ON OCTOBER 3, 2000, U.S. District Court Judge Roger G. Strand awarded a victorious defendant in a criminal case $150,000 in attorneys' fees and $50,480.58 in litigation costs.[1] He did so under the Hyde Amendment,[2] a 1997 law designed to allow defendants to seek financial redress when they have been subjected to vexatious, frivolous or bad faith federal criminal prosecutions. The ruling marks the first time that the amendment was applied in the District of Arizona.

But what happens to similarly vindicated defendants in Arizona state courts? Currently, they have no recourse. After emerging successfully from a maliciously conceived prosecution, Arizona defendants must merely strive to repair their lives, finances and reputations. This is a fundamental unfairness that should be changed. In fact, Arizona should enact its own version of the Hyde Amendment.

Seeking Attorneys' Fees in Criminal Cases

BAD FAITH PROSECU

The Hyde Amendment

During the 1997 legislative session, Congressman John Murtha (D–PA) introduced an amendment to an appropriations bill that allowed members of Congress and their staffs to seek reimbursement for legal expenses associated with successful defenses to a federal criminal prosecution.[3] Congressman Murtha's proposal was in response to the legal costs incurred by another member of Congress, Rep. Joseph McDade (R–PA), who was acquitted in 1996 after an eight-year defense of bribery and racketeering charges.[4] Because Congressman Murtha's proposal was limited to members of Congress and their staff, Rep. Henry Hyde (R–IL), Chairman of the House Judiciary Committee, thought that it was too narrow. Chairman Hyde offered his own appropriations bill amendment that extended to all federal criminal defendants.

The Hyde Amendment was attached as a rider to the appropriations bill for the Departments of Commerce, Justice and State. Codified at 18 U.S.C § 3006(A), it provides that, in certain limited circumstances, vindicated criminal defendants can recover attorneys' fees against the government:

> The court, in any criminal case (other than a case in which the defendant is represented by . . . [appointed] counsel . . .) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and

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other litigation expenses, where the court finds that the [government's] position . . . was vexatious, frivolous, or in bad faith, unless . . . [it] 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 18, United States Code [the Equal Access to Justice Act].

Making a Case Under the Amendment

The purpose of the Hyde Amendment is to protect innocent individuals from the risk of financial ruin when forced to defend against frivolous or bad faith prosecutions. It also deters the government from prosecuting such cases.[5] To prevail on an application for attorneys' fees and costs under the Amendment, an applicant must prove that: (1) the applicant's case was pending on or after November 26, 1997 (the date of the Amendment's enactment); (2) the case was a criminal case; (3) the applicant was not represented by appointed counsel; (4) the applicant was the prevailing party; (5) the prosecution was vexatious, frivolous or in bad faith; (6) the attorneys' fees were reasonable; and (7) there are no special circumstances that would make such an award unjust.[6]

Under the Amendment's civil counterpart, the Equal Access to Justice Act (EAJA), the burden of proof is on the government to show that its pursuit of the suit was substantially justified.[7] The Hyde Amendment, however, rejects

the EAJA's approach to the burden of proof and places the burden on the applicant.[8] Moreover, by using the terms "vexatious," "frivolous" and "in bad faith," the Amendment requires that applicants show more than that the government's position was not substantially justified.[9]

Vexatious, Frivolous or in Bad Faith

The Hyde Amendment does not define the terms "vexatious," "frivolous" or "in bad faith." As a starting point, therefore, courts have turned to *Black's Law Dictionary* to define them.[10] According to *Black's*, *vexatious* means "without reasonable or probable cause or excuse." A *frivolous action* is one that is "groundless … with little prospect of success; often brought to embarrass or annoy the defendant." And *bad faith* is "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; … it contemplates a state of mind affirmatively operating with furtive design or ill will." This standard is not easily met, nor is it intended to be.

It is not enough, for example, for an applicant merely to show that he has prevailed at the pretrial, trial or appellate stages of the prosecution; otherwise, almost every reversal would result in an award of attorneys' fees.[11] Rather, an applicant "must show that the government's position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact to be frivolous."[12] Needless to say, such a standard places "a daunting obstacle before defendants who seek attorney's fees and costs from the government."[13]

Once such an award is made, however, it is likely to stick. Because the district court hears the evidence from the beginning and is in a better position than the court of appeals to distinguish between a good faith prosecution and one that is vexatious, frivolous or in bad faith, the district court's findings will not be reversed unless there is clear evidence that the court committed a clear error of judgment.[14]

The Facts of *United States v. Thomas De Jong*

Thomas De Jong was a dairy farmer who owned a large farm known as Rainbow Valley Dairy.[15] Beginning in 1989, De Jong participated in a U.S. Department of Agriculture Soil Conservation Services program allowing cost sharing for the construction of a wastewater facility for the farm. The program designed a wastewater treatment facility for De Jong. The facility, completed in 1992, consisted of a series of waste storage ponds. However, the design of the ponds soon proved to be inadequate, and De Jong spent more than $600,000 to correct the problems.

