No.

IN THE SUPREME COURT OF THE UNITED STATES

DAMION SLEUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has long recognized the dangers posed when the Government uses so-called "cooperators" to prosecute criminal cases. As Justice Jackson observed nearly 70 years ago:

> The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.

On Lee v. United States, 343 U.S. 747, 757 (1952).

In this case, the Government's use of co-defendant Shawndale Boyd as its star witness at petitioner Damion Sleugh's trial posed these very dangers. Pretrial, Boyd obtained sealing of his applications for subpoenae duces tecum based on his Fifth and Sixth Amendment interests in shielding his trial defense from the Government. (The record suggests strongly that Boyd was pursuing an alibi defense, which cannot be reconciled with his trial testimony.) But then, shortly before trial, Boyd flipped, pleaded guilty, and confessed before the jury as the star witness at petitioner's trial.

At trial, petitioner's ability to cross-examine Boyd was hamstrung because he lacked access to representations Boyd made to the district court to secure process to advance his "trial defense."

But the bases to keep Boyd's representations secret evaporated when Boyd abandoned his trial defense and confessed his participation in the charged crimes. Following his trial convictions, pursuant to *Ellis v. United States*, 356 U.S. 674, 675 (1956) (appellate counsel has a duty to conduct "conscientious investigation" of the record to determine all "possible grounds of appeal"), petitioner sought to obtain Boyd's subpoena applications to determine if they materially impeached his trial testimony. *See also Hardy v. United States*, 375 U.S. 277, 280 (1964) (appellate counsel's duties involve reviewing the "entire" record); *Jones v. Barnes*, 463 U.S. 745 (1983) (appellate counsel has an obligation to scour the record for appealable issues). If Boyd's applications contained such material impeachment—and that is likely on this record—petitioner contended that the withholding of these materials during trial may have distorted the fact-finding process and supported a new trial under this Court's due process jurisprudence. *See e.g.*, *Giglio v. United States*, 405 U.S. 150 (1972). But the lower courts denied disclosure.

The Questions Presented are:

> Does the need for sealing a co-defendant's subpoena applications end once the co-defendant changes his plea and testifies for the Government at trial?
>
> Do the First and Fifth Amendments require disclosure of a co-defendant's subpoena applications once judgment against the co-defendant has entered, where the co-defendant testified at trial in a manner apparently inconsistent with any trial defense?

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes, Rules

OPINION BELOW

The court of appeals issued a published opinion reported at *United States v. Sleugh*, 896 F.3d 1007 (9th Cir. 2018).

JURISDICTION

The opinion of the court of appeals was filed July 23, 2018. The court of appeals denied rehearing on October 4, 2018. This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Crim. P. 17(c)

(c) Producing Documents and Objects.

> **(1) In General.** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena

designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

INTRODUCTION

In a published decision, the court of appeals decided an issue of first impression: whether petitioner, who was convicted at trial and sentenced to life imprisonment, had a right to inspect Rule 17 subpoena applications submitted by his co-defendant, Shawndale Boyd, *after* Boyd had waived his trial rights, testified against petitioner pursuant to a cooperation plea agreement, and served his sentence.

Petitioner contended that there was no basis to continue sealing to protect Boyd's "trial defenses" from disclosure because Boyd had waived his trial rights and pleaded guilty. Even if there existed a basis for continued sealing, petitioner claimed a right of access based on "special need," as explained by *United States v.*

Kravetz, 706 F.3d 47 (1st Cir. 2013), the only other circuit court to have addressed this issue. Petitioner argued that because the applications likely contained impeachment material against Boyd, he possessed a "special need" to review them in order to assess, for direct appeal, a due process challenge that the presiding judge had a duty to review the cooperator's subpoena applications and provide any resulting impeachment evidence to petitioner, pretrial, so as to avoid a distortion of the fact-finding process. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio*, 405 U.S. 150. Petitioner thus argued that he also had a right of access to the sealed materials under the Due Process clause of the Fifth Amendment and the First Amendment.

