutors from ethics rules"); Casey, *Regulating Federal Prosecutors*, 19 GEORGIA ST. UNIV. L. REV. at 402 (McDade Amendment "was widely believed" to be, *inter alia*, "a response to the contact rule"). Even the Third Circuit below recognized as much. App. A33 ("We recognize that Congress passed the McDade Amendment in part to combat perceived abuses by federal prosecu-

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If we tolerate unethical government conduct, then we undermine citizen confidence in our government. Congress must not permit that to happen.").

tors and require them to comply with state no-contact rules.").

In considering the McDade Amendment, Congress was well aware of the policy concerns voiced by the DOJ and others – and endorsed by the Third Circuit below – regarding the effect the Amendment would have on the federal practice of using confidential informants to elicit statements from represented parties outside the presence and without the consent of their lawyers.[8] Such arguments were ultimately unpersuasive to Congress, which proceeded to enact the McDade Amendment. In the years since the McDade Amendment, various attempts to exempt federal investigatory activities from state ethics rules have failed. *Federal Prosecutors,* 113 HARV. L. REV. at 2093-94; Casey, *Regulating Federal Prosecutors*, 19 GEORGIA ST. UNIV. L. REV. at 410 n. 95.

The McDade Amendment stands as ample rejection of the DOJ's efforts to insulate federal prosecutors from the requirements of state ethics rules. There is no longer any plausible dispute that state ethics rules, including the no-contact rule at issue in this case, apply to federal prosecutors. There is likewise little dispute that the rule applies even pre-indictment absent a state ethics rule or opinion limit-

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[8] Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. at 12 (1996) (statement of Assoc. Deputy Att'y Gen. Seth P. Waxman) ; Statement of Rep. McDade, 1996 WL 520240 (referring to and submitting for the record DOJ regulations attempting to authorize prosecutorial exemption from no-contact rule).

ing the scope of the rule. Indeed, both courts below admitted that Pennsylvania Rule 4.2 applies even where a represented person is not yet a party to a formal proceeding. See *supra* at 5-6, 9; see also Casey, *Regulating Federal Prosecutors*, 19 GEORGIA ST. UNIV. L. REV. at 400 n. 39 ("Model Rule 4.2 was amended in 1995 to clarify that it was intended to apply to every represented person, not just those who are parties to formal litigation").

Unfortunately, federal prosecutors continue to argue, and the Third Circuit has now accepted, that established practice and mere policy concerns are sufficient to render otherwise forbidden contacts "authorized by law" within the terms of the no-contact rule. That decision is contrary to the terms of Rule 4.2, the McDade Amendment, and decisions of the Second and Ninth Circuits.

The decision below recognized that there were no Pennsylvania cases or ethics opinions authorizing the type of contacts at issue in this case, and hence the court was unable to point to any "law" that authorized the otherwise plainly forbidden contact. App. A33-34 ("Pennsylvania courts have not considered whether such conduct is permissible"; while *Balter* relied in part on New Jersey case law holding that pre-indictment investigatory contacts were "authorized by law" under that State's rule, "there is no analogous Pennsylvania decision"). But in a severe distortion of the phrase "authorized by law," the court held that there was likewise no state decision expressly *forbidding* the particular contacts in this case and relied upon its own policy views to declare that the contacts were authorized by law. App. A33-34

("After all, the Pennsylvania courts have *not* held that such conduct is impermissible"; "we do not believe the absence of an analogous Pennsylvania decision renders any less compelling our observations regarding the negative consequences that would follow from an outcome contrary to that we reach here") (emphasis in original).

The plain terms of the operative portion of Rule 4.2 apply to and forbid the contact in this case. The exception for contacts "authorized by law" places the affirmative burden on attorneys who would violate the rule to support their conduct with explicit authorization. The mere absence of a further express disapproval by the Pennsylvania courts of such contacts does not render that conduct "authorized by law." See *County of Washington* v. *Gunther*, 452 U.S. 161, 169 (1981) (construing an exception to Title VII for behavior "authorized" by the Equal Pay Act and holding that "[a]lthough the word "authorize" sometimes means simply 'to permit,' it ordinarily denotes affirmative enabling action. BLACK'S LAW DICTIONARY 122 (5th ed. 1979) defines 'authorize' as '[t]o empower; to give a right or authority to act.'[] * * * The question, then, is what wage practices have been affirmatively authorized by the Equal Pay Act.") (footnote omitted); *id.* at 169 n. 9 ("Similarly, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 147 (1976) states that the word 'authorize' 'indicates endowing formally with a power or right to act, usu. with discretionary privileges.' (Examples deleted.)").

