(Final Copy)

No. 99-5111

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DAVID P. TRUE
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

JOEL I. KLEIN
Assistant Attorney General

A. DOUGLAS MELAMED
Deputy Assistant Attorney General

JOHN J. POWERS, III
NANCY C. GARRISON
Attorneys
U.S. Department of Justice
Antitrust Division
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-1531

OF COUNSEL:

KATHERINE A. SCHLECH
NANCY H. MCMILLEN
ARNOLD C. CELNICKER
MARK C. GRUNDVIG
Attorneys
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W.
Washington, D.C. 20530

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of the underlying Sherman Act prosecution pursuant to 15 U.S.C. §1 and 18 U.S.C. §3231. Defendant-appellant's application for attorney's fees and litigation expenses was filed pursuant to the Hyde Amendment, 18 U.S.C.A. §3006A note ("Attorney Fees and Litigation Expenses to the Defense") (1999 Pocket Part), Pub. L. 105-119, §617, 111 Stat. 2440, 2519 (Nov. 26, 1997). The district court would have had jurisdiction over a Hyde Amendment application that conformed to statutory

requirements, but the United States submits that because this application did not do so, the district court lacked jurisdiction to consider it. *See infra* Argument I. B.

This Court has jurisdiction pursuant to 28 U.S.C. §1291 to review the district court's final order denying the Hyde Amendment application.

ISSUES PRESENTED FOR REVIEW

1. Whether a Hyde Amendment fee application that fails to establish that the applicant meets the maximum net worth standard for individuals, and that does not provide an itemized statement as to the claimed fees and expenses should be dismissed for lack of jurisdiction, or denied.

2. Whether the district court abused its discretion in denying appellant's application based on its consideration of the record and its finding that "the position of the United States in pursuing this prosecution was not vexatious, frivolous, or in bad faith."

STATEMENT OF THE CASE

On September 3, 1997, a federal grand jury returned the one-count indictment in this case, charging David P. True with conspiring to fix prices, rig bids and allocate customers in violation of section 1 of the Sherman Act, 15 U.S.C. §1. R. 1 (JA 028-32).[1]

On September 18, 1998 the jury returned a verdict of not guilty, R. 243 (JA 065); judgment was entered on September 22, 1998, R. 247 (JA 066).

On October 22, 1998, True filed his Application for Fees and Expenses Pursuant to the "Hyde Amendment." R. 253 (JA 067-70). On January 8, 1999, the district court denied the application, "conclud[ing] that the Defendant is not entitled to fees and expenses because the position of the United States in pursuing this prosecution was not vexatious, frivolous, or in bad faith." R. 262 (JA 163).

True's notice of appeal was filed on January 15, 1999. R. 263 (JA 164).

STATUTORY PROVISIONS

The Hyde Amendment, 18 U.S.C.A. §3006A note ("Attorney Fees and

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[1]"R. ___" refers to the district court docket entry. "Tr. _____" refers to the trial transcript. "(JA ____)" refers to the deferred joint appendix page numbers, added in the final copy of the brief filed pursuant to Fed. R. App. P. 30(c)(2). "Br. ___" refers to the Brief of Defendant-Appellant David P. True (proof copy, filed March 15, 1999).

Litigation Expenses to the Defense") (1999 Pocket Part), Pub. L. 105-119, §617, 111 Stat. 2440, 2519 (Nov. 26, 1997), provides in relevant part:

> the court, in any criminal case . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code.

The Hyde Amendment, and the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d), are reprinted in Addendum A to this Brief.

STATEMENT OF FACTS

1. The Sherman Act Conspiracy Charged Against True

The indictment charged that defendant-appellant David P. True, vice president and general manager of Austin Powder Company (Austin) since 1988, conspired to restrain interstate trade and commerce in violation of section 1 of the Sherman Act, 15 U.S.C. §1. R. 1, ¶¶1, 2 (JA 028-29). The combination and conspiracy, described in the indictment and bill of particulars, consisted of a continuing agreement, understanding, and concert of action among True and his co-conspirators, beginning in the Fall of 1988 and continuing at least until sometime in 1993, to lessen competition and to increase prices for commercial explosives in the West Kentucky Region,[2] by fixing prices, allocating customers and rigging bids. R. 1, ¶3 (JA 029).[3]

Four companies -- Austin, Atlas Powder Company (now ICI Explosives USA), IRECO (now DYNO Nobel), and the Midland Group -- and employees of those companies participated in the conspiracy. R. 36, at 2 (JA 037). As part of

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[2]The "West Kentucky Region" includes western Kentucky, southern Indiana and southern Illinois. R. 1, ¶1 (JA 028).

[3]The record evidence of the charged conspiracy and True's participation in it is summarized *infra* Argument II. C. 2.

the conspiracy, True, subordinates under his direction, supervision and control, and other co-conspirators agreed 1) to rig, fix or reduce competition on bids for all the commercial explosives products they sold in the West Kentucky Region pursuant to bid, 2) to discuss and agree on their companies' prices and surcharges, and 3) to refrain from competing on the basis of price for one another's existing customers. R. 1, ¶4 (JA 029-30); R. 36 (JA 036-64). The conspirators also carried out these understandings, discussing and agreeing on prices and bids, but under the Sherman Act, the combination and conspiracy itself was the charged offense. R. 36, at 2 (JA 037).

2. The Investigation and Trial

The grand jury investigation began in December 1992, and continued through True's indictment in September 1997. Eventually, Austin -- True's employer -- and the other corporate conspirators -- Atlas, IRECO, and Midland -- pled guilty; so did several of the major individual conspirators, including True's subordinate, Thomas Mechtenberg. Only True went to trial.

This case was tried to a jury in the United States District Court for the Western District of Kentucky, Owensboro Division, before United States District Judge Joseph H. McKinley, Jr., beginning on September 2, 1998. To prove its case against True, the United States introduced testimony from conspirators,

including David Childs (a former Austin vice president who became president of Midland), and Thomas Mechtenberg and Richard Porter (True's subordinates), and documentary evidence, including memoranda of communications among the conspirators and notifications to customers.

The district court reserved decision on defendant's motion for judgment of acquittal under Fed. R. Crim. P. 29, *see* Tr. 1549, 1903 (JA 481, 482), and submitted the case to the jury, which returned a verdict of not guilty, R. 243 (JA 065); R. 247 (JA 066).

3. True's Application for Fees and Expenses Under the Hyde Amendment

On October 22, 1998, True filed a three-page Application for Fees and Expenses Pursuant to the "Hyde Amendment" ("fee application"). R. 253 (JA 067-70). The United States moved to dismiss the application because it failed to meet threshold requirements of 28 U.S.C. §2412(d)(1)(B), which are incorporated in the Hyde Amendment, and because True had not satisfied his burden to establish that the United States' position was "vexatious, frivolous, or in bad faith." R. 254 (JA 121-33).

After further filings by both parties,[4] the district court denied the application:

> Based on the arguments of counsel and the record in the case, the Court concludes that the Defendant is not entitled to fees and expenses because the position of the United States in pursuing this prosecution was not vexatious, frivolous, or in bad faith.

R. 262 (JA 163). Having ruled against True on this decisive issue, the court did not consider "the challenges made to the application raised in the government's motion to dismiss." *Id.*

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[4]Defendant True's: 1) Supplemental Memorandum in Further Support of True's Application for Fees and Expenses Pursuant to the "Hyde Amendment"; and 2) Response to the Government's Motion To Dismiss True's Application, R. 255 (JA 071-120); United States' Reply to Defendant's Response to Motion To Dismiss Defendant's Application for Fees and Expenses Pursuant to the "Hyde Amendment," R. 257 (JA 134-47); Mr. True's Motion To Strike the Government's "Reply," R. 258 (JA 148-53); Response of the United States to True's Motion to Strike Reply, R. 260 (JA 154-57); Mr. True's Reply to Government's Response to Mr. True's Motion To Strike, R. 261 (JA 158-62).

SUMMARY OF ARGUMENT

Appellant was not entitled to fees under the Hyde Amendment; there was no abuse of discretion or other error in the district court's denial of his application.