The court of appeals rejected petitioner's claims in a published opinion. Pet. App'x 1.[1] In so doing, it overlooked petitioner's Fifth Amendment Due Process claim and instead focused on a public right of access under the First Amendment and common law. The panel further rejected petitioner's "special need" for the sealed materials, finding that even if the applications contained impeachment material, they could not affect any appeal, and that he was not entitled to Boyd's "defense theories." Finally, the panel found a need for continued sealing, because

[1] "Pet. App'x" to petitioner's appendix, which is attached hereto. Also as used herein, "ER" refers to Sleugh's Excerpts of Record; "AOB" to his Opening Brief on Appeal, "GAB" to the Government's Answering Brief, "BBI" to Boyd's Brief as Intervenor, "Dkt." to the Ninth Circuit's docket, and "CR" to the district court record

unsealing "could reveal Boyd's defense theories" with respect to future prosecutions.

Consideration by this Court is necessary. As presented below, this proceeding involves questions of exceptional importance: (1) whether a cooperator's Rule 17 subpoena applications may remain sealed indefinitely, or should be disclosed once the bases for sealing elapsed; and (2) whether the likelihood that Boyd's applications contained representations inconsistent with his testimony requires disclosure under a theory of "special need" and/or pursuant to the Fifth Amendment's Due Process clause.

Petitioner further contends that this Court's First Amendment jurisprudence requires unsealing of Boyd's subpoena applications, *see Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 8–9 (1986) (*"Press-Enterprise II"*), and the court of appeals decision conflicts with this Court's precedent. And he contends that the court of appeal's assessment that applications for Rule 17 subpoenas are a form of criminal discovery is incorrect. *See United States v. Nixon*, 418 U.S. 683, 699-700 (1974).

In sum, petitioner is serving a life sentence arising, in large part, from Boyd's trial testimony. Before testifying, Boyd appeared to pursue an alibi defense, and that defense (or any defense) cannot be consistent with his testimony confessing he was at the scene and confessing felony murder. *See* GER 125-340;

see also GAB 6-10.[2] Sealing Boyd's representations to the district court from petitioner, despite the likely presence of impeachment material, runs contrary to this Court's strong presumption against sealing, and violates fundamental concepts of fairness mandated by the Fifth Amendment.

The Court should grant this petition.

STATEMENT OF THE CASE

A. Trial court proceedings.

In March 2014, the Government filed a six-count indictment charging petitioner and Boyd with drug, robbery, gun, and homicide charges. CR 1. Their joint trial was scheduled for June 15, 2015. CR 73. To obtain evidence supporting his trial defense, Boyd filed sealed applications for Rule 17 subpoenas. *See e.g.*, CR 215 at 2:8-9. The court granted at least some of them, and issued the requested court process. *See* CR 220. Shortly before trial, Boyd flipped and entered a cooperation plea agreement with, and ultimately testified for, the Government. *See* CR 131, 133.

Boyd's testimony proved crucial: he purported to describe petitioner's role in the marijuana transaction at the heart of this case, and claimed to have heard petitioner confess to shooting the seller. CR 138 at 591-92. Petitioner contradicted

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[2] Recently, California amended its felony-murder rule such that Boyd can no longer be prosecuted for murder based on his conduct. *See* California Senate Bill 1437, signed into law September 30, 2018.

Boyd's testimony, and testified that he did not even hold the gun, let alone fire it, during the transaction. CR 151 at 1155, 1217. The seller died from a gunshot to his shoulder, and the jury convicted petitioner of using a firearm during a drug trafficking crime resulting in death. CR 175. Petitioner received a life sentence. CR 146, 175. Boyd got three years. CR 180, 183.

While his direct appeal of his convictions was pending, *see* Ninth Circuit No. 15-10547, petitioner filed in the district court an administrative motion for disclosure of sealed materials to appellate counsel. CR 210.[3] He sought limited disclosure, on an Attorneys' Eyes Only ("AEO") basis, and agreed to maintain the documents under seal. CR 210 at 1:6-8. The Government consented to the requested disclosures, but Boyd objected and contended the materials were protected by attorney-client privilege and work-product doctrine. *See* CR 210, 214.[4]

The district court referred the motion to a magistrate judge, who denied disclosure. *See* CR 218; Pet. App'x 14. The magistrate judge reasoned that sealing was proper in the first instance (which petitioner never contested), and that

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[3] The court of appeals stayed petitioner's direct appeal pending this appeal. Ninth Circuit Case No. 15-10547, Dkt. 29; *see also id.*, Dkt. 32 (lifting stay after issuance of the mandate).