The Court's reliance on its own policy judgments regarding the utility of surreptitious contacts with represented targets of a federal investigation also

does severe violence to the McDade Amendment. Congress considered the identical policy arguments from opponents of the McDade Amendment and rejected them by adopting the law in any event. See *supra* at 12-14. It is for Congress and the States, not the federal courts, to make the policy judgment whether the benefits of restricting prosecutorial contacts outweigh the costs from limiting certain investigatory techniques deemed to be unethical.[9]

For the Third Circuit to substitute its own policy judgments for that of Congress and the States, and to claim that such judgments constitute authorization by law, flies in the face of both the language of Rule 4.2 and Congress's authority and judgment regarding the desirability of ethical constraints on the behavior of federal prosecutors.

In addition to being contrary to the McDade Amendment and the language of Rule 4.2, the decision below conflicts with the decisions of the Second and Ninth Circuits.

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[9] The same policy concerns cited by the Third Circuit likewise apply to investigatory efforts at the state level yet the Pennsylvania courts have not excluded pre-indictment contacts from the scope of the Rule or held that they are "authorized by law." Indeed, unlike New Jersey, Pennsylvania law does not require the initiation of formal proceedings before the no-contact rule applies. See *supra* at 5-6. The Third Circuit's attempt to distinguish pre- and post-indictment contacts by calling the former an established investigatory technique, thus flouts the official construction of the Rule rejecting such a distinction. And it violates the McDade Amendment's mandate that federal attorneys are bound by state ethics rules "to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

As the court below noted, App. A32, the Second Circuit in *Hammad* held that a federal prosecutor violated New York's no-contact rule (DR 7-104(A)(1)) by using a confidential informant to elicit incriminating statements from the represented target of a criminal investigation. 858 F.2d at 839-40. The government attorney in *Hammad* directed the confidential informant regarding what questions to ask, and provided a fictitious grand jury subpoena addressed to the informant to serve as a prop to direct the conversation in the desired direction.

The Second Circuit held that the no-contact rule applied prior to indictment and that the contact was not authorized by law where the informant acted as the alter ego of the AUSA.

Although recognizing that the application of DR 7-104(A)(1) at the pre-indictment stage was a "closer question" (unlike the broader reach of Rule 4.2 here, which is not in dispute), the court found "no principled basis in the rule to constrain its reach" to post-indictment contacts and noted that courts holding otherwise " 'have not clearly stated the bases for those decisions.' " 858 F.2d at 838 (citation omitted). The Second Circuit cited favorably to district court decisions applying the rule to pre-indictment contacts and held that to limit the rule to post-indictment communications – to which the Sixth Amendment separately applies – would "make[] the rule superfluous," " ' is neither apparent nor compelling,' " and that the "sixth amendment and the disciplinary rule serve separate, albeit congruent purposes." *Id.* at 838-39 (citation omitted).

While the court expressed sympathy with the government's contention that applying the no-contact rule "would impede legitimate investigatory practices," it nonetheless went on to hold that though the "use of informants to gather evidence against a suspect will frequently fall within" the exception to the rule for contacts "authorized by law," the contacts in this case were not so authorized. *Id.* at 839-40. The court declined to "list all possible situations that may violate DR 7-104(A)(1), but held that where the prosecution provided false documents to the informant "to create a pretense that might help the informant elicit admissions from a represented suspect," the informant became the "alter ego of the prosecutor" and "the informant was engaging in communications proscribed by" the no-contact rule. *Id.* at 840.[10]

In the present case, the AUSA similarly orchestrated Noonan's conversations with petitioner and provided a false document to Noonan "to create a pretense that might help [him] elicit admissions from"

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[10] Although not an exhaustive distinction between authorized and unauthorized contacts, the crux of the Second Circuit's holding turns on the degree of control the AUSA exercises over its confidential informant. Where an AUSA actively directs the informant's questioning and provides pretextual props to guide the conversation and elicit admissions, the informant becomes the AUSA's "alter ego" and the contact is not "authorized by law." In contrasts, where an AUSA merely passively wires an informant to record conversations not being manipulated and shaped by the informant and the AUSA, the contact may be "authorized." The continued availability of such passive undercover activities under the Second Circuit's approach strikes a logical balance between legitimate investigation and unauthorized attorney contacts and mitigates the concern over interfering with law enforcement.

petitioner. Noonan was thus indisputably the "alter ego" of the AUSA, and the decision below conflicts with *Hammad*.

