

App. No. _____

In The

Supreme Court of the United States

Theryn Jones,

Petitioner,

v.

United States,

Respondent,

PETITIONER'S APPLICATION TO EXTEND THE TIME TO
FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

Pursuant to Rule 13.5 of the Rules of this Court, petitioner respectfully requests that the time to file a petition for a writ of certiorari be extended three days—from January 10, 2023, to and including January 13, 2023—to accommodate an unexpected and just-discovered logistical problem regarding the printing and preparation of the petition. Counsel for petitioner sincerely apologize for not identifying this difficulty sooner and for filing this application without the notice contemplated by the Rules. Given that counsel represent a criminal defendant pursuant to the Criminal Justice Act and that counsel will file the petition as soon as practically feasible—thereby inflicting no prejudice on the opposing party, the United States—counsel respectfully submit that good cause exists to grant this brief extension.

BACKGROUND

This case presents the question of when, if ever, the Due Process Clause of the Fifth Amendment requires reversal of a criminal conviction based on the government’s refusal to seek immunity under 18 U.S.C. § 6003 for a defense witness. Here there is a deeply entrenched circuit split between the Second Circuit, which looks for government *intent* to distort factfinding, on the one hand and the Ninth Circuit, which looks to whether government actions have the *effect* of distorting factfinding, on the other. This case presents an ideal vehicle for the Court to resolve the circuit conflict on this important question of criminal procedure.

1. This Court’s precedents have long guaranteed a defendant’s right to present witnesses in his defense. “The right of an accused in a criminal trial . . . to call witnesses in [his] own behalf” is a component of “the right to a fair opportunity to defend against the State’s accusations” and has “long been recognized as essential to due process.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Indeed, “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Id.* at 302; accord *Washington v. Texas*, 388 U.S. 14, 19, 23 (1973) (describing “the right to present the defendant’s version of the facts . . . to the jury” as “a fundamental element of due process of law”). At the same time, the Fifth Amendment protects defendants by prohibiting compelled self-incrimination. While those various protections often reinforce each other, they can come into conflict in cases like this one, where the defendant on trial seeks to present exculpatory evidence from a witness, but the witness invokes the Fifth Amendment to avoid inculcating himself.

The federal use-immunity statute, 18 U.S.C. § 6003, provides a way to reconcile that conflict. It authorizes the government to grant limited-purpose immunity to a witness who has invoked the Fifth Amendment, thereby enabling the witness to testify but to retain his constitutional protection against prosecution for compelled self-incrimination. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Government invocation of Section 6003 serves the court and the public in advancing the search for truth while respecting constitutional rights. In some cases, the principal beneficiary of Section 6003 immunity will be the prosecution, as when the

government immunizes a cooperating witness. In other cases, the principal beneficiary may be the defendant, as when the government immunizes a defense witness.

The difficulty arises when the government and the defendant disagree about whether Section 6003 immunity should be granted. Courts broadly agree that, in light of separation-of-powers principles and the discretionary language of Section 6003, “[t]he government is under no general obligation to grant use immunity to witnesses the defense designates as potentially helpful to its cause but who will invoke the Fifth Amendment if not immunized.” *United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2004). At the same time, courts also broadly agree that, “under ‘extraordinary circumstances,’ due process may require that the government confer use immunity on a witness for the defendant.” *Id.*; *accord Straub*, 538 F.3d 1147, 1156 (9th Cir. 2008) (“To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions. Of course, whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment.”).

2. Petitioner is an innocent man condemned to spend the rest of his life in prison for a crime that *someone else* admitted to committing. Petitioner Theryn Jones was tried for murder and other serious charges. When he attempted to call an

exculpatory witness on his behalf – a witness who would have testified to committing the very crime petitioner was on trial for. The government refused to provide the witness with immunity—even though it had immunized many of its own witnesses against petitioner. The district court then denied petitioner’s Motion to Compel the government to immunize the witness. The jury found Petitioner guilty and he was sentenced to life in prison.