[4] Boyd later abandoned his attorney-client privilege claim in the court of appeals. *See* BBI; *see also* Dkt 35 at 9-10.

petitioner had no right of access. Pet. App'x 16-20. The magistrate judge also reasoned that the applications could not have undermined Boyd's trial testimony because the supporting affidavits came from Boyd's counsel, not Boyd himself. Pet. App'x 21-22. With respect to the Government's sealed filings and the subpoenas and authorizing orders themselves, the magistrate judge granted disclosure as unopposed. Pet. App'x 22.

Petitioner timely objected, and asked the district court set to aside the portion of the order denying access to Boyd's applications. CR 225. The district court overruled petitioner's objections, finding neither clear error nor an abuse of discretion in denying petitioner's motion for disclosure. Pet. App'x 9-13.

B. Appellate proceedings.

After the court of appeals docketed this disclosure appeal, Dkt. 1, Boyd filed an emergency motion to intervene, which the court of appeals granted. Dkt. 3, 14.

Petitioner argued, *inter alia*, that (1) there was no basis for the continued sealing of Boyd's Rule 17 subpoena applications because Boyd had pleaded guilty, testified for the Government, and since served his sentence; and (2) even if there existed any continued need for sealing, petitioner possessed a right of access the materials under both the "special need" test articulated in *Kravetz*, and the Fifth Amendment's Due Process clause. AOB 8-23. Petitioner argued that he had demonstrated a special need to access the sealed applications by showing that they

likely contained impeachment material against Boyd, and that review was required to assess a claim for relief on direct appeal. AOB 14-21. As to the due process claim, petitioner argued that in light of his showings, continued closure violated the fundamental concept of fairness embodied in the Fifth Amendment's Due Process clause. AOB 21-24.

C. The Ninth Circuit's opinion.

The court of appeals obtained jurisdiction pursuant to 28 U.S.C. § 1291. Agreeing that this appeal presented claims of first impression, the panel held that (1) petitioner lacked a presumptive right of access to the sealed applications under the First Amendment or the common law; (2) petitioner did not demonstrate a "special need" to review the sealed applications; and (3) there existed a continued need to seal Boyd's applications. Pet. App'x 3-8. The Court did not address petitioner's due process claim.

The panel also adopted *Kravetz*, and reasoned that Rule 17 subpoena applications were akin to civil discovery materials, and "only tangentially related to the underlying cause of action." Pet. App'x 5 (internal quotations and citations omitted). It thus held that a right of public access, under either the First Amendment or the common law, did not attach to Boyd's applications, because those documents do not constitute court records or judicial proceedings. Pet. App'x 4-6.

In turning aside petitioner's claim to a "special need," the panel reasoned that petitioner was not entitled to Boyd's "defense theories." Pet. App'x 6-7. The panel further held that even if the applications contained impeachment material, that mattered not because Boyd's applications were "never in front of the jury, and [the Court does] not engage in *de novo* fact-finding on appeal." Pet. App'x 7.

Finally, the panel adopted Boyd's argument—newly-minted on appeal and never presented to the district court or in his emergency motion to intervene in the court of appeals, *compare* BBI 27-30 *with* CR 214 & Dkt. 3-1, 3-2—that despite testifying for the Government and having served his short sentence years ago, he still nonetheless possessed a reasonable fear of future prosecution. Pet. App'x 7-8 & n.7.

REASONS FOR GRANTING THE PETITION

A criminal defendant has both a constitutional right to obtain evidence which bears upon the determination of either guilt or punishment. *See e.g.*, *California v. Trombetta,* 467 U.S. 479, 485 (1984) (Due Process clause of Fifth Amendment requires prosecution to turn over exculpatory evidence) (citing *Brady*, 373 U.S. at 87 (1963); *United States v. Agurs,* 427 U.S. 97, 112 (1976)).

Similarly, appellate counsel maintains a duty to scour the district court record to identify any legal bases that undermine the jury's finding of guilt. *See Ellis*, 356 U.S. at 675; *Hardy*, 375 U.S. at 280; *Jones*, 463 U.S. at 752-53.

By this appeal, petitioner seeks to obtain sealed court records which likely contained impeachment material that should have been available at trial, the suppression of which may have permitted a distortion of the fact-finding process, and for which the expressed bases for sealing had lapsed.

This Court should grant this petition to address these questions.

