No. 22-785

# In The Supreme Court of the United States

THERYN JONES,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


JOHN D. CLINE
*Counsel of Record*
LAW OFFICE OF JOHN D. CLINE
600 Stewart Street, Suite 400
Seattle, WA 98101
(360) 320-6435
cline@johndclinelaw.com

JUSTIN S. WEDDLE
BRIAN WITTHUHN
JULIA I. CATANIA
WEDDLE LAW PLLC
250 West 55th Street, 30th Floor
New York, NY 10019
(212) 997-5518
jweddle@weddlelaw.com

JEFFREY T. GREEN
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1600 L Street NW
Washington, DC 20036
(202) 872-8600
jgreen@sidley.com

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## INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a nonprofit bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of thousands of members, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. Each year, NACDL files amicus briefs in this Court and others in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. The question in this case, involving the right of a criminal

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of amicus' intention to file this amicus brief ten days before the due date.

defendant to present powerful exculpatory evidence to the jury, is such an issue.

## INTRODUCTION

The Due Process Clause of the Fifth Amendment and the Compulsory Process Clause of the Sixth Amendment guarantee a criminal defendant the right to present witnesses in his own defense, and thereby protect the integrity of the fact-finding process at trial. As this Court has stated, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), for it gives the defendant the power to place before the jury testimony that contradicts witnesses called by the prosecution, and permits the jury to assess the credibility of the witnesses on each side. Through this clash of evidence at trial—tempered by privileges and rules of evidence that apply equally to the prosecution and the defense—the truth emerges.

In practice, however, the prosecution enjoys a substantial evidentiary advantage over the defense. The prosecution, pursuant to 18 U.S.C. § 6003, has the power to compel witnesses to testify with use immunity even if they assert their Fifth Amendment privilege against self-incrimination. The defense, on the other hand, has no statutory authority to invoke an immunity power. A district court *may* issue an

order of immunity for the defense, but only "upon the request of the United States attorney." *Id*. The result is that the government has the power to unlock—or block—the testimony of witnesses who assert their Fifth Amendment rights, for prosecution and defense witnesses alike. This creates an imbalance in the truth-seeking process of trials.

The courts of appeals have struggled for decades to determine the standards governing immunity for defense witnesses. That struggle has produced a clear, entrenched circuit split. Most circuits hold that federal courts are powerless to remedy the evidentiary imbalance that results from the government's refusal to immunize a defense witness absent prosecutorial misconduct or bad faith and, in some circuits, an additional showing that the testimony is essential to the defense. By contrast, the Ninth Circuit holds that a district court should immunize a defense witness if the witness's testimony is relevant and directly contradicts the testimony of an immunized prosecution witness—a test that does not depend on prosecutorial misconduct or bad faith.

Here, the defendant was blocked from presenting to the jury key testimony of a witness who invoked his Fifth Amendment right because the government refused to consent to immunity and the Second Circuit applies a highly restrictive standard for overcoming that refusal. This case presents the ideal vehicle to

resolve this split in the circuits and redress the evidentiary imbalance that threatens the fairness of many criminal trials. The Court should grant the writ and, on review, adopt the Ninth Circuit approach for defense witnesses who contradict an immunized prosecution witness.

## SUMMARY OF ARGUMENT

This Court should grant the writ to resolve the deep and unyielding circuit split over the circumstances under which the government's refusal to immunize a defense witness violates the defendant's rights to due and compulsory process. The issue of defense witness immunity is an important and recurring one.

The majority position, followed in the First, Second, Fourth, Seventh, Eighth, and Tenth Circuits —that the government's refusal to immunize a defense witness does not violate due process absent prosecutorial misconduct or bad faith and, in some circuits, a showing of necessity—fails to protect the defendant's Fifth and Sixth Amendment right to present evidence in his own defense and skews the presentation of evidence in the government's favor. The majority approach also overstates the government's (often theoretical) interest in protecting a future prosecution of the proposed defense witness, particularly because even innocent witnesses may

assert their Fifth Amendment privilege. *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam).