1. Appellant True was a prevailing criminal defendant, but he did not satisfy the other threshold requirements for a Hyde Amendment fee award. Because True's application and subsequent filings neither showed that he met the maximum net worth standard for an individual seeking Hyde Amendment fees, nor contained the required itemized statement to support his request for over four million dollars, the application should have been dismissed for lack of jurisdiction, or denied.

2. The district court properly denied True's application on the independently sufficient ground that the United States' position was not vexatious, frivolous, or in bad faith. There is no reason for this Court to revisit that determination. A Hyde Amendment applicant has the burden of proof, and the district court's conclusion, based on its first-hand assessment of the record, is entitled to deference. Appellant has not shown any clear error in the district court's assessment of the evidentiary record or any abuse of discretion in its ruling. The district court was not required to make more detailed findings, to

grant discovery, or to conduct an evidentiary hearing.

The record amply supports the United States' position that True participated in an illegal conspiracy to restrain competition and to raise prices for explosives in the West Kentucky Region, and that his participation continued until sometime after September 3, 1992 (the critical date with respect to the statute of limitations). True's other allegations -- which go to the weight of the evidence, the credibility of particular witnesses, and the district court's evidentiary rulings -- are unwarranted and immaterial.

ARGUMENT

The Hyde Amendment (enacted as part of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. 105-119, 111 Stat. 2440 (Nov. 26, 1997)), allows a district court to award "a reasonable attorney's fee and other litigation expenses,"[5] to a "prevailing" criminal defendant "where the court finds that the position of the United States was *vexatious, frivolous, or in bad faith.*" 18 U.S.C. §3006A note (emphasis added). Fee awards under the Hyde Amendment "shall be granted

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[5]The term "fees" as used in this brief refers to the "reasonable attorney's fee and other litigation expenses" that may be awarded under the Hyde Amendment.

pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [28 U.S.C.] section 2412," which includes the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d). *Id.*

The Hyde Amendment creates a limited statutory exception to the "American rule," under which parties in civil cases and criminal defendants bear their own attorney's fees. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975) (discussing EAJA). Thus, like EAJA, it is a limited waiver of sovereign immunity and must be strictly construed. *See, e.g., Ardestani v. INS*, 502 U.S. 129, 137 (1991); *National Truck Equipment Ass'n v. National Highway Traffic Safety Admin.*, 972 F.2d 669, 671 (6th Cir. 1992); *Owens v. Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988).[6]

An applicant may not recover fees under the Hyde Amendment unless he complies with all procedural requirements *and* carries his burden of proving to the district court that his is one of the rare cases in which the position of the

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[6]The Hyde Amendment took effect for cases pending on or after November 26, 1997. There are as yet no Supreme Court or court of appeals decisions construing it, although there are several pending appeals, including *United States v. Ranger Electronic Communications, Inc.*, No. 98-2322 (6th Cir.). There also have been district court decisions, most unpublished. Needless to say, they are entitled to consideration only insofar as their reasoning is sound, and they have no precedential value.

United States is properly characterized by the narrow statutory terms "vexatious, frivolous, or in bad faith." Denial of an application is reviewed by this Court under an abuse of discretion standard; a party appealing a denial should not be permitted to reargue to this Court questions involving the weight of the evidence or the credibility of witnesses.

I. TRUE'S HYDE AMENDMENT FEE APPLICATION SHOULD HAVE BEEN DISMISSED OR DENIED BECAUSE IT FAILED TO SATISFY THRESHOLD STATUTORY REQUIREMENTS

The Hyde Amendment expressly incorporates the "procedures and limitations" of 28 U.S.C. §2412. True's application failed to comply with such statutory requirements, and the United States submits that the district court, therefore, lacked jurisdiction to consider it. Although the district court did not address the jurisdictional issue, it is properly before this Court. *See United Food v. Southwest Ohio Regional Transit*, 163 F.3d 341, 349 n.3 (6th Cir. 1998) (citing cases). The United States raised it in its motion to dismiss, R. 254, at 3-8 (JA 124-29), and this Court must, in any event, determine whether the district court had jurisdiction. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Even if this Court concludes that defects in True's *initial* filing were not a *jurisdictional* bar, it should affirm the district court's order denying Hyde

Amendment fees on the alternative or additional ground that True *never* complied with the threshold statutory requirements. *See Russ' Kwik Car Wash v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985) (affirming on alternative grounds raised but not decided in district court). While there is no doubt that the district court correctly concluded that the United States' position was not vexatious, frivolous, or in bad faith, a holding by this Court that threshold requirements must be met would conserve the resources of prosecutors, defendants, and the courts in this Circuit, and it would in no way infringe on rights of defendants who satisfy the Hyde Amendment criteria.

A. Standard of Review

Construction of the Hyde Amendment's requirements is an issue of law which this Court considers de novo. *See, e.g., Allied Mechanical Services, Inc. v. National Labor Relations Board*, 113 F.3d 623 (6th Cir. 1997) (court of appeals reviews questions of law de novo); *Peters v. Secretary of Health and Human Services*, 934 F.2d 693, 694 (6th Cir. 1991) (per curiam) (construing EAJA filing requirements); *United States v. Brown*, 915 F.2d 219, 223 (6th Cir. 1990).

B. The Application Requirements Are Jurisdictional

The "procedures and limitations" of EAJA that apply under the Hyde

Amendment included the requirement that:

> A party seeking an award of fees and other expenses shall, *within thirty days of final judgment* in the action, submit to the court *an application* for fees and other expenses *which shows* that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

28 U.S.C. §2412(d)(1)(B) (emphasis added).

Although True filed a document captioned "Application for Fees and Expenses Pursuant to the 'Hyde Amendment'," R. 253 (JA 067-70), within the thirty-day period, that three-page filing did not satisfy this requirement. It neither showed that True was a party eligible to receive an award, *i.e.*, "an individual whose net worth did not exceed $2,000,000 at the time the . . . action was filed," 28 U.S.C. §2412(d)(2)(B), nor contained an "itemized statement" as to the fees and expenses he sought, 28 U.S.C. §2412(d)(2)(B).

As this Court has held, EAJA's 30-day time limit for filing is jurisdictional; a "district court lack[s] jurisdiction to hear [a claim that] was not timely filed." *Peters v. Secretary of HHS*, 934 F.2d at 694. *See also Shalala v. Schaefer*, 509 U.S. 292 (1993). The United States submits that a *complete* -- as

well as timely -- application is a jurisdictional prerequisite to the court's authority to award fees under the statute. The statute plainly states that a party seeking fees "*shall, within thirty days* of final judgment in the action, *submit* to the court *an application which shows that the party . . . is eligible* to receive an award under this subsection." 28 U.S.C. §2412(d)(1)(B) (emphasis added). Nothing in the wording or structure of this provision suggests that the application is a mere notice requirement and that the requisite information can be supplied after the deadline so long as some sort of fee application was timely filed. Nor is there any suggestion that certain elements necessary to meet the statute's jurisdictional prerequisites are less important than others, or that some are to be interpreted less strictly. Rather, the mandatory and jurisdictional nature of timely filing under §2412(d)(1)(B), the 30-day filing period itself, the requirement that an applicant show eligibility in the application, and the requirement of an "itemized statement" as to the fees sought should be interpreted as a single, mandatory jurisdictional threshold.

The United States recognizes that the only courts of appeals that have addressed this jurisdictional argument -- the Third Circuit and the Federal Circuit -- have rejected it in EAJA cases, holding that a court may permit a party who files a defective, but otherwise timely, application to supplement it later with the

required information. *Bazalo v. West*, 150 F.3d 1380 (Fed. Cir. 1998); *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985). However, we respectfully urge this Court to adopt what we believe to be the better view, as set out in the dissenting opinions in *Bazalo* and *Dunn*, and to hold that the district court should have dismissed or denied True's application for lack of jurisdiction. *See Bazalo*, 150 F.3d at 1384 (Schall, J., dissenting); *Dunn*, 775 F.2d at 105 (Adams, J., dissenting).

C. True Did Not Establish That He Met the Statutory Net Worth Standard, and He Did Not Provide an Itemized Statement of Fees and Expenses

Although we submit that True's application should have been dismissed on purely jurisdictional grounds, a holding that a Hyde Amendment fee applicant may supplement his initial filing would not advance True's case. For even if it is proper for a district court to afford an applicant an opportunity to cure initial omissions through subsequent filings, True failed to do so.