3. The Second Circuit denied petitioner’s appeal in a brief Summary Order. In the Second Circuit, to obtain an order compelling the government to seek immunity pursuant to 18 U.S.C. § 6003, the defendant must show first “that the government has used immunity in a discriminatory way” or “has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation.” *United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006). Second, “the defendant must show that the evidence to be given by an immunized witness will be material, exculpatory and not cumulative and is not obtainable from any other source.” *Id.* For the second point, the defendant must show that “the non-immunized witness’s testimony would materially alter the total mix of evidence before the jury.” *Id.* Applying an abuse of discretion standard, the Second Circuit held that the district court did not abuse its discretion in denying Petitioner’s Motion to Compel—despite having granted every Government motion on the issue.

REASONS FOR EXTENDING THE TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that the time to file a petition for a writ of certiorari be extended three days—from January 10, 2023, to and including January 13, 2023—to accommodate an unexpected and just-discovered logistical problem regarding the printing and preparation of the petition. Given that counsel represent a criminal defendant pursuant to the Criminal Justice Act and that counsel will file the petition as soon as practically feasible—thereby inflicting no prejudice on the opposing party, the United States—counsel respectfully submit that good cause exists to grant this brief extension.

1. There is a reasonable probability that this Court would grant a petition or a writ of certiorari in this case. The courts of appeals have squarely divided over when the government’s denial of Section 6003 immunity for a defense witness requires reversal of a conviction under Due Process Clause. As pertinent here, the Ninth Circuit has held that reversal is required where “(1) the defense witness’s testimony was relevant; and (2) ... the prosecution granted immunity to a government witness in order to obtain that witness’s testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness, with the *effect* of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial.” *United States v. Straub*, 538 F.3d 1147, 1162 (9th Cir. 2008) (emphasis added). The Second Circuit, in contrast, has held that the reversal is required only where (1) the defense “witness’[s] testimony will be material, exculpatory and not cumulative and is not

obtainable from any other source,” and (2) the government “has *deliberately* denied immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation” or engaged in similar *intentional* misconduct. *United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006) (emphasis added).

The conflict between the Second and Ninth Circuits on this question is deeply entrenched, widely recognized, and highly significant. Commentators have noted and highlighted the “split among the courts of appeals” on the issue. Nathaniel Lipanovich, *Resolving the Circuit Split on Defense Witness Immunity: How the Prosecutorial Misconduct Test Has Failed Defendants and What the Supreme Court Should Do About It*, 91 Tex. L. Rev. 175 (2012); see William F. Johnson & Jennifer K. Kim, *Defense Witness Immunity: The Time Has Come in the 9th Circuit – Will It Catch On?*, 24 No. 6 Andrews White-Collar Crime Rep. 1, 2010 WL 697368, at *4 (2010) (describing the same “circuit split on the appropriate standard for compelling immunity”). A district court recently noted that “the Ninth Circuit has articulated its own use-immunity test,” *United States v. Baca*, 447 F. Supp. 3d 1149, 1224 (D.N.M. 2020) (citing *Straub*, 538 F.3d at 1162), and explained that—if the Tenth Circuit “decides to adopt the test that the Ninth Circuit has stated”—“the outcome [of cases] would be different,” *id.*

2. An extension of the time to file a petition for a writ of certiorari is warranted in light of the unusual unexpected and just-discovered logistical problem regarding the printing and preparation of the petition. The Court and the parties would benefit from an additional three days to resolve the ongoing logistical problems

with the printing and preparation of the petition. Counsel for petitioner sincerely apologize for not identifying this difficulty sooner and for filing this application without the notice contemplated by the Rules. Given that counsel represent a criminal defendant pursuant to the Criminal Justice Act and that counsel will file the petition as soon as practically feasible—thereby inflicting no prejudice on the opposing party, the United States—counsel respectfully submit that good cause exists to grant this brief extension.

CONCLUSION

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for three days to and including January 13, 2023.

Respectfully Submitted,

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