The Court should adopt the Ninth Circuit's approach, which allows a defendant to compel use immunity for a witness, where the witness's testimony is relevant and directly contradicts an immunized prosecution witness, and the absence of the testimony has the *effect* of distorting the fact-finding process. *United States v. Straub*, 538 F.3d 1147, 1162 (9th Cir. 2008). Other circuits' approach fails adequately to protect a defendant's fundamental right to present witnesses in his defense; indeed, in circuits that follow the prosecutorial-intent standard, the constitutional promise of defense witness immunity is a nullity.

Moreover, the Ninth Circuit's effects-based approach aligns with the Framers' chosen method for determining truth in American criminal cases—the crucible of trial. This Court has repeatedly emphasized that a *jury* must weigh the reliability of exculpatory evidence, and such evidence should not be subject to a *prosecutor's* (or a court's) gatekeeping reliability determination. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) (Scalia, J.) (emphasizing that the Constitution "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"). To give effect to the

Constitution's guarantee of a fair trial and the right of the accused to present a defense, the Compulsory and Due Process Clauses must be read to grant "the means to secure such a trial." *United States v. Burr*, 25 F. Cas. 30, 33 (Circuit Court, D. Va. 1807)) (Marshall, C.J.).

## ARGUMENT

### I. THE CIRCUITS ARE DEEPLY SPLIT ON DEFENDANTS' CONSTITUTIONAL RIGHT TO DEFENSE WITNESS IMMUNITY

For decades the courts of appeals have grappled with the circumstances under which the Constitution requires defense witness immunity. A clear split in the circuits has developed. Most circuits reject defense witness immunity absent prosecutorial misconduct or bad faith and, in some circuits, a showing that the testimony is necessary or essential to the defense.[2]

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[2] *See, e.g., United States v. Castro*, 129 F.3d 226, 232-33 (1st Cir. 1997); *United States v. Ebbers*, 458 F.3d 110, 117-22 (2d Cir. 2006); *United States v. Quinn*, 728 F.3d 243, 257-61 (3d Cir. 2013) (en banc); *United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005); *United States v. Hager*, 879 F.3d 550, 556 (5th Cir. 2018); *United States v. Davis*, 845 F.3d 282, 292 (7th Cir. 2016); *United States v. Washington,* 318 F.3d 845, 855 (8th Cir. 2003); *United States v. Dalton*, 918 F.3d 1117, 1131 (10th Cir. 2019); *United States v. Merrill*, 685 F.3d 1002, 1014-15 (11th Cir. 2012).

The Ninth Circuit, by contrast, holds that due process requires defense witness immunity without a showing of misconduct or bad faith, if the testimony is relevant and directly contradicts the testimony of an immunized prosecution witness.[3]

### A. The Majority Approach

Among the majority of circuits that require a showing of prosecutorial misconduct or bad faith, courts use several different standards. The Second and Fourth Circuits hold that the defendant must show "discriminatory use [of immunity] by the Government to gain tactical advantage, probative and exculpatory value of the expected evidence, and unobtainability from other sources." *United States v. Dolah*, 245 F.3d 98, 105-06 (2d Cir. 2001); *see, e.g., United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005) (same). Under the second prong of this standard, the defendant must also establish that the proposed testimony is "not cumulative" and "would materially alter the total mix of evidence before the jury." *United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006) (quotations omitted).

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[3] *See, e.g., United States v. Straub*, 538 F.3d 1147, 1162 (9th Cir. 2008); *United States v. Wilkes*, 662 F.3d 524, 533-34 (9th Cir. 2011); *United States v. Wilkes*, 744 F.3d 1101, 1104-05 (9th Cir. 2014).

The First, Seventh, Eighth, and Tenth Circuits hold that prosecutorial discretion to grant or deny immunity "is cabined only by the requirement that a prosecutor may not immunize witnesses with the intention of distorting the fact-finding process." *United States v. Davis*, 845 F.3d 282, 292 (7th Cir. 2016) (quotation omitted); *see, e.g., United States v. Dalton*, 918 F.3d 1117, 1131 (10th Cir. 2019); *United States v. Campbell*, 410 F.3d 456, 463-64 (8th Cir. 2005) (providing as an example of an "intent to distort" circumstances where the government "makes repeated threats or warnings to defense witnesses" to induce them to invoke the Fifth Amendment); *United States v. Castro*, 129 F.3d 226, 232-33 (1st Cir. 1997); *cf. United States v. Emuegbunam*, 268 F.3d 377, 401 (6th Cir. 2001) (leaving open whether intent to distort fact-finding process suffices for due process violation); *United States v. Perkins*, 138 F.3d 421, 424 n.2 (D.C. Cir. 1998) (same).