A. The panel didn't address petitioner's Fifth Amendment due process claim; this Court should, or should at least vacate the court of appeals' judgment so that it may decide the question in the first instance.

Petitioner argued that he had a right of access to Boyd's sealed Rule 17 applications under, *inter alia*, the Due Process clause of the Fifth Amendment. *See* AOB 21-24. Boyd responded to that claim, *see* BBI 19-21, but the Government didn't. *See* GAB. The court of appeals adopted the Government's approach, and didn't address petitioner's Fifth Amendment claim either. Pet. App'x 1-8.

The court of appeal's failure to address petitioner's Due Process claim itself warrants the granting of this petition, or at least vacating and remanding for the court of appeals to address that question.

The court of appeals instead focused on petitioner's right of access solely under the First Amendment and common law. Pet. App'x 3-8. But petitioner's "right of access" claim centered on three points: (1) a First Amendment right of access; (2) his demonstrated "special need," and (3) the Due Process clause. The panel rejected the first two and never addressed the third.

As for the third, due process guarantees fundamental fairness. *See e.g.*, *Schall v. Martin*, 467 U.S. 253, 263 (1984). *In camera* proceedings excluding the defense "are anathema in our system of justice, and in the context of a criminal proceeding, may amount to a denial of due process." *United States v. Thompson*, 827 F.2d 1254, 1528-59 (9th Cir. 1987); *see also Chambers v. Florida*, 309 U.S. 227, 237 (1940) (noting that the right to procedural due process arose in large part from the dangers of secret proceedings); *United States v. Abuhamra*, 389 F.3d 309, 330-31 (2d Cir. 2004); *see also United States v. Acevedo-Ramos*, 755 F.2d 203, 206 (1st Cir. 1985) (Breyer, J.) (noting that *ex parte* submissions are permissible only "in the very unusual case in which strong special interests warrant confidentiality").

Sealing materials from an adverse party thus requires a particularly high showing given that such *ex parte* presentations remove the fundamental protections contemplated by the adversary process. *See Abuhamra*, 389 F.3d at 330-31. Petitioner contends that allowing Boyd's sealed subpoena applications to remain sealed and denying him access, despite the non-existence of any genuine basis supporting continued sealing, violates the fundamental concepts of fairness and equity embodied in the Due Process clause of the Fifth Amendment.

Boyd filed materials under seal in preparation for a joint trial, and justified that sealing as protecting trial strategy from the Government. Then, just weeks

before that trial, he flipped, pleaded guilty, and testified for the Government, resulting in petitioner's conviction and life sentence. It would be fundamentally unfair to forever keep the sealed materials from petitioner, especially so when he has made a showing that those materials very likely contradicted Boyd's trial testimony.

Moreover, the due process implications are bolstered by the fact that it is Boyd—not the Government—who opposed disclosure to petitioner's appellate counsel. Boyd's insistent push to maintain the materials under seal and away from petitioner's appellate counsel only buttresses petitioner's argument that the sealed applications likely contain impeachment material and that their continued closure only serves one purpose: protecting Boyd's perfidy. Furthermore, no party would suffer prejudice if the materials were ordered disclosed. The Government did not object, and Boyd received the benefit of his plea bargain and has since served his sentence.

Allowing these materials to remain sealed from petitioner's counsel long after disposition runs contrary to the fundamental concepts of fairness under the Fifth Amendment and would accordingly result in a denial of due process. Thus, petitioner maintains that he possesses a right of access to Boyd's sealed applications under the Fifth Amendment. Petitioner respectfully requests this Court grant his petition to that it may address whether the district court's order

denying him access to these materials constituted a denial of due process and that he possesses a due process right of access to the materials at issue

At a minimum, the Court should grant the petition, vacate the Ninth Circuit's judgment, and remand for consideration of his due process claim in the first instance. *See Ajoku v. United States*, 572 U.S. 1056 (2014).

B. The bases for sealing Boyd's subpoena applications evaporated when he pleaded guilty and petitioner possesses a right of access under the First Amendment and the common law.

Under both the First Amendment and the common law, court proceedings and records are presumptively open to the public. *See e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573-74 (1980) (criminal trial); *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (suppression hearing); *CBS, Inc. v. U.S. Dist. Court for Cent. Dist. of California*, 765 F.2d 823, 825 (9th Cir. 1985) (Kennedy, J.) (post-trial documents and proceedings). Accordingly, "the importance of public access to judicial records . . . cannot be belittled." *United States v. Schlette*, 842 F.2d 1574, 1582 (9th Cir. 1982) (brackets and quotation marks omitted).