Embodying the adage that no good deed goes unpunished, De Jong was indicted by a federal grand jury for violations of the Clean Water Act.[16] In essence, the indictment alleged that on three separate occasions De Jong improperly discharged wastewater from his storage ponds into an unnamed wash on the northeast portion of his property.[17] The source of the discharges was a pipe located within the berm of one of the storage ponds. The government argued that the pipe was never part of the recommended design and was unnecessary. De Jong maintained that the pipe was necessary and was integral to the storage pond's safe operation.

Trial in the De Jong matter began on July 14, 1999, and lasted six days. The jury found De Jong not guilty on all charges.

The Court's Order

After his acquittal, De Jong moved for his attorney's fees and costs pursuant to the Hyde Amendment. He argued that the government failed to investigate the case properly and that the prosecution was vexatious and in bad faith. De Jong claimed that prior to the prosecution, the government had in its possession information that indicated there were pre-existing design flaws in the wastewater treatment facility not attributable to De Jong, and that his remediation, including the addition of an overflow pipe, was not only in compliance with established engineering principles but also with published government standards. De Jong also claimed that the prosecution was actually the result of some ill will between De Jong and an employee with the Bureau of Land Management.

BAD FAITH IS "NOT SIMPLY BAD JUDGMENT OR NEGLIGENCE, BUT RATHER IT IMPLIES THE CONSCIOUS DOING OF A WRONG BECAUSE OF DISHONEST PURPOSE OR MORAL OBLIQUITY."

In ruling for De Jong, the Court noted that an applicant seeking Hyde Amendment fees and costs must establish that the government's position was foreclosed by binding precedent or was so obviously wrong as to be frivolous.[18] The Court found that De Jong had met this standard and that the government's case was frivolous and was not substantially justified. The Court concluded that the government knew that the design of the wastewater treatment ponds was inadequate through no fault of De Jong's and that De Jong had spent in excess of $600,000 of his own money to correct the design flaws. In addition, the Court concluded that, contrary to the government's position at trial, the overflow pipe that was the source of the discharge appeared to be mandated by

proper engineering design and was certainly not evidence of criminal intent to discharge wastewater illegally.

The Court next turned to the question of whether the government's prosecution was vexatious or in bad faith. The Court noted that under the Hyde Amendment, an applicant must offer specific, concrete allegations that lead to the conclusion that a prosecution is vexatious or in bad faith.[19] Finding that De Jong had met this burden, the Court again noted that the government knew (1) that the design of the wastewater treatment ponds was seriously flawed, (2) that De Jong had spent a large amount of personal funds to correct the design, and (3) that the government had unreasonably interpreted relevant case law regarding the legality of certain limited discharges.

Adding insult to injury, the Court also found that De Jong had established that the BLM employee in question did have a personal motive for seeing a criminal penalty imposed on De Jong. Finally, the Court remarked that De Jong had not only informed the government of the merits of his legal position before trial, he also had expressed a willingness to come to some "reasonable" resolution of the dispute. With all this in mind, the Court concluded that the government's position was in bad faith and that prosecutorial zeal had overridden prosecutorial common sense. Payment of the award order must come from the budget of the U.S. Attorney for the District of Arizona or the U.S. Department of Justice.

Although De Jong was a rare case, it highlights the need for a remedy when government prosecutors grossly overreach, in both federal and state court.

Attorneys' Fees in Arizona State Criminal Matters

In Arizona state courts, there is currently no avenue for a vindicated criminal defendant to seek attorneys' fees and costs after a malicious prosecution. However, the Arizona legislature has authorized courts to award fees and other expenses to any party that "prevails by an adjudication on the

merits in a civil action brought by the state, a city, town, or county against the party."[20] Fees include such things as expert witnesses, necessary studies and reports and reasonable and necessary attorneys' fees. The statute seeks to accomplish the same objectives as the EAJA—to compensate an individual who has been forced to muster a defense against a meritless claim.[21]

Arizona's fee statute, however, does not provide for an award of fees in criminal cases.[22] Perhaps this is because legislators believed such a provision would impair the prosecutorial function. As the federal experience has shown, however, that fear is misguided.