The Ninth Circuit likewise has held that "general enabling statutes" were insufficient to render contacts with represented parties "authorized by law" under the California version of the no-contacts rule, holding that more concrete statutory authority was required to authorize contacts beyond that permitted by case law." *United States* v. *Lopez*, 4 F.3d 1455, 1461 (CA9 1993). Although the court was addressing a post-indictment contact, its views on what *type* of authority is required to "authorize" an otherwise prohibited contact is not dependent on that contextual difference. Rather, the court held that absent specific statutory or judicial authority for prohibited contacts, such contacts were not "authorized by law."[11]

The cases relied upon by the Third Circuit in support of its conclusion, App. A31-A32, all were decided before the McDade Amendment, and either limited the rule to post-indictment or custodial contacts, or held that the informant was not the alter ego of the

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[11] The Ninth Circuit did note that cases in some circuits had held pre-indictment non-custodial contacts to be beyond the scope of the then-extant no-contact rules. 4 F.3d at 1460-61 & n. 2. Such cases often turned on the rules' application to a "party" being construed as requiring the initiation of formal legal proceedings to trigger the rule's constraints. See *infra*, at 21 n. 12. Those cases provide no authority limiting the scope of the later-adopted Rule 4.2, which is not so limited and applies even in the absence of formal legal proceedings. See *supra* at 5-6. Of course, if there were Pennsylvania cases construing its Rule 4.2 to allow the contacts in this case, that would indeed constitute "authorization by law." There are no such cases, however.

prosecutor.[12] None of those cases addressed the authorized by law exception, and the reasoning they used – that the rule does not apply prior to initiation of formal proceedings – does not apply to Rule of Professional Conduct 4.2.

The ethics of pre-indictment prosecutorial contact with represented targets is an important issue that arises in many criminal investigations and prosecutions, as the DOJ's own policy arguments recognize. Whatever the putative benefits of such contacts, their ethical consequences arise with precisely the same frequency as those benefits. The no-contact rule exists in large part to protect represented individuals from being taken advantage of by adverse attorneys and to allow them to guard against making uncounseled admissions that subsequently can be used against them in litigation. Where the adverse attor-

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[12] *United States* v. *Powe,* 9 F.3d 68 (CA9 1993) (holding, without explanation, that California no-contact rule does not apply to pre-indictment non custodial contacts with a suspect); *United States* v. *Ryans,* 903 F.2d 731 (CA10) (holding that no-contact rule in DR 7-104(A)(1) does not apply "before the initiation of criminal proceedings"), *cert. denied*, 498 U.S. 855 (1990); *United States* v. *Sutton,* 801 F.2d 1346, 1366 (CADC 1986) (relying on *United States* v. *Lemonakis*, 485 F.2d 941, 956 (CADC 1973), *cert. denied*, 415 U.S. 989 (1974), which held that the no-contact rule did not apply during the investigatory stage where the informant was not the "alter ego" of the prosecutor); *United States* v. *Dobbs,* 711 F.2d 84, 86 (CA8 1983) (citing *Lemonakis* and pre-indictment non-custodial nature of interview to conclude that DR 7-104(A)(1) did not apply); *United States* v. *Weiss,* 599 F.2d 730, 740 (CA5 1979) (finding no violation of no-contact rule because defendant's attorney was also under criminal investigation, which the court thought was a sufficient reason to ignore an even earlier Canon of Ethics embodying the no-contact rule).

ney is employed by the government, the rule serves many of the same functions as the Fourth, Fifth, and Sixth Amendments. Congress's determination that application of state ethics rules was necessary to constrain prosecutorial abuse of, *inter alia*, the no-contact rule, and that the benefits of applying such rules outweighed their claimed burdens on law enforcement, likewise reflects on the importance of the issue. This Court therefore should grant certiorari to resolve the split in the circuits regarding application of the no-contact rule and to confirm that federal courts may not manufacture their own policy-based "authorization" for federal prosecutors to violate that rule.