The presumption of openness certainly is not absolute. Rather:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 1984) ("*Press-Enterprise I*"). Where materials have been sealed from a defendant in addition to the public, the presiding court must also address: (1) disclosure to the defendant of the substance of the sealed submission, and (2) careful scrutiny on the reliability of the *ex parte* evidence. *See Abuhamra*, 389 F.3d at 330-31 (2d Cir. 2004); *see also Acevedo-Ramos*, 755 F.2d at 206 (Breyer, J.) (noting that *ex parte* submissions are permissible only "in the very unusual case in which strong special interests warrant confidentiality").

So too, even where denial of access is appropriate, it must be no greater than necessary to protect the interest justifying it. *Global Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 606-610 (1982).

The foregoing principles carry particular force in the context of an appeal.

The Second Circuit has observed, in holding that a defendant had a right to inspect *in camera* materials from the trial record, that even when sealing is initially proper, a defendant's interests can overcome the sealing justification as time passes, and as the need for sealing dissipates. *United States v. Moten*, 582 F.2d 654, 661 (2d Cir. 1978).

Petitioner agrees with the general principle that criminal defendants may file some subpoena applications *ex parte* to avoid revealing trial strategy. As a result, petitioner does (and has) not challenge(d) the propriety of the *initial* sealing of the

subpoena applications here. But Boyd subsequently waived his rights to trial when he pleaded guilty, so there no longer exists any compelling need to keep his subpoena applications sealed from petitioner, who exercised his right to trial and to confront witnesses, including Boyd.

Thus, the question is not whether petitioner has a *right* to the sealed subpoena applications, but whether there now exists a *basis* for the continued sealing of these materials. Whatever basis once justified sealing vanished when Boyd relinquished his trial rights, pleaded guilty, and testified for the Government.

Boyd was required to set forth his factual bases to obtain process in his sealed subpoena applications. *See Nixon*, 418 U.S. at 700 (1974); CR 223 at 3-4. Because Boyd cooperated, pleaded guilty, and waived his right to present his defense, there is no remaining need to conceal his court filings "to protect his trial strategy." If Boyd testified truthfully, then the subpoena applications should comport with and corroborate his trial testimony. On the other hand, if Boyd changed his story to please the Government and reduce his sentencing exposure—from a life sentence to the three years he received—then the subpoena applications should reveal his duplicity and call his testimony into question. The only remaining benefit of keeping these materials from petitioner's appellate counsel is to conceal Boyd's misconduct (and potential perjury). That "benefit" to Boyd is

not a compelling need that justifies sealing. Indeed, it would stand as an affront to justice and the truth-seeking function of the trial courts.

Close scrutiny is warranted in such circumstances where a cooperating witness has great incentive to craft his testimony to satisfy the Government. As for Boyd, before he cooperated, he was facing a lifetime in prison. After he cooperated, on the Government's motion, he received a three-year sentence. CR 180, 183.

But the court of appeals barely addressed this argument by asserting that this Court's "experience and logic test" does not support petitioner's access to the Boyd's subpoena applications at all. Pet. App'x 3-8. In so ruling, the court of appeals mistook this Court's precedents.

Whether there exists a First Amendment right of access to Rule 17(c) subpoenas depends on experience and logic. *See Press–Enterprise II*, 478 U.S. at 8–9 (explaining that in determining whether a First Amendment right of access attaches to a particular type of proceeding or document, courts should consider two complementary considerations: "whether [they] have historically been open to the press and general public" (the "experience" prong), and "whether public access plays a significant positive role in the functioning of the particular process in question" (the "logic" prong)).

Following *Kravetz*, the court of appeals held that "there is no tradition of access to criminal discovery." Pet. App'x 5 (quoting *Kravetz*, 706 F.3d at 53). But that's not the issue. The question is whether there is a "tradition" of requiring public disclosure of filings seeking relief from the trial courts. There can be no doubt that there is. Indeed, the Northern District of California's local rules emphasize that filings in criminal cases are presumptively open to the public, and that filings may be sealed "only upon a request that establishes that a document is sealable because, for example, the safety of persons or a legitimate law enforcement objective would be compromised by the public disclosure of the contents of the document [and] [t]he request must be narrowly tailored to seek sealing only of sealable material[.]" N.D. Cal. Crim. L. R. 56-1(b).