The Fifth Circuit holds that due process may require defense witness immunity where the government "abuse[s] its immunity power." *United States v. Bustamante*, 45 F.3d 933, 943 (5th Cir. 1995); *see Hager*, 879 F.3d at 556. The Fifth Circuit has never articulated exactly what constitutes government "abuse" of the immunity power but has also never found it to exist. The Eleventh Circuit appears either to adopt this view or to go even further, suggesting that the circuit's precedent "forecloses" *any* authority

of the courts to compel the government to grant a defense witness use immunity. *See Merrill*, 685 F.3d at 1014-15.

Among the circuits that embrace the "intention of distorting the fact-finding process" standard, there is further divergence. The Seventh Circuit holds that the prosecution can rebut any inference of an intent to distort merely by asserting that the defense witness' proposed testimony is false and thus would constitute perjury. *See, e.g., Davis*, 845 F.3d at 291-92. By contrast, the First Circuit has expressed doubt that the prosecutor's disbelief of the defense witness's testimony, without more, suffices to rebut an inference of intent to distort the fact-finding process. As the court put it:

> The government's belief [that the defense witness would lie] would obviously be pertinent if it were considering whether to immunize witness testimony to present as part of the prosecution's case. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). But one might think that it was a matter for the jury, not the prosecutor, to decide whether testimony seemingly helpful to the defendant was actually false. Surely this would be so if the question were one of disclosing exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

*United States v. Mackey*, 117 F.3d 24, 28 (1st Cir. 1997). Nevertheless, *Mackey* found that the government had not acted in bad faith because its "primary" reason for refusing immunity to the witness was "the risk of compromising any future prosecution" of the witness, rather than the prosecution's disbelief of the witness's proffered testimony. *Id*.

### B. The Third Circuit Approach

The Third Circuit has devised its own approach. Prior to 2013, the Third Circuit allowed courts to exercise inherent authority to grant judicial use immunity to defense witnesses—regardless of the prosecution's intent—where the witnesses had crucial, exculpatory testimony. *See Gov't of Virgin Islands v. Smith*, 615 F.2d 964, 968-72 (3d Cir. 1980). According to a 2012 study, this resulted in courts in the Third Circuit granting defense witness immunity requests at a higher rate (10.87%) than any other circuit. *See* Nathanial 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, 178 (Nov. 2012).

In 2013, however, the Third Circuit abrogated the rule of *Smith* and now requires that a defendant prove either that the prosecution "act[ed] with the deliberate intention of distorting the factfinding

process," *or* that a five-factor test is satisfied to establish a due process violation. *Quinn*, 728 F.3d at 260-61 (en banc). The five factors that guide its due process inquiry are: "[1] [immunity was] properly sought in the district court; [2] the defense witness [is] available to testify; [3] the proffered testimony [is] clearly exculpatory; [4] the testimony [is] essential; and [5] there [are] no strong governmental interests which countervail against a grant of immunity." *Id*. at 251 (quoting *Smith*, 615 F.2d at 972).

Although the Third Circuit approach purports to place due process limits on the government's withholding of defense witness immunity (even in the absence of prosecutorial misconduct), the five-factor test has proven to be insurmountable. For example, *Quinn* held that testimony is not "clearly exculpatory" if it is "at best speculative," "severely impeached by the witness's prior inconsistent statement," "ambiguous on its face," "even if believed, would not in itself exonerate the defendant," or is "*overwhelmingly* undercut or undermined by substantial prosecution evidence in the record." *Quinn*, 728 F.3d at 262-63 (quotations and brackets omitted; emphasis in original). Thus, *no* court in the Third Circuit has granted defense witness immunity since *Quinn*. *See, e.g., United States v. Santos*, 2022 U.S. Dist. LEXIS 96693, at *35-36 (D.N.J. Mar. 22, 2022) (finding that defendant had not met Third Circuit's "high bar for what constitutes clearly exculpatory testimony");

*United States v. Evans*, 2021 U.S. Dist. LEXIS 236324, at *34-44 (M.D. Pa. Dec. 8, 2021) (court finds proposed defense testimony neither "clearly exculpatory" nor "essential").