1. An individual cannot be a "party" for purposes of EAJA and the Hyde Amendment and "eligible to receive an award" unless his "net worth did not exceed $2,000,000 at the time the [underlying] action was filed." 28 U.S.C. §2412(d)(2)(B). True's application contained *no* information about his net worth, and his subsequent filings did not cure that defect. Moreover, an individual who

has been or will be indemnnified by his employer cannot recover, *see United States v. Paisley*, 957 F.2d 1161, 1164 (4th Cir. 1992); *SEC v. Comserv Corp.*, 908 F.2d 1407, 1413-15 (8th Cir. 1990), and True failed to show that he, rather than Austin Powder Company had paid or would have to pay the claimed fees.[7] Instead of supplying the required information, True contended that "the eligibility requirements for an award pursuant to the EAJA" are not "procedures or limitations" and therefore "are wholly irrelevant to one's eligibility for an award under the Hyde Amendment." R. 255, at 3 (JA 073). Plainly, however, a statutory provision that *limits* recovery to applicants who meet certain requirements -- such as maximum net worth -- and comply with specified *procedures* -- such as showing that they meet the eligibility requirements and itemizing the fees claimed -- is within any normal meaning of the phrase

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[7]The United States' motion to dismiss noted that counsel for Austin had told counsel for the United States that Austin was obligated (presumably under some form of indemnity agreement or by operation of state law, or both) to pay True's attorney's fees and costs in connection with the grand jury investigation and this prosecution. *See* R. 254, at 6 (JA 127). The United States did not assert that these informal statements were conclusive evidence that Austin would bear the fees, but True never denied it, and he had the burden of proof. *See National Truck Equipment Assoc. v. National Highway Traffic Safety Administration*, 972 F.2d 669, 671 (6th Cir. 1992). (A corporate indemnifier who is not a defendant in the case cannot recover the fees and costs of its executive because it is not a "prevailing party." *Comserv*, 908 F.2d at 1412 and n.5.)

"procedures and limitations."

2. A party seeking Hyde Amendment fees must include in his application not only "the amount sought" but "an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 28 U.S.C. §2412(d)(1)(B). Again, True's application failed to satisfy this threshold requirement, and his subsequent filings did not cure the defect.

The application, R. 253 (JA 067-70), which did not include any separate statement, summarized "[t]he fees and litigation expenses that Mr. True has been able to calculate to date," over $3.6 million.[8] It added: "Mr. True is still gathering and organizing the fees and expenses and will supplement this application, as necessary, within 20 days of filing." True's supplemental memorandum, R. 255 (JA 071-120), increased his fee request to a total of over $4.1 million, but provided little further detail.[9]

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[8]The application listed "Attorneys Fees (THF [Thompson Hine & Flory] and Sullivan Mountjoy)" of "$2,331,716 (14,690.5 hrs x $158.78 per hr)"; "Expert Fees (NERA), $1,011,822.50," and "Litigation Expenses (including experts' expenses), $326,812.16." R. 253, at 2 (JA 068).

[9]The supplemental memorandum repeated the total, hours, and rates for attorneys as given in the application, included hours and "per hour" amounts for experts, and gave no detail on the claimed "litigation expenses" of over $750,000.

Moreover, it appears even from the limited information provided that True's claim was excessive,[10] and his filings certainly did not contain the information the district court needed to determine whether the fees claimed were "reasonable" and consistent with the limitations of 28 U.S.C. §2412(d)(2)(A).[11]

R. 255, Attach. A (JA 088).

[10]Section 2412(d)(2)(A) limits attorney's fees to $125 per hour unless there is specific justification for a higher fee. True claimed attorney's fees of $158.73 per hour, and offered no justification. *See* R. 253, at 2 (JA 068); R. 255, Attach. B (JA 089-92). Further, only fees incurred after True's indictment would be recoverable under the Hyde Amendment. *See* 18 U.S.C. §3006A note ("in a criminal case"); 28 U.S.C. §2412(d)(1)(A) ("incurred . . . in [the] action"). True's application implied that it included attorney's fees for representation "in connection with [the] investigation," prior to his indictment, R. 253, at 1 (JA 067); it is impossible to tell whether it also included fees and expenses more properly attributable to related private treble damage actions.

[11]The Hyde Amendment, like other fee shifting statutes, does not permit recovery of fees that exceed "the amount necessary to cause competent legal work to be performed" on the matters for which fees are recoverable. *See Coulter v. Tennessee*, 805 F.2d 146, 148-49 (6th Cir. 1986) (discussing general principles for awarding "reasonable" fees). Thus, the court must carefully evaluate the specific tasks performed, the hours expended, and the rates charged. *See id.* at 149-52; *Hudson v. Reno*, 130 F.3d 1193, 1207-08 (6th Cir. 1997) (reviewing fee award in Title VII civil rights case); *Environmental Defense Fund v. Reilly*, 1 F.3d 1254, 1258-60 (D.C. Cir. 1993) (denying reimbursement for "an unreasonable number of hours" claimed to have been spent by one of the attorneys for the prevailing party).

II. THE DISTRICT COURT PROPERLY DENIED TRUE'S HYDE AMENDMENT APPLICATION ON THE GROUND THAT THE UNITED STATES' POSITION WAS NOT VEXATIOUS, FRIVOLOUS, OR IN BAD FAITH

A. Standard of Review

1. In denying True's application, the district court found that the position of the United States "was not vexatious, frivolous or in bad faith." R. 263 (JA 164). It properly did "not . . . substitute for the formula that Congress has adopted any judicially crafted version of it," but made the determinative finding in terms of "the test the statute prescribes." *Pierce v. Underwood*, 487 U.S. 552, 564 (1988). Appellant does not allege any legal error in the district court's understanding of that test. However, to the extent that review of the district court's decision requires *construction* of the statutory phrase "frivolous, vexatious, or in bad faith," that is an issue of law for this Court to consider de novo. *See supra* I.A.

2. The district court's *application* of the Hyde Amendment standard to the position of the United States in this case should be reviewed for abuse of discretion, and the district court's evaluation of the record should be upheld unless clearly erroneous. It is well-established that an abuse of discretion standard governs review of decisions applying EAJA standards to fee applications

in particular cases. *Pierce v. Underwood*, 487 U.S. 552, 557-63 (1988); *Sigmon Fuel Co. v. Tennessee Valley Authority*, 754 F.2d 162, 166-67 (1985); *Trident Marine Construction, Inc. v. District Engineer*, 766 F.2d 974, 980 (1985); *Jankovich v. Bowen*, 868 F.2d 867, 869 (6th Cir. 1989) (per curiam); *Perket v. Secretary of Health and Human Services*, 905 F.2d 129, 132 (6th Cir. 1990). While the Hyde Amendment's standard for an award of fees and its burden of proof differ significantly from EAJA's, *see infra* II. B, the same considerations make abuse of discretion the appropriate standard for appellate review under both fee recovery provisions.

As the Supreme Court observed in *Pierce*, EAJA "provides that attorney's fees shall be awarded 'unless *the court finds* that the position of the United States was substantially justified.'" 487 U.S. at 559 (emphasis by the Court). "This language, the Court reasoned, "emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal." *Id.* The Hyde Amendment likewise provides that fees may be awarded only "*if the court finds* that the position of the United States was vexatious, frivolous, or in bad faith," suggesting similar appellate deference.[12] A

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[12]Both EAJA and the Hyde Amendment give the district court further latitude to deny fees, even having found for the prevailing party with respect to

deferential standard not only is consistent with the language of EAJA and the Hyde Amendment, it is appropriate because "a 'request for attorney's fees should not result in a second major litigation.'" *Pierce*, 487 U.S. at 563 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

The abuse of discretion standard for review of EAJA decisions requires "a highly deferential standard of review such as the clearly erroneous standard" for "findings based upon the district judge's assessment of the probative value of the evidence" or other essentially factual issues. *Sigmon Fuel*, 754 F.2d at 167; *Trident Marine*, 766 F.2d at 980; *Jankovich*, 868 F.2d at 869. Appellant nonetheless argues (Br. 13) that "the district court in this case did not make any factual findings" and that, therefore, "th[is] Court should review *de novo* all of the lower court's decision to deny Mr. True's fee application." He is wrong.