Similarly following *Kravetz*, the court of appeals held that the logic prong supported continued sealing because "there is scant value and considerable danger in a rule that could result in requiring counsel for a criminal defendant to prematurely expose trial strategy to public scrutiny." Pet. App'x 5 (quoting *Kravetz*, 706 F.3d at 54).

But again, the court of appeals framed the question incorrectly. Logically, there is significant value in a criminal defendant's and the public's ability to review representations by the prosecution's key witness about the crime at bar.

See Giglio, 405 U.S. at 765-66. This is especially true when the witness is obtaining benefits from the Government.

Moreover, contrary to the assessment by the court of appeals, Pet. App'x 5, no risk of "premature" exposure of trial strategy exists here, for multiple reasons. First, Boyd waived his trial rights, and thus his trial defense. Just as the Government has the right to impeach a defendant with statements taken in violation of *Miranda*, *Harris v. New York*, 401 U.S. 222, 226 (1987) ("[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances"), Government cooperators should not be permitted, with the court's assistance, to shield prior representations made to the court itself when they've abandoned the basis for sealing: a trial defense. To permit otherwise invites distortion of the fact-finding process.

Second, and more perhaps more importantly, trial ended years ago: Boyd long ago testified for the Government and received the benefit of his bargain (a three-year sentence). Any concern about preventing *premature* disclosure of trial strategy is not present here.

So too, the panel's holding that disclosure now "cannot affect this appeal because [the applications] were never in front of the jury, and we do not engage in *de novo* fact-finding on appeal[,]" *id.* at 1016, misses the critical point. Upon

disclosure of Boyd's applications, petitioner can marshal those court records to attempt to show that they contain representations inconsistent with Boyd's testimony at trial, and to establish the district court's obligation to have presented that evidence to petitioner pretrial. Just like the courts of appeals can assess *Brady* claims following a criminal trial, even where the suppressed evidence was never before the jury, *see e.g.*, *United States v. Mazzarella*, 784 F.3d 532 (9th Cir. 2015); *United States v. Jernigan*, 492 F.3d 1050 (9th Cir. 2007) (*en banc*), it can likewise assess such a claim in petitioner's direct appeal, but only if petitioner is armed with the evidence to present such a claim.[5]

Disclosure is even more important if counsel represented that Boyd claimed he was not present at the scene, only to subsequently confess to such a presence at trial. Such material constitutes impeachment evidence, and would call the Government's case into doubt. Put another way, the applications may well contain *Brady/Giglio* material; if so, the district court's failure to so inform petitioner pretrial may provide a meritorious claim on direct appeal.

But the court of appeals missed this issue by misunderstanding Rule 17 subpoenas and this Court's precedents. The panel rejected the notion that Rule 17

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[5] The court of appeals stated that Boyd's applications do not "contain factual assertions *contradicting* [his] trial testimony." Pet. App'x 7 n.4 (emphasis added). But that's not the question, and highlights the importance of disclosure to Sleugh's counsel for studied, *adversarial* assessment. The question is whether the applications contained representations that are *inconsistent* with Boyd's testimony. That critical question remains unanswered.

subpoena applications constitute court records because it likened them to discovery documents attached to motions in civil cases. Pet. App'x 5-6. The panel then noted that Rule 17 applications "are not evidence themselves[,]" Pet. App'x 6, the basis for which is far from clear. Declarations made under penalty of perjury, filed with the district court, may certainly constitute evidence; indeed, it is that "evidence" of Boyd's potential deception the panel believed could provide the Government a basis to resuscitate a dismissed homicide prosecution against Boyd, by claiming breach arising from false testimony. Pet. App'x 8. In any case, petitioner respectfully contends that both findings are incorrect.

This Court has made clear that Rule 17 subpoenas are *not* for purposes of discovery or counsel's investigation. *Nixon*, 418 U.S. at 687 (Rule 17(c) subpoenas are "not intended to provide a means of discovery for criminal cases"). Rather, a party seeking the issuance of a Rule 17 subpoena must demonstrate: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" *Id.* at 699-700.