### C. The Ninth Circuit's Effects-Based Approach

The Ninth Circuit does not require a showing of intentional prosecutorial misconduct or bad faith for a due process violation based on the government's refusal to grant immunity to a defense witness. Nor does it require a heightened showing of need for the testimony. The court has established a test that focuses on the effect of the denial of immunity:

> [F]or a defendant to compel use immunity the defendant must show that: (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.

*Straub*, 538 F.3d at 1162; *see Wilkes*, 662 F.3d at 533-34; *Wilkes*, 744 F.3d at 1104-05.

Notably, the Ninth Circuit's "relevance" requirement is "minimal." *Straub*, 538 F.3d at 1157. Unlike in the Third Circuit, "[t]he defendant need not show that the testimony sought was either clearly exculpatory or essential to the defense." *Id.* (quotations omitted). In the Ninth Circuit, therefore, if the government opts to immunize a prosecution witness, it cannot withhold immunity from a proposed defense witness who will directly contradict that prosecution witness. The government remains free, of course, to forego immunizing its own witness if it deems immunity for the contradictory defense witness too costly.

### D. The Impact of the Circuit Split

These disparate standards have a profound and recurring impact on criminal cases. Outside the Ninth Circuit, and the Third Circuit before *Quinn*, there has been only one reported grant of defense witness immunity, by a district court in the Second Circuit, which occurred over thirty years ago. *See* Lipanovich, *supra*, 91 Tex. L. Rev. at 178. That single immunity grant—in *United States v. De Palma*, 476 F. Supp. 775 (S.D.N.Y. 1979)—was later vacated by the Second Circuit. *United States v. Horwitz*, 622 F.2d 1101, 1105-06 (2d Cir. 1980). In the majority of circuits, in other words, prosecutors have effectively unlimited power to shape the evidence the jury hears through selective immunity grants.

By contrast, there have been a significant number of reported immunity grants in the Ninth Circuit. *See* Lipanovich, *supra*, 91 Tex. L. Rev. at 178 (finding that as of 2012, the Ninth Circuit held that due process required defense witness immunity in five of sixty-four cases (i.e., 7.81% of the time)). And these grants of immunity have had a profound practical impact. In one high profile trial, for example, the immunity conferred at the district court's direction on two defense witnesses allowed them to "provide[] extremely favorable testimony, which directly contradicted [a key immunized prosecution witness's] testimony and changed the course of the trial." Richard Marmaro and Matthew E. Swan, *Obtaining Defense Witness Immunity: Lessons From the Broadcom Trial*, 37 Litigation 21, 25 (Spring 2011) (describing Broadcom trial, in which Judge Cormac Carney required immunity grants for two defense witnesses).

The Second Circuit's highly restrictive approach to defense witness immunity had a powerful—and opposite—impact on petitioner's trial. If Jones had been tried in the Ninth Circuit, his proposed witness would have received immunity, and the jury would have heard the witness's exculpatory testimony. But because Jones was tried in the Second Circuit, the government's refusal to immunize the witness denied him the ability to present the exculpatory evidence. As a result, the jury heard only the immunized

prosecution witnesses' version of the events, notwithstanding the jury's request, via a note to the court in the middle of the trial, to hear testimony from the witness Jones sought to have immunized. This too changed the course of the trial.