In support of his fee application, True argued that the United States' position that True's participation in the West Kentucky explosives conspiracy continued into the statute of limitations period was frivolous, vexatious, or in bad faith because it was inconsistent with available evidence. The district court's

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the United States' position, if "*it finds* that special circumstances make such an award unjust." If anything, the Hyde Amendment suggests even greater discretion in and deference to the district court, using "*may* award" rather than EAJA's "*shall* award."

conclusion, "[b]ased on the arguments of counsel and the record in the case," that "the position of the United States in pursuing this prosecution was not frivolous, vexatious, or in bad faith," R. 262 (JA 163), was a finding of fact. Indeed, it was precisely the kind of "assessment of the probative value of the evidence" that an experienced judge who had presided over the trial was in the best position to make, and to which this Court gives deference under the abuse of discretion standard.[13]

The district court was not required to make detailed subsidiary findings specifically refuting each of True's unwarranted assertions concerning particular aspects of the United States' case, each of which had been raised and argued or explored on cross-examination in the course of the trial. The Hyde Amendment and the incorporated EAJA "procedures and limitations" contain no special

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[13]This Court's holdings in the EAJA context that "[w]ith respect to the district court's evaluation of the government's legal argument, a de novo standard is appropriate," *Sigmon Fuel*, 754 F.2d at 167; *Trident Marine*, 766 F.2d at 980, have no application to this case. *See also Pierce*, 487 U.S. at 560-63 (In some EAJA cases deferential review may also be appropriate for the district court's evaluation of the government's position on "mixed questions of law and fact" and even "a judgment ultimately based upon evaluation of [a] purely legal issue governing the litigation."). The offense charged in this case was a per se violation of the Sherman Act, and that legal theory is not at issue. Whether the conspiracy and True's membership in it continued into the statute of limitations period is solely a question of fact.

requirements for findings, and a district court is not required to engage in any detailed discussion of what a party seeking fees has *failed* to prove. As this Court explained in a similar context: "While a district judge cannot award [Rule 11] sanctions without giving the factual basis for that award," the district court need *not* "make factual findings to explain why it did not order sanctions," and this Court "has not interpreted Rule 52 to require district courts explicitly to treat each issue raised." *Orlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414, 417 (6th Cir. 1992).

B. The Hyde Amendment Does Not Permit a Court To Award Fees Unless the Prevailing Defendant Shows That the Position of the United States Is Properly Characterized by the Narrow Statutory Terms "Vexatious, Frivolous, or in Bad Faith"

The Hyde Amendment places the burden on a prevailing criminal defendant to convince the district judge -- who has observed the evidence and the conduct of the prosecution throughout the case -- that the position of the United States was "vexatious, frivolous, or in bad faith." It does *not* allow *all* prevailing criminal defendants to recover fees, nor does it place the burden on the United States to show that its position was "substantially justified" as is the case under EAJA. In construing the Hyde Amendment standard, this Court should look to its statutory language and the common meanings of the terms Congress used, and

to the Amendment's legislative history.[14]

The three Hyde Amendment terms -- "vexatious, frivolous, or in bad faith" -- are commonly used in cases dealing with litigation misconduct. *See, e.g., Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-46 (1991) ("a court may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'"). They may have different shades of meaning in different contexts, and there is some overlap among them, but they appear to address distinct concerns. "Frivolous" generally refers to complete lack of objective merit, i.e., "clearly insufficient on its face," "groundless," "devoid of merit." Black's Law Dictionary at 668 (6th ed. 1990). *See also* Ballentine's Law Dictionary at 503 (William S. Anderson, ed., 3d ed. 1969); Webster's Third New International Dictionary (1981) at 913 ("having no basis in law or fact"). "Bad faith" denotes action taken for an improper purpose or without a belief in its propriety, i.e., it "generally impl[ies] or involv[es] actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some

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[14]*See Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("[W]here . . . resolution of a question of federal law turns on a statute and the intention of Congress, [the federal courts] look first to the statutory language and then to the legislative history if the statutory language is unclear."); *United States v. Brown*, 915 F.2d 219, 223 (6th Cir. 1990) (quoting *Blum*).

duty . . . the conscious doing of a wrong because of dishonest purpose or moral obliquity." Black's Law Dictionary at 139. *See also* Ballentine's Law Dictionary at 118. "Vexatious" means harassing, in the sense of an abuse of process, i.e., "lacking justification and intended to harass," Webster's Third New International Dictionary at 2548, or "instituted maliciously and without probable cause," Black's Law Dictionary at 1565. *See also* Ballentine's Law Dictionary at 1341. In some contexts, however, the term "vexatious" does not imply that a showing of "subjective bad faith" is a prerequisite to a fee award. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417-421 (1978) (explaining standard for awarding fees to a prevailing defendant under Title VII of the Civil Rights Act of 1964).

The Hyde Amendment's legislative history, while sparse, confirms that the statutory terms should be construed narrowly. The fee recovery provision first proposed as an amendment to the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, H.R. 2267, 105th Cong. (1997), would have given Members of Congress and their staffs -- but not other criminal defendants -- a right to reimbursement in *any* case of acquittal, dismissal, or reversal on appeal. *See* 143 Cong. Rec. H7791 (daily ed. Sept. 24, 1997) (remarks of Rep. Hyde). Congressman Hyde then proposed a substitute,

patterned after the standards and procedures of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d). *See* 143 Cong. Rec. H7791 (daily ed. Sept. 24, 1997) (remarks of Rep. Hyde). Under EAJA, parties prevailing against the United States in civil actions (other than tort cases) may recover fees "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A).[15]

The Administration and Congressional opponents of the proposed Hyde Amendment argued that allowing prevailing criminal defendants to recover fees under the EAJA standard "'would have a profound and harmful impact on the Federal criminal justice system,'" in that it would "'create a monetary incentive for criminal defense attorneys to generate additional litigation in cases in which prosecutors have in good faith brought sound charges, tying up the scarce time and resources that are vital to bringing criminals to justice.'" 143 Cong. Rec. H7792 (daily ed. Sept. 24, 1997) (remarks of Rep. Scaggs, quoting

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[15]The Supreme Court has construed EAJA to place the burden on the United States to show that its position was legally and factually "'justified in substance or in the main' -- that is justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). This statutory formulation "is no different from the 'reasonable basis in both law and fact' formulation adopted by . . . the vast majority of . . . Courts of Appeals that have addressed this issue," including this Court. *Id.* (citing *Trident Marine Construction, Inc. v. District Engineer*, 766 F.2d 974, 980 (6th Cir. 1985)).

Administration statement of policy). Because of these concerns, the Administration indicated that if this amendment were included, the President would veto the appropriations bill. *Id.*

The House adopted the Hyde Amendment, with the EAJA standard, but the Senate version of the appropriations bill had *no* provision for fees in criminal cases. *See* H.R. Conf. Rep. No. 105-405, at 193-94 (1997), *reprinted in* 143 Cong. Rec. H10862-3 (daily ed. Nov. 13, 1997). The Conference Report proposed the compromise that was ultimately enacted -- allowing fees only if the district court finds the position of the United States "vexatious, frivolous, or in bad faith." *Id.* The Conference Report explains that "a grand jury finding of probable cause to support an indictment does not preclude a judge from finding that the government's position was vexatious, frivolous, or in bad faith," *id.*, but the Hyde Amendment as enacted clearly has a narrower standard than EAJA and expressly does not adopt its burden of proof.

It is evident, therefore, that Congress intended prevailing criminal defendants to recover fees under the Hyde Amendment only in rare cases. It did not intend the United States to pay defense attorney's fees in proper, but unsuccessful, prosecutions. Further, a "presumption of regularity" supports federal prosecutors' decisions, and "in the absence of clear evidence to the

contrary, courts presume that they have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotations and citations omitted). Attorneys for the United States unquestionably have an obligation to do justice and not to bring meritless cases. But it also would be irresponsible and contrary to the public interest for the United States *not* to seek indictments and to prosecute cases where prosecution is warranted, despite conflicts in the evidence. Thus, the Hyde Amendment does not allow recovery unless a criminal defendant not only prevails but carries the burden of showing that the United States' position was vexatious, frivolous, or in bad faith.