Of particular relevance here is the final *Nixon* factor: that the application not constitute a "general fishing expedition." As such, before issuing Boyd's Rule 17 subpoenas, the lower court must have been satisfied that Boyd sought to secure evidence that—based on his representations—was necessary to sustain his proffered trial defense, and *not* that he was simply fishing for evidence in support of a "theory of defense." So too, when addressing Rule 17(c) subpoena applications, *Nixon* addressed the need to demonstrate how the requested materials could have "potential evidentiary uses" by assessing the materials being subpoenaed against the charges levied by the Government. *Nixon*, 418 U.S. at 700-02.

For these reasons, the panel opinion's analogy to the documents at issue in *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092 (9th Cir. 2016)—confidential discovery documents attached to the plaintiffs' motion for a preliminary injunction and filed under seal—is misplaced. So too is its holding that Rule 17 applications are only "tangentially related to the underlying cause of action." Pet. App'x 5 (quoting *Center for Auto Safety*, 809 F.3d at 1099). *Nixon*'s analysis, *see* 418 U.S. at 700-02, demonstrates that the applications are directly related to the underlying prosecution.

And Rule 17 applications are decidedly not "materials submitted to a court for its consideration of a discovery motion[.]" Pet. App'x 5 (internal quotations,

brackets, and citation omitted). Rather, they're Boyd's representations to the court—through counsel—identifying specific facts justifying the issuance of court process to obtain trial evidence to sustain a proffered defense. Where, as here, those representations and the proffered "defense" cannot be squared with an in-court confession, the applications are likely inconsistent with that trial testimony, and should be disclosed to the remaining defendant to permit assessment of the fairness of his trial on direct appeal.[6]

Finally, the court of appeals' incorrectly credited Boyd's bases for continued sealing. There exists no realistic possibility that the authorities will resuscitate a homicide prosecution against Boyd. But the court of appeals accepted Boyd's argument that there was still a possibility that the California authorities could prosecute him for the homicide; a possibility that will exist for as long as Boyd lives. Pet. App'x 8. Respectfully, that concern is both overstated and surprising.

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[6] The panel also rejected petitioner's claim that he had demonstrated a "special need" to access Boyd's Rule 17 applications by finding that appellate counsel's obligation to review the entire record on appeal "does not automatically create a right of access to sealed materials containing a co-defendant's defense theories." Pet. App'x 6-7. But Boyd's Rule 17 applications are not defense theories; they're representations to the court specifying existing evidence to be obtained pretrial. *Nixon*, 418 U.S. at 699-700. While "defense theories" may change over the course of trial preparation, that's far different from sworn representations to a federal court. When those applications may contain impeachment material, disclosure is required under any assessment of fair process. Put simply, if Boyd's representations to the court are inconsistent in any way with his trial testimony, petitioner's right to review and marshal evidence from them outweighs Boyd's interest in protecting his (waived) trial strategy.

It is surprising, because this claim was such an afterthought, Boyd did not raise it in his briefs in the district court *or* in his emergency motion to intervene in the court of appeals. *See* CR 214; Dkt. 3.

And it is overblown for three reasons. For one, petitioner seeks disclosure on an AEO basis, and disclosure to petitioner would not put Boyd at risk because the authorities would not receive the applications. Moreover, to support the invocation of one's privilege against self-incrimination, a party must demonstrate "a reasonable cause to apprehend danger" from the compelled testimony. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Boyd has no reasonable cause to fear further prosecution on this record. Boyd testified against petitioner years ago, and has long since served his three-year sentence. Years have passed, and the California authorities have stood by and done nothing, *viz.*, the State officers accepted the result obtained by their federal counterparts.

Second, before October 2018, the State could have convicted him of felony murder easily based on his testimonial confession at petitioner's trial. *See* GER 125-30. But now, there is no possibility for such conviction—either based on petitioner's trial testimony or whatever account Boyd presented in his subpoena applications (absent an extraordinary unlikely confession to first degree murder in those applications)—at this point in time because California recently amended its felony-murder rule to exclude Boyd's conduct from qualifying. *See supra,* n.2.

As a result, Boyd cannot demonstrate a "reasonable" basis to fear prosecution now; he possesses only an illusory one. It thus follows there is no continued basis for sealing. *See Press-Enterprise I*, 464 U.S. at 510; *Global Newspaper Co.*, 457 U.S. at 606-610.