II. The Third Circuit Erroneously Held that Suppression Is Not an Appropriate Remedy for Statements Obtained through Unethical Prosecutorial Conduct, in Conflict with the Second and Tenth Circuits.

The Third Circuit's further holding that, even assuming a violation of Rule 4.2, "suppression would not have been the appropriate remedy," App. A35 n. 23, also presents an important issue and is in conflict with decisions of this and other courts. The court's sole support for that proposition was its citation to the Second Circuit's decision in *Hammad*, which, although finding a violation of the no-contact rule, held that exclusion of the resulting statements was not appropriate because "the law was previously unsettled in this area" and "in light of the prior uncertainty regarding the reach of DR 7-104(A)(1)." 858 F.2d at 842.

The Third Circuit in this case, however, offered no comparable justification, but simply rejected exclusion out of hand. Unlike in *Hammad*, there is no uncertainty regarding the scope of Rule 4.2. Under Pennsylvania law Rule 4.2 plainly applies prior to the initiation of formal proceedings – *i.e.*, at the pre-indictment stage. It is precisely that issue that was "uncertain" under DR-104(A)(1), the prior version of the no-contact rule considered in *Hammad* and other cases cited by the Third Circuit. See *supra* at 21 n. 12. But cases reading the scope of the earlier no-contact rule narrowly cannot be read as creating "uncertainty" regarding the reach of Pennsylvania's Rule 4.2, which specifically resolves that uncertainty in the official comments. Indeed, the district court opinion recognized that substantive application of Rule 4.2 to this case – apart from the "authorized by law" exception – was "beyond doubt" and "clear." App. B10, B12.

The lack of statutory authority or Pennsylvania law authorizing the conduct here also was not in question. That the Third Circuit manufactured "authorization" for the pre-indictment contacts based on its own policy views hardly makes the law uncertain, particularly insofar as identical policy arguments for limiting the application of state ethics rules were rejected by Congress when it passed the McDade Amendment. This is not a situation of good-faith efforts to comply with Rule 4.2, or uncertainty regarding its scope, but rather a continuation of the DOJ's long-running efforts to circumvent state ethics rules generally and the no-contact rule specifically. That such efforts continue unabated even after the

McDade Amendment amply demonstrates a need for the deterrence that exclusion would supply.

The Third Circuit's rejection of suppression as an appropriate remedy for violation of the no-contact rule also conflicts with the decisions of other circuits addressing such violations. Other courts considering evidence obtained in violation of the no-contact rule have held, contrary to the Third Circuit, that exclusion is indeed an appropriate remedy for such violations.

The Tenth Circuit in *United States* v. *Thomas*, for example, required the exclusion of statements taken in violation of the no-contact rule contained in the earlier Canons of Ethics. 474 F.2d 110, 112 (CA10) ("any statement obtained by interview from [a defendant represented by counsel] may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview"), *cert. denied,* 412 U.S. 932 (1973). And the Second Circuit in *Hammad*, although declining to suppress the statements therein because of previous uncertainty in the law, nonetheless expressly "reject[ed] the government's effort to remove suppression from the arsenal of remedies available to district judges confronted with ethical violations." 858 F.2d at 842; see also *United States* v. *Killian,* 639 F.2d 206, 210 (CA5) (where the government obtained statements from defendant in violation of DR 7-104(A)(1), "[s]uppression of the statements would probably have been the appropriate sanction in this case, were it not for the refusal of the government to use those statements."), *cert. denied,* 451 U.S. 1021 (1981); *United States* v. *Durham,* 475 F.2d 208, 211 (CA7 1973) (statements could not be

admitted into evidence where they were obtained in the absence of retained counsel in violation of the Sixth Amendment and in circumstances "appear[ing] to raise ethical questions" under DR 7-104(A)(1)); but see *United States* v. *Lowery*, 166 F.3d 1119, 1124 (CA11) ("a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible"), *cert. denied*, 528 U.S. 889 (1999).

The Third Circuit's decision in this case thus contributes to a division among the circuits regarding whether suppression is an appropriate remedy for violations of the no-contact rule.