C. True Has Shown No Abuse of Discretion in the District Court's Evaluation of the Record and Denial of His Application

1. There Is No Basis for This Court to Re-examine the Trial Record

True's application did not specify any basis for his allegation that the position of the United States was frivolous, vexatious, or in bad faith; he made only a vague and general reference to his Rule 29 motion for judgment of acquittal and "the evidence adduced at trial." R. 253, at 2 (JA 068).[16] His

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[16]Rule 29, of course, does not provide the Hyde Amendment standard. The issue under the Hyde Amendment is not simply whether the evidence was insufficient to sustain a conviction; rather Congress required the applicant to prove to the district court that the United States' position was "vexatious,

supplemental filings did not seriously dispute the existence of a West Kentucky explosives price-fixing conspiracy -- to which his company, Austin, as well as his subordinate, Mechtenberg, pled guilty. He argued (R. 255, at 8-14 (JA 078-84)), however, that the United States should not have prosecuted him -- and that no reasonable prosecutor would have done so -- because there was insufficient evidence that the conspiracy continued into the statute of limitations period (i.e. beyond September 3, 1992),[17] or that he participated in a single continuing conspiracy as charged. He also attacked the credibility of testimony from co-conspirator witnesses Mechtenberg, Porter and Bussey, and he complained about government counsel's attempts to refresh witnesses' recollections, as described by the witnesses on cross-examination. *Id.*

The district court considered these arguments in light of the record in this case and rejected them, finding that the position of the United States was not vexatious, frivolous, or in bad faith. R. 262 (JA 163).[18] True now repeats the

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frivolous, or in bad faith." *See supra* II.B.

[17]The indictment was returned on September 3, 1997, and it is undisputed that the general five-year criminal statute of limitations, 18 U.S.C. §3282, governs criminal charges brought under Section 1 of the Sherman Act, 15 U.S.C. §1.

[18]We note that, in addition to considering "the record" under the "vexatious, frivolous, or in bad faith" standard in the specific context of True's

same arguments on appeal. He has made no claim that the district court's assessment of the record was clearly erroneous, however. Nor has he shown any other basis under the applicable abuse of discretion standard for appellate review, *see supra* II.A, for this Court further to consider his allegations.

2. The Record Supports the United States' Position That True Participated in a Single Conspiracy To Rig Bids, Fix Prices and Allocate Customers, from Late 1988 Until Sometime After September 3, 1992

Although this Court need not examine the trial record in order to affirm the decision below, it provides ample justification for the district court's conclusion that the United States' position was *not* vexatious, frivolous, or in bad faith. Indeed, the record evidence would have allowed the jury to find, beyond a reasonable doubt, "that the conspiracy charged in the indictment existed after September 3, 1992, and that Mr. True was a member of it after that date," Tr. 2100 (Jury Instruction Number 10) (JA 483). *See Glasser v. United States*, 315

Hyde Amendment application, the district court had assessed it in the context of an earlier evidentiary ruling. In its September 17, 1998 Order, R. 230 (JA 214-15), the district court overruled True's objections to admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), finding "by a preponderance of the evidence that a conspiracy existed, that the declarants were all members of the conspiracy, that the Defendant was a member of the conspiracy, and that all the statements" at issue -- including statements made after September 3, 1992 (*see* R. 221, Ex. A) (JA 178-84) -- "were made in furtherance of the conspiracy."

U.S. 60, 80 (1942) ("verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it").

Testimony of co-conspirator witnesses [19] and corroborating documents showed that the West Kentucky explosives conspiracy began in late 1988. Through a series of meetings and conversations, the conspirators reached an understanding to work together to raise prices by staying away from each others' customers, by fixing prices, and by rigging bids. Tr. 244-45 (Childs) (JA 298-99); 944-45, 948-52 (Mechtenberg) (JA 370-71, 374-78); 1438-54 (Bussey) (JA 277-93).[20]

The evidence also showed that the agreement, discussions among the

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[19]The full names of witnesses whose testimony is cited in this Brief, their corporate affiliations and positions, and the transcript pages at which their testimony appears are listed in Addendum B to this Brief.

[20]Government Exhibit 1 (JA 484-85), Vincent's memo of a phone message from Childs to Julian Smith (President of DYNA-Blast, a distributor owned by IRECO), dated "12/30/88," substantiates testimony that the conspiracy began in late 1988. *See* Tr. 106-08 (Vincent) (JA 467-69). Because the conspirators undertook to "confirm doing this," *i.e.*, trying to increase prices by not under cutting bids to existing customers, "for 3 months," True argues (Br. 27-28) that GX 1 indicates that they agreed to *resume competing* after three months. Neither GX 1 nor other evidence supports that strained interpretation. To the contrary, the conspirators wanted to increase prices further, Tr. 470 (Childs) (JA 331), and they were sufficiently pleased with their arrangement to continue it.

conspirators, and big rigging, price fixing, and customer allocation consistent with the agreement continued from 1988 until at least late 1992. Tr. 245-48, (Childs) (JA 299-302); 542-48 (Kiser) (JA 356-62); 944-47 (Mechtenberg) (JA 370-73); 1340-43 (Porter) (JA 448-51).[21] Specifically, several conspirators testified that their agreement continued through the November 1992 ANFO price increase, which they discussed and coordinated. Tr. 248, 339-43 (Childs) (JA 302, 314-18); 568, 596-98 (Kiser) (JA 363, 364-66); 991-93 (Mechtenberg) (JA 389-91); 1378-81 (Porter) (JA 460-63). It ended *only after* the corporate

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[21]For example, Bussey described the formation of the conspiracy and how the conspirators were going to "get the price up" and "maintain it." Tr. 1447-49 (JA 286-88). Childs testified that the purpose of the conspiracy was "to raise prices in the area," Tr. 244 (JA 298), and that he and his co-conspirators discussed and coordinated the annual general price increases and the ANFO price increases. Tr. 245-46 (JA 299-300). ("ANFO," an explosives product, is ammonium nitrate and fuel oil. *See* Tr. 117 (Vincent) (JA 470).) He did not think that there were any ANFO increases between January 1989 and January 1993 that he had *not* coordinated with his competitors. Tr. 248 (JA 302). Porter testified that he began talking with his competitors "[t]o make sure everyone got the [price] increase." Tr. 1343 (JA 451). Kiser testified that he fixed prices "[f]rom the time I got there in 1989 until the subpoenas came out in 1992." Tr. 527 (JA 355). He said he and his competitors "were coordinating our activities to try to move the price in the marketplace . . . [t]o stabilize the marketplace there in western Kentucky and to move the margins up so everybody could make a little bit more money," Tr. 542-43 (JA 356-57); "[t]here was not supposed to be competition on pricing to existing customers," Tr. 546 (JA 360). He referred to the agreement as "an umbrella" and added that all customers and all products were subject to the agreement. Tr. 547-48 (JA 361-62).

conspirators received the December 1992 grand jury subpoenas in the Department of Justice antitrust investigation. Tr. 314-17, 470, 472-73 (Childs) (JA 309-12, 331, 333-34); 527, 597-99 (Kiser) (JA 355, 365-67) 945-47, 972-73 (Mechtenberg) (JA 371-73, 386-87); 1335, 1381-82 (Porter) (JA 443, 463-64).[22]

True's assertion (Br. 25) that Mechtenberg "unequivocally and categorically denied the existence of a comprehensive, continuing agreement as contended by the government" and that his denial made it unreasonable for the United States to prosecute True, mischaracterizes both the charge and the quoted testimony. As the United States' bill of particulars, R. 36 (JA 036-64) explained, the conspiracy "was to lessen competition and to increase prices for commercial explosives products in the West Kentucky Region" and "did not exclude any particular customer or any particular commercial explosive product." Thus, the conspiracy encompassed "all of the bids to existing customers" R. 36, at 5 (JA 040), "all annual price increases from 1989 to 1993," *id.* at 7 (JA 042), and allocation of "[a]ll existing customers . . . and products," *id.* at 8 (JA 043).