In sum, while closure of Boyd's subpoena applications was once warranted, it no longer is as the basis for that closure vanished along with his trial rights. This Court should grant this petition to address the merits of petitioner's motion for disclosure.

1. The panel also incorrectly assessed petitioner's showing about the likelihood of suppressed impeachment material in Boyd's sealed applications.

Rejecting petitioner's claim that he demonstrated a special need for the sealed materials, the panel noted: "[petitioner] did not specify any particular portion of Boyd's testimony as problematic, and did not articulate how he thought counsel's assertions in support of obtaining the cell phone and other records were likely to contain any inconsistent or otherwise impeaching statements." Pet. App'x 3; Pet. App'x 6 ("[petitioner] does not explain how any potentially inconsistent testimony by Boyd creates a special need for Boyd's Rule 17(c) subpoena applications.") (internal quotations omitted).

Petitioner respectfully disagrees. He continues to contend that material Boyd's counsel subpoenaed—including the surveillance videos[7]—suggests strongly that Boyd was pursuing an alibi defense. But after flipping, Boyd testified he was present during the events leading up to the marijuana transaction and resulting death. It follows that the representations in the sealed applications are likely inconsistent with that testimony because Boyd testified he had no defense at trial, let alone an alibi. In fact, his testimony confessed felony murder, as then defined. There is *no* trial defense that can be consistent with his testimony.

Further, petitioner now understands that Judge Berg's hypothetical, presented to Boyd's counsel at oral argument, reflects the true facts from at least one of Boyd's subpoena applications (while ascribing the subpoena recipient as 7-Eleven):

> What if [] one of these 17(c) subpoenas were applied for [] let's say video surveillance records at a 7-Eleven and the reason they were applied for is because the client had told the attorney that client wasn't there, and that was put into the application. The attorney essentially said—because you're saying it may not be the attorney's statement or the client's statement—but in this case, it was the client's statement: 'my client told me he was not there, I want to prove this, therefore I want the video surveillance.' And then it turns out that the video surveillance shows that he was there, and [] later we have a situation like this, where the—another defendant who was convicted, after that defendant testified about his

[7] *See* ER 78, 80.

> role, wants to cross-examine him [] by saying he told his lawyer that he wasn't there?[8]

This is precisely the scenario petitioner contemplates. The panel's assertion that petitioner failed to demonstrate how such an inconsistency in the Government's star witness's representations constitutes a "special need" is thus mistaken. If true, petitioner should be permitted access to those representations so that he may present, on direct appeal, an argument that the district court maintained a *sua sponte* duty to provide such impeachment to petitioner before trial, *see Brady*, 373 U.S. 83; *Giglio*, 405 U.S. 150, and to marshal this information to demonstrate why this hidden information was material and prejudicial, and undermines confidence in the jury's verdict.

And, of course, it seems patently unfair for the court of appeals to require petitioner, or any other defendant, to identify the particular impeachment material to be found the sealed applications while denying his counsel, even on an AEO basis, the opportunity to review those applications.

2. This case presents an excellent vehicle to address the questions presented.

This case is an ideal vehicle to address these important questions. This appeal stands alone, divorced from the underlying merits of the trial. The issues were raised in the district court, and preserved for *de novo* review. And the issues

[8] https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000013341 at 18:12-19:16.

address a core concern of federal criminal practice: ensuring a defendant access to all impeachment materials with respect to witnesses testifying based on extraordinary benefits conferred on them by the Government. This oft-recurring issue is of extraordinary importance, and implicates another core concern: the presumed public nature of criminal proceedings, and enforcing closely the bases for when and for how long filings in criminal proceedings may be secreted.

For all of these reasons, this Court's attention is warranted.

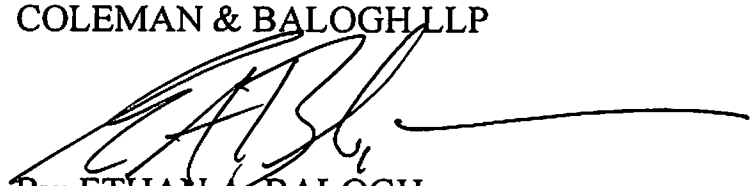
CONCLUSION

Petitioner Damion Sleugh respectfully asks the Court to grant his petition.

Respectfully submitted,

DATED: January 2, 2019

COLEMAN & BALOGH LLP



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