During the debate on his amendment, Chairman Hyde stated that the legislation was aimed at those rare situations in which the prosecution was "not just wrong," but "willfully wrong."[23] Accordingly, defendants like De Jong, who successfully defend against maliciously conceived prosecutions and who suffer serious damage to their wallets and, frequently, to their reputations, have some redress.[24] In such situations, Chairman Hyde wanted to return some measure of justice to criminal defendants as the EAJA does for civil litigants, albeit with heightened legal standards and more demanding burdens of proof.[25]

Defendants in Arizona criminal cases ought to be afforded this same protection. In civil cases, the Arizona legislature found that "certain individuals . . . may be deterred from . . . defending against unreasonable government action because of the expense involved," and it wanted to "reduce [both] the deterrence and the disparity."[26] The legislature should amend A.R.S. § 12-348 and allow vindicated criminal defendants the opportunity to recover attorneys' fees in those rare cases in which the state has subjected an individual to vexatious, frivolous, or bad faith prosecutions. It is fundamentally unfair to force a wrongfully accused individual to bear the sometimes staggering costs of a maliciously conceived prosecution.

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[*DE JONG*] HIGHLIGHTS THE NEED FOR A REMEDY WHEN GOVERNMENT PROSECUTORS GROSSLY OVERREACH, IN BOTH FEDERAL AND STATE COURT.

ENDNOTES

1. *United States v. De Jong*, CR-96-413-PHX-RGS (Order of Oct. 3, 2000).
2. 18 U.S.C. § 3006(A).
3. *See* Elkan Abramowiz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, THE CHAMPION, Mar. 1998, at 23.
4. Congressman McDade also was responsible for another piece of legislation that limits the authority of federal attorneys. The McDade Act, codified at 28 U.S.C. § 530(B), provides that attorneys 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 attorney's duties, to the same extent and in the same manner as other attorneys in that state. The Act has a far-reaching impact on federal prosecutors. For example, the Oregon Supreme Court recently found that it is unethical for an attorney either to misrepresent his identity or to ask another person to misrepresent his identity in connection with any type of investigation. *See In re Gatti*, 8 P.3d 966 (Or. 2000). The Court specifically found that there was no exception for prosecutors. 8 P.3d at 976. Although it is entirely legal under federal law for a federal prosecutor to instruct an FBI agent to work in an undercover capacity, such an instruction would be considered unethical under Oregon state law. Arguably, under the McDade Act federal prosecutors are now foreclosed from using undercover agents when investigating criminal matters in the District of Oregon.
5. *United States v. Pritt*, 77 F. Supp.2d 743, 746 (S.D. W. Va. 1999).
6. *Id.* at 747; *United States v. Holland*, 34 F. Supp.2d 346, 358-359 (E.D. Va. 1999).
7. *Meinhold v. United States Dep't of Defense*, 123 F.3d 1275, 1277 (9th Cir. 1997).
8. *United States v. Lindberg*, 220 F.3d 1120, 1124 (9th Cir. 2000).
9. *Id.* at 1124-1125; *United States v. Truesdale*, 211 F.3d 898, 907-908 (5th Cir. 2000); *United States v. Gilbert*, 198 F.3d 1293, 1302 (11th Cir. 1999).
10. *Gilbert*, 198 F.3d at 1298-1299; *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000); *United States v. Reyes*, 16 F. Supp.2d 759, 761 (S.D. Tex. 1998).
11. *Lindberg*, 220 F.3d at 1125.
12. *Gilbert*, 198 F.3d at 1298-1299; *United States v. Troisi*, 13 F. Supp.2d 595, 597 (N.D. W. Va. 1998); *Pritt*, 77 F. Supp.2d at 748; *United States v. Peterson*, 71 F. Supp.2d 695, 698 (S.D. Tex. 1999).
13. *Gilbert*, 198 F.2d at 1302-1303.
14. *Lindberg*, 220 F.3d at 1124.
15. The facts set forth in this article are taken from Judge Strand's Sept. 30, 2000, order.
16. 33 U.S.C. § 1251 *et seq.*
17. The scope of the Clean Water Act is very broad, and it extends "to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground water." *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975).
18. *De Jong*, CR-96-413-PHX-RGS, Order (Sept. 30, 2000), pp. 4-5, *citing Gilbert*, 198 F.3d at 1304.
19. *Id.*, *citing Pritt*, 77 F. Supp.2d at 749.
20. A.R.S. § 12-348(A)(1).
21. *Estate of Walton*, 164 Ariz. 498, 501 (1990).
22. A.R.S. § 12-348(H)(2), (7), (8); *Mields v. Villareal*, 159 Ariz. 556, 559 (1989) (holding that trial court erred in granting attorneys' fees against the state where special action involved a criminal prosecution).
23. 143 CONG. REC. H7786-04 at H7791.
24. *Pritt*, 77 F. Supp.2d at 746.
25. 143 CONG. REC. H7786-04 at H7793.
26. Law 1981, Ch. 208 § 1(A), (B).