The bill of particulars made clear, however, that this did *not* mean that, in

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[22]The subpoenas were issued to Austin, Atlas, and IRECO, on December 11, 1992, and served shortly thereafter. *See* GX 483 (JA 551).

fact, every price was fixed or every bid was rigged or every customer allocated. *See* R. 36, at 4-5, 7-8 (JA 039-40, 042-43). New accounts were not subject to the agreement. R. 36, at 4 (JA 039). With respect to existing accounts, ample evidence established the existence of the conspiracy charged in the indictment, and although the conspirators did not always act in accordance with their agreement, the success of the conspiracy was immaterial. *Id.* at 2 (JA 037). *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-25 (1940); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995); *United States v. Cooperative Theaters of Ohio*, 845 F.2d 1367, 1373 (6th Cir. 1988). Construed in the light most favorable to the government, *see Glasser*, 315 U.S. at 80 -- indeed, under any reasonable construction -- Mechtenberg's negative responses to cross-examination questions concerning "all bids," "all prices" and "all customers" (Br. 25-26, quoting Tr. 1021-22 (JA 407-08)), therefore, are fully consistent with the existence of the charged conspiracy.[23]

The evidence also showed that True participated throughout the

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[23]Similarly, True (Br. 26-27) takes out of context one sentence from GX 538, a written statement Mechtenberg prepared and submitted to the probation officer, describing the West Kentucky conspiracy. *See* Tr. 1082-90 (JA 422-30). Read as a whole, the statement is entirely consistent with Mechtenberg's trial testimony and the charge against True.

conspiracy. He monitored and encouraged the participation of his subordinates, Mechtenberg and Porter; as they both testified, they communicated with True about their discussions and agreements with competitors on various bids and price increases and he endorsed their actions.[24] Tr. 944-45, 951-52, 956-57, 959, 966-67, 977, 996-97, 1001-02, 1002-03, 1016-20 (Mechtenberg) (JA 370-71, 377-78, 379-80, 382, 384-85, 388, 394-95, 396-97, 397-98, 402-06); 1345-49, 1377, 1380-81 (Porter) (JA 453-57, 459, 462-63). In addition, True participated directly in communications with representatives of other companies in furtherance of the conspiracy. Tr. 252, 317-18 (Childs) (JA 304, 312-13); 712 (Westmaas) (JA 473); 1006-08 (Mechtenberg) (JA 399-401); 1169, 1185-88, 1205-07 (Drury) (JA 343, 344-47, 348-50); 1433-34, 1438-42 (Bussey) (JA 272-73, 277-81).[25]

The United States was not required to prove any specific *act* by True himself after September 3, 1992, in order to prove his continued participation in

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[24]*See United States v. Wise*, 370 U.S. 405, 416 (1962) (corporate official participates in conspiracy by authorizing subordinates' activity); *United States v. Gillen*, 599 F.2d 541, 546-47 (3d Cir. 1979) (same).

[25]There was no evidence that True withdrew from the conspiracy prior to its termination, and he never told his subordinates to cease their illegal activity. Tr. 1020 (Mechtenberg) (JA 406); 1356 (Porter) (JA 458).

the conspiracy. *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (1995). But there *was* such evidence. Porter testified that he reported to True the agreement with Childs on the November 1992 ANFO increase, and that True endorsed it. Tr. 1380-81 (JA 462-63).

3. True's Arguments Based on Co-conspirators' Plea Agreements and His Attacks on Certain Testimony of Government Witnesses Are Unwarranted and Irrelevant

Despite ample evidence that the charged conspiracy and his participation in it continued beyond September 3, 1992, True contends (Br. 19) that "the government itself believed, and had repeatedly manifested its belief, that the statute of limitations had expired on the charged conspiracy before the indictment was returned," and, therefore, "misled," "coerced," and "manipulated" witnesses to secure testimony to support the case against True. As the district court obviously recognized, these charges distort the trial record; they are unsubstantiated and meritless as well as immaterial.[26]

a. True argues (Br. 20-21) that the plea agreements Mechtenberg and

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[26]In a criminal case that has gone to trial, the "position" of the United States is its entire litigating position, *i.e.* that the defendant should be indicted, tried, and convicted. *See Commissioner, INS v. Jean*, 496 U.S. 154, 159-60 (1990). Contrary to appellant's suggestion (Br. 16 n.8; *see also* R. 255, at 6-7 (JA 076-77)), the Hyde Amendment does not call for separate evaluations of each step by counsel for the United States in preparing and trying the case.

three of the corporate conspirators entered into in 1996 and 1995[27] -- which described the offense to which *they* would plead guilty as a West Kentucky conspiracy from "Fall 1988" or "late 1988" "until mid-1992" -- somehow manifest the government's "belief" that the statute of limitations had expired before September 3, 1997, the date True was indicted. This spurious argument fails for multiple reasons.[28]

As an initial matter, plea agreements merely describe the offenses to which the corporations and individuals entering into those agreements agree to plead guilty. The conspirators' plea agreements were not evidence against True. *See, e.g.*, Tr. 942 (JA 368) (court instructs jury that Mechtenberg's plea agreement "is no evidence of any guilt on the part of the defendant"); 1A Charles A. Wright, Federal Practice and Procedure (1999) §175, at 231 ("A plea of guilty by one defendant binds that defendant only and does not prove the guilt of any other

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[27]ICI (Atlas), DYNO Nobel (IRECO), and Mine Equipment and Mill Supply, Inc. (Midland) entered into plea agreements and pled guilty to informations in September 1995. In September 1996, Mechtenberg and Austin entered into plea agreements and pled guilty to informations.

[28]True's attempt (Br. 19-20) to show such a "belief" from agreements by Westmaas and Drury not to assert a statute of limitations defense for particular periods is even more farfetched. As he acknowledges (Br. 20 n.9), they were not even charged with any West Kentucky conspiracy.

defendant."). And they did not limit the United States' discretion to seek an indictment against True on the basis of the evidence presented to the grand jury.

Moreover, even if the descriptions of the West Kentucky explosives conspiracy in certain plea agreements were somehow relevant, they are not inconsistent with the charge against True. They do not say that the West Kentucky conspiracy *ended* in mid-1992, and the informations to which the co-conspirators pled guilty pursuant to the agreements clearly charged a conspiracy that "continued *at least* until mid-1992." *See* GX 527 (Mechtenberg information) (emphasis added) (JA 552-56);[29] Tr. 942-44 (JA 368-70); GX 528 (ICI (Atlas) information) (JA 557); Tr. 1426 (Bussey) (JA 271).[30]

True's assertion (Br. 23) that in drafting Mechtenberg's information, the United States "refus[ed] to accept Mechtenberg's explicit recollection that the

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[29]True's further suggestion (Br. 23) that the change from "until mid-1992" (in Mechtenberg's plea agreement) to "at least until mid-1992" (in the information) was material and inconsistent with the plea agreement -- and that the United States somehow forced or tricked Mechtenberg into entering a guilty plea to this information -- is absurd. The minor variation in wording was inconsequential, Mechtenberg was represented throughout by able counsel, and he never disputed the description of the offense.

[30]The plea agreement of True's employer Austin, like the informations, used the phrase "until at least mid-1992." *See* GX 113 (JA 518-29); Tr. 1334 (Porter) (JA 442).

conspiracy ended in mid-1992," is baseless. That was not Mechtenberg's recollection. He, like other witnesses (*see supra* II.C.2) testified that he stopped fixing prices in "late 92" because "[s]ubpoenas were issued, and the investigation began by the Government." Tr. 945-46 (JA 371-72); *see also* Tr. 972-73 (JA 386-87).[31]

b. True's assertion (Br. 33-38) that "the government misled and coerced Mechtenberg" in order to obtain his testimony against True also is belied by the record. Mechtenberg was not misled concerning the page from True's Daytimer calendar dated December 26, 1988, GX 2-A (JA 486) (*see* Br. 33-35). This page was first offered and admitted into evidence as part of GX 2, the *entire 1989* calendar. *See* Tr. 825-26, 830, 959-60 (JA 439-40, 441, 382-83). Mechtenberg did not testify that counsel for the United States misrepresented its source; indeed, Mechtenberg said he was *not* surprised that this page was from the 1989 calendar. *See* Tr. 1037 (JA 416). Further, regardless of whether the notes were made on December 26, 1988, or on some other date, Mechtenberg testified -- and

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[31]True (Br. 23) chides government counsel for "debating" Mechtenberg, based on Mechtenberg's acknowledgment, on cross-examination of "somewhat a debate concerning the ending point" of the conspiracy. Tr. 1023 (JA 409). But neither Mechtenberg's testimony as a whole -- which the district court heard -- nor anything else suggests that government counsel were attempting to secure anything but full and accurate testimony, or that their conduct was improper.