The Third Circuit's rejection of suppression as an appropriate remedy also is in conflict with decisions of this Court holding that suppression or exclusion is a proper remedy for statutory, as well as constitutional, violations.[13] *McNabb v. United States,* 318 U.S. 332, 341, 345 (1943) ("The principles governing the admissibility of evidence in federal criminal trials have not been restricted * * * to those derived solely from the Constitution."; allowing the use of statements obtained in "flagrant disregard of the procedure which Congress has commanded," even where "Congress has not explicitly forbidden the use of evidence so procured," would "stultify the policy which Congress has enacted into law"); *United States* v. *Payner,* 447 U.S. 727, 734-35 & n. 7 (1980) ("Federal courts may use their supervisory power in some cir-

[13] While ethics rules are typically adopted by state bars and state courts, they are binding on federal prosecutors pursuant to statute – the McDade Amendment.

cumstances to exclude evidence taken from the *defendant* by 'willful disobedience of law.' ") (emphasis in original; quoting *McNabb*, 318 U.S. at 345).

Congress went to great lengths to address what it viewed as the abusive practices of federal prosecutors and to require them to abide by state ethical standards. To allow prosecutors to use evidence obtained from a defendant in violation of those standards would indeed "stultify" Congress's policy in the McDade Amendment of requiring compliance with state ethics rules.

The propriety of exclusion is confirmed by one of the central purposes of the no-contact rule – "to 'prevent situations in which a represented party may be taken advantage of by adverse counsel.' " *Frey v. Department of Health and Human Servs.,* 106 F.R.D. 32, 34 (E.D.N.Y. 1985) (quoting *Wright By Wright v. Group Health Hosp.,* 691 P.2d 564, 567 (Wash. 1984)). The rule's historical purpose of " 'shielding the adverse party from improper approaches,' " *id.*, reflects the concern that "an adversary's attorney may take advantage of an individual party * * * by extracting damaging statements from him," *University Patents, Inc. v. Kligman,* 737 F. Supp. 325, 327 (E.D. Pa. 1990). Such improper conduct is precisely what occurred in the present case and is precisely what the no-contact rule seeks to prevent.[14]

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[14] The district court's suggestion that the purpose of the no-contact rule is merely to protect attorney-client confidentiality and has no application where petitioner spoke to a third-party (Noonan), App. B26-28, ignores the more fundamental purpose of the rule to prevent an adverse attorney from taking advantage of a party outside the presence of that party's counsel. By

Indeed, if anything, the AUSA's surreptitious use of a *proxy* to interview petitioner was even more disturbing given that Noonan's questioning of petitioner was being guided by the prosecutor with an eye toward obtaining admissions, but petitioner was unaware of the prosecutor's involvement and hence could not even protect himself from being taken advantage of. Rather, he spoke casually without an eye to precision that could have avoided the subsequent disputes over what he said and meant and over whether it was petitioner or Noonan that actually made various supposedly incriminating statements. See, e.g., App. A19-20 (discussing dispute over whether petitioner or Noonan mentioned supposed destruction of evidence).

The central dangers the no-contact rule was designed to mitigate were amply present in this case and arose from the fully intentional efforts of the AUSA to manipulate and shape the conversations between Noonan and petitioner in order to obtain adverse and uncounseled admissions. In light of the DOJ's long-running efforts to free itself from state ethical constraints on such practices, even after the adoption of the McDade Amendment, the need for meaningful deterrence of that conduct is manifest.[15]

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misidentifying the relevant purpose of the no-contact rule, the district court undervalued the need for exclusion as a proper remedy for its violation.

[15] The district court's suggestion, App. B30-B31, that "the Government relied in good faith on the long line of cases holding that pre-indictment non-custodial interrogation with a party represented by counsel is 'authorized by law,' " is not even remotely persuasive given that none of those cases so hold. Rather, they rely on grounds of substantive inapplicability pre-

As this Court observed in *Mapp v. Ohio* in the analogous Fourth Amendment context, anything short of exclusion would be "worthless and futile" for securing the no-contact rule's goals. 367 U.S. 643, 652 (1961).

This Court should grant certiorari to resolve the split in the circuits regarding the propriety of exclusion as a remedy for violations of the no-contact rule and to vindicate the Congressional policy judgments embodied in the McDade Amendment, making state ethics rules binding on federal prosecutors.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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indictment that the district court admits elsewhere do not apply to Rule 4.2. See *supra* at 21 n. 12.