the jury could have concluded -- that Mechtenberg got the information about bids to be made by Austin's competitor and gave it to True pursuant to the bid-rigging agreement before the bids were submitted.[32]

Nor were the differences between Mechtenberg's trial testimony and various earlier statements the result of any "manipulative and coercive tactics" or "extraordinary pressure" (Br. 35). Mechtenberg's testimony on cross-examination concerning his discussions with government attorneys -- throughout which he was represented by counsel -- shows that the United States sought his full and truthful testimony, and that his own counsel engaged in plea negotiations and advised his client concerning the seriousness of the crimes for which he might be indicted and the sentences that might be imposed. Tr. 1109-10 (JA 433-34). There is no indication of any threats or other improprieties by government

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[32]Mechtenberg testified that the notes on GX 2-A were information he had obtained from Childs (president of Austin's competitor, Midland) and conveyed to True about the prices Childs planned to bid to one of Midland's customers, Jim Smith Coal. Tr. 959-60 (JA 382-83). Mechtenberg testified further that his conversation with Childs and his conversation with True took place *before* the conspirators submitted their bids to Smith Coal, and that he and True "mutually decided to bid a little bit higher than the number Childs had given us." Tr. 948-52 (JA 374-78). Defense counsel brought out on cross-examination that the "December 26, 1988" page was at the front of True's 1989 calendar, and that the notations *might* have been made after, rather than on, December 26, 1988. Tr. 1038-39 (JA 417-18). But that testimony merely raised an issue for the jury.

counsel, and nothing to support True's claim that the United States' position was "vexatious, frivolous or in bad faith."[33]

c. True (Br. 21-22) asserts that the government's treatment of Childs constituted "vexatious and bad faith behavior with regard to the limitations period." Plainly, it did not. The United States has an obligation to obtain testimony from witnesses that is as accurate as possible, and it often is necessary as well as permissible, to refresh witnesses' recollections of events that occurred several years earlier. Thus, as Childs testified, government counsel showed him various documents to refresh his recollection, and he testified that he was mistaken in his earlier testimony regarding when the conspiracy ended, Tr. 316-17 (JA 311-12), having merely confused two government agencies investigating different antitrust matters, Tr. 472 (JA 333).

d. True's assertion (Br. 40-41) that the United States "manipulated" Porter's testimony that the conspirators had coordinated the November 1992

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[33]It is all too common for potential defendants initially to deny their participation in illegal activity. There is nothing wrong with the United States' reliance on trial testimony that it believes to be truthful and in which a witness acknowledges wrongdoing he previously denied. Defense counsel fully cross-examined Mechtenberg on his prior statements and his discussions with government counsel, the jury took that testimony into account in weighing his credibility, and it was part of the record before the district judge who denied the Hyde Amendment application.

increase in the price of ANFO to Andalex, Tr. 1378-82 (JA 460-64), is also baseless. It was entirely proper for government counsel to use the price increase letter sent to Andalex in November 1992 (GX 212) (JA 550), to refresh the witness' recollection. Any conflicts in Porter's testimony or uncertainty on his part merely created a credibility issue for the jury; they did not indicate that the United States' position was "unfounded," "unjust," or "in reckless disregard of the facts" as True (Br. 41) claims.[34]

e. True's assertion (Br. 32) that "the trial court was deceived" by the United States' arguments for admission of Bussey's testimony concerning True's communications with Longmire and Caldwell (Bussey's superiors at Atlas) is outrageous. The United States offered Bussey's testimony under Rule 801(d)(2)(E) (co-conspirator statements); defendant objected that the testimony

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[34]Indeed, Porter rejected defense counsel's suggestion that his testimony was manipulated. When asked, "You thought it was [November 1992] because the government told you that's when it was, didn't they?," he replied, "No. No. . . . the document [GX 212, the price increase letter] kind of proves it." Tr. 1383 (JA 465).

Defense counsel's subsequent questions about "an $8 increase to Andalex in May of 1992," Tr. 1383-84 (JA 465-66), may have confused Porter. (There was no record evidence of a May 1992 ANFO increase to Andalex.) But Porter said he was sure that he had coordinated an increase to Andalex before the grand jury subpoenas came out. Tr. 1382 (JA 464). (He thought that was "sometime early in '93." *Id.*)

would somehow mislead the jury. Tr. 1434-40 (JA 273-79). The district court admitted the statements, an evidentiary ruling that was well within its discretion, and, in any event, is not at issue under the Hyde Amendment. The trial judge certainly was not "deceived"; he considered and rejected the argument from True's counsel that it would be misleading to put on only Bussey, when other potential witnesses did not recall the conversation.[35]

True has no basis for complaint about the United States' decision not to call Longmire and Caldwell as trial witness. In compliance with its *Brady* obligations, the United States had informed True's counsel (by letter dated July 17, 1998) that Longmire and Caldwell "denied or professed no recollection" of conversations with True. R. 255, Attach. B at 3 (JA 091). The United States had no reason to call these witnesses, and no obligation to do so. If True thought their lack of recollection would help him refute Bussey's testimony, *he* could have called them.[36]

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[35]The court concluded: "I don't think it's misleading -- it's going to be perhaps misleading from your point of view, if you don't put on that witness. But from the jury's point of view it's not going to be misleading. It's misleading because you think you have evidence that will show another side to it." Tr. 1437 (JA 276).

[36]True (Br. 32) asks: "If the government did not believe that [Longmire amd Caldwell] were being totally forthcoming on this critical issue [the

D. There Is No Basis for Discovery of Internal Government Memoranda or for Further Proceedings in the District Court

Finally, True argues (Br. 41) that if this Court finds the record insufficient to support his Hyde Amendment claim, it should remand with instructions to order the government to produce "all prosecution memoranda, as well as copies of all notes and memoranda of interviews of all alleged conspirators." This request is entirely unprecedented and unwarranted.

True cites no statutory authority for discovery by the applicant in a Hyde Amendment proceeding. Nor is there any. The Hyde Amendment confers no right to discovery,[37] and it incorporates the EAJA "limitation" that "the position of the United States" shall be evaluated "*on the basis of* the *record* . . . which is made in the . . . action for which fees . . . are sought." 28 U.S.C.

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conversations with True], why did it not void the plea agreement of either of them for failure to provide 'truthful, complete, and accurate testimony'?" The United States' decision not to void the plea agreement on that ground, however, only undermines True's contention that the United States was "pressuring" or "coercing" witnesses in order to obtain their testimony against him.

[37]The Hyde Amendment allows the court "for good cause shown to *receive*" additional evidence "ex parte and in camera," but does not authorize it to require the United States to provide discovery to applicants. 18 U.S.C.A. §3006A note (emphasis added).

§2412(d)(1)(B) (emphasis added).[38]

The only case True cites in support of his discovery demand is *United States v. Gardner*, 23 F. Supp. 2d 1283 (N.D. Okla. 1998). But even the *Gardner* decision -- which assumes that a trial judge might in some unusual circumstances have discretion to grant limited discovery for purposes of a Hyde Amendment fee application[39] -- provides no support for True's view (Br. 41-42) that the district court should have granted, or that this Court now should order it to grant, his vague, broad and unsubstantiated request for access to prosecution files.

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[38]Fed. R. Crim. P. 16(a)(1)(C) is inapplicable; a defendant's right to discovery of documents "material to the preparation of the defendant's defense" refers "only to defenses in response to the Government's case-in-chief." *United States v. Armstrong*, 517 U.S. 456, 462-63 (1996). Moreover, even where discovery *is* otherwise authorized, Rule 16 specifically provides that it "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government" or "of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. §3500." Fed. R. Crim. P. 16(a)(2). Appellant received all statements to which he was entitled under *Jencks* and *Brady*, and he cannot obtain in a Hyde Amendment proceeding internal prosecution memoranda that would be exempt even under Rule 16.

[39]The United States submits that *Gardner* was wrongly decided, and that district court decision, of course, does not bind this Court. The fee litigation in *Gardner* was subsequently resolved through a settlement agreement, and no court of appeals has ruled on any Hyde Amendment discovery issue.

The district court in *Gardner* recognized that there is "no authority to support the view that Hyde Amendment applicants should have either sweeping access to sensitive materials or broad powers to compel testimony." 23 F. Supp. 2d at 1296.[40] Thus even under its view, discovery in Hyde Amendment proceedings would be appropriate only in a "unique and narrow band of cases" where the defendant has presented "'some evidence to show the existence of'" frivolous, vexatious, or bad faith governmental action, *id.* at 1296-97 (quoting *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (standard for discovery on motion to dismiss for selective prosecution)).

True made absolutely no showing that the discovery he seeks would be material or even relevant to his claim, which rested on alleged insufficiency in the trial record. The district court could -- and did -- fully assess that record without discovery.[41] Accordingly, even under the standard adopted by the Oklahoma district court in *Gardner*, True would not be entitled to discovery.

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[40]Accordingly, that court ordered *only* in camera production and ex parte hearing, and denied the applicant's request for "depositions of IRS agents and United States Attorneys." 23 F. Supp. 2d at 1296-97.

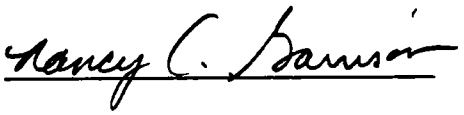
[41]By contrast, in *Gardner*, the United States had dismissed the indictment, and the Hyde Amendment application was based largely on alleged improprieties in an IRS investigation. *See* 23 F. Supp. 2d at 1295-96.

Finally, True had no right to an evidentiary hearing in the district court. The district court properly based its decision on the record in the underlying action. There was no need for an evidentiary hearing, and it was well within the district court's discretion not to hear argument. Where, as in this case, a Hyde Amendment application fails to present even a prima facie case, a hearing would only waste judicial and prosecutorial resources.

CONCLUSION

This Court should dismiss True's Hyde Amendment fee application for lack of jurisdiction. Alternatively, if it determines that the district court had jurisdiction, it should affirm the order denying the application.

Respectfully submitted.



JOEL I. KLEIN
Assistant Attorney General

A. DOUGLAS MELAMED
Deputy Assistant Attorney General

JOHN J. POWERS, III
NANCY C. GARRISON
Attorneys
U.S. Department of Justice
Antitrust Division
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-1531

OF COUNSEL:

KATHERINE A. SCHLECH
NANCY H. MCMILLEN
ARNOLD C. CELNICKER
MARK C. GRUNDVIG
Attorneys
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W.
Washington, D.C. 20530

November 10, 1999

(Proof copy filed April 14, 1999)

Addendum A:

Statutes

Hyde Amendment, 18 U.S.C.A. § 3006A note ("Attorney Fees and Litigation Expenses to Defense") (1999 Pocket Part), Pub. L. 105-119, Title VI, §617, 111 Stat. 2519 (Nov. 26, 1997):

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

Equal Access to Justice Act, 28 U.S.C. §2412(d):

> (d)(1)(A)Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the

highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in > section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Veterans Appeals;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on

behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

Addendum B:

Witnesses cited in the Brief for Appellee United States of America

WITNESSES CITED IN THE BRIEF FOR APPELLEE UNITED STATES OF AMERICA (arranged alphabetically)			
WITNESS	COMPANY	POSITION	COMPLETE TESTIMONY IN TRANSCRIPT
John Bussey	West Kentucky Explosives (a subsidiary of **Atlas** Powder Company (now ICI Explosives USA, Inc.))	General Manager (until 1989)	1420-95
David Childs	**Midland** Powder Company	President	155-174, 242-437, 465-503
Fred Drury	**IRECO**, Inc. (now DYNO Nobel, Inc.)	Vice President of the Central Division	1165-1321
Robert Kiser	Western Kentucky Explosives (a subsidiary of **Atlas** Powder Company (now ICI Explosives USA, Inc.))	General Manager and Vice President (from 1989 forward)	523-650
Thomas Mechtenberg	**Austin** Powder Company	West Central Regional Manager (until 1990); Mississippi Valley East Regional Manager (from 1990 forward)	923-1114

WITNESSES CITED IN THE BRIEF FOR APPELLEE UNITED STATES OF AMERICA (arranged alphabetically)			
Sonja Myles (document custodian)	**Austin** Powder Company	Executive Secretary to David P. True	822-90
Richard Porter	**Austin** Powder Company	Mississippi Valley Regional Manager (until 1990) and Division President (from 1990 forward)	1328-1420
Marty Vincent	DYNA-Blast Inc. (part of **IRECO**, Inc. until sold to **Midland** Powder Company in December 1989)	Operations Manager	93-154
Donald Westmaas	**IRECO**, Inc. (now DYNO Nobel, Inc.)	Executive Vice President of Marketing	708-819

Addendum C:

Joint Appendix Designations

No. 99-5111

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DAVID P. TRUE
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

DESIGNATIONS OF CONTENTS FOR JOINT APPENDIX FOR APPELLEE UNITED STATES OF AMERICA

Pursuant to Rule 30 of the Federal Rules of Appellate Procedure and the Court's February 1, 1999, Order, Appellee the United States of America hereby designates the following parts of the Record as items to be included in the Deferred Joint Appendix, in addition to the parts of the Record designated by the Appellant:

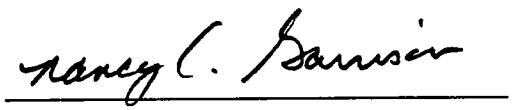
Record Entry Description	Date	Record Entry No.
Order admitting co-conspirators' statements pursuant to Fed. R. Evid. 801(d)(2)(E)	09/17/98	R. 230
Motion to Dismiss Defendant's Application for Fees and Expenses Pursuant to the "Hyde Amendment"	11/03/98	R. 254
United States' Reply to Defendant's Response to Motion to Dismiss Defendant's Application for Fees and Expenses Pursuant to the "Hyde Amendment"	11/24/98	R. 257
Response of the United States to True's Motion to Strike Reply	12/11/98	R. 260

Trial Transcript Description	Date	Tr. Pages
Marty Vincent	09/02/98	106-08, 117
David Childs	09/03/98	244-48, 251-56, 314-18, 339-43
	09/04/98	470-73
Robert Kiser	09/04/98	527, 542-48, 568, 596-99
Donald Westmaas	09/08/98	712
Sonja Myles (document custodian)	09/08/98	825-26, 830

Thomas Mechtenberg	09/09/98	942-52, 956-60, 966-67, 972-73, 977, 991-97, 1001-03, 1006-08, 1016-22, 1037, 1082-90
Fred Drury	09/10/98	1169, 1185-88, 1205-07
Richard Porter	09/11/98	1334-49, 1356, 1377
John Bussey	09/11/98	1426, 1441-54

Exhibit Description	**Exhibit No.**
Plea Agreement for Austin Powder Company	GX 113
Grand Jury Subpoena Issued in December 1992	GX 483
ICI (Atlas) Information	GX 528

I certify that all documents designated by the United States for inclusion in the Deferred Joint Appendix are part of the Record in this case.

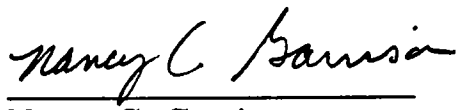


Nancy C. Garrison
Attorney
U.S. Department of Justice
Antitrust Division
Appellate Section - Rm. 10535
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-1531

April 14, 1999

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that this Brief for Appellee United States of America complies with the type volume limitation of Rule 32(a)(7) of the Federal Rules of Appellate Procedure and contains 11,184 words, as counted by the word-processing system used to prepare the brief.



Nancy C. Garrison
Attorney
U.S. Department of Justice
Antitrust Division
Appellate Section - Rm. 10535
601 D Street, N.W.
Washington, D.C. 20530
(202) 514-1531

November 10, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November 1999, I caused two copies of the Brief for Appellee United States of America (final version) to be served by Federal Express next day delivery on counsel for Defendant-Appellant David P. True:

Leslie W. Jacobs, Esq.
THOMPSON HINE & FLORY LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114-1216

and

Allen W. Holbrook, Esq.
SULLIVAN, MOUNTJOY, STAINBACK
& MILLER PSC
100 St. Ann Building
Owensboro, KY 42301-0727

Nancy C. Garrison