## II. DEFENSE WITNESS IMMUNITY IS AN IMPORTANT AND RECURRING ISSUE THAT THE MAJORITY OF CIRCUITS HAVE DECIDED INCORRECTLY

Although the critical constitutional issues implicated by the government's power to grant (or withhold) immunity have been recognized repeatedly for decades, most circuits get badly wrong the weighing of the competing interests at stake. In 1966, then-Judge Burger noted the risk that the government's selective use of witness immunity could violate a defendant's right to due process. *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966). In 1982, the Fifth Circuit noted that the approaches for granting defense witnesses immunity taken by the courts of appeals have varied for decades. *United States v. Thevis*, 665 F.2d 616, 639 (5th Cir. 1982) (noting "widely divergent opinions" on the issue). The conflict among the circuits shows no sign of abating, and no amount of further consideration by the courts of appeals will resolve this entrenched split.

### A. Defense Witness Immunity Implicates Competing Interests

There are competing law enforcement and fairness issues at stake, as this Court has recognized. The Court has referred to "the risk that immunity will frustrate the Government's attempts to prosecute" an immunized defense witness, *United States v. Doe*, 465 U.S. 605, 616 (1984), while also recognizing that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," *Chambers*, 410 U.S. at 302; *see, e.g., Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Washington v. Texas*, 388 U.S. 14, 19 (1967). Due process "speak[s] to" that "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 475 (1973); *cf. Chambers*, 410 U.S. at 295 (the "denial or significant diminution [of the right to confront] calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined" (quotation omitted)).

### B. Most Circuits Improperly Balance These Interests

Most circuits have given short shrift to the defendant's interests and rights and give the government too much power to curate the evidence the jury hears by selectively immunizing witnesses. Only in the Ninth Circuit does the government's interest

*not always* receive decisive weight. As the Ninth Circuit observed, "where two eyewitnesses tell conflicting stories, and only the witness testifying for the government is granted immunity, the defendant would be denied any semblance of a fair trial." *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991) (quotation omitted).

The majority rule thus violates the defendant's Fifth and Sixth Amendment right to a "meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324 (quotation omitted). It also stands in tension with this Court's cases, in a variety of contexts, barring the government from suppressing important exculpatory evidence in criminal cases regardless of the prosecutors' intent. *E.g., Brady*, 373 U.S. at 87 (prosecutor's duty to disclose material exculpatory evidence); *Jencks v. United States*, 353 U.S. 657 (1957) (requiring production of prior statements of prosecution witnesses); *Roviaro v. United States*, 353 U.S. 53, 60 (1957) (requiring disclosure of informant's name where name was "relevant and helpful to the defense of an accused" or "essential to a fair determination of a cause").

The majority circuits also give far too much weight to the government's concern about preserving future prosecutions of immunized witnesses. Many witnesses assert the Fifth Amendment privilege out of an abundance of caution; as this Court has observed,

"one of the Fifth Amendment's basic functions is to protect *innocent* men who otherwise might be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam) (quotation and ellipses omitted; emphasis in original). Notwithstanding this tendency of witnesses to proceed gingerly, the government freely uses proffer agreements and grand jury immunity orders to hear from a broad range of witnesses in the pre-trial phases of a case, but then the prosecution—and only the prosecution—decides which of those witnesses the jury gets to hear.

### C. This Case Shows the Unfairness of the Government's Selective Use of Immunity to Filter the Jury's Access to Evidence

This case starkly demonstrates the unfairness of the Second Circuit's intent-based, overly stringent test. Here, Jones knew about the witness's exculpatory testimony because the prosecution interviewed the witness multiple times pursuant to a proffer agreement—a form of limited use immunity—but refused to enter into a cooperation agreement with the witness when the witness exculpated, rather than inculpated, Jones. The prosecution therefore used its immunity power to learn inculpatory and exculpatory information, and then used its power again at trial to give the jury the inculpatory evidence while blocking

the exculpatory evidence revealed by its proffer sessions.

Moreover, the government's interest in withholding trial immunity did not present anything close to a substantial "risk that immunity will frustrate the Government's attempts to prosecute" the exculpatory witness. *Doe*, 465 U.S. at 616. The witness Jones sought to call had already pled guilty; only his sentencing remained. The government's purported concern about limitations on its sentencing arguments warranted little, if any, weight, especially when compared to Jones's interest, and the interest of the public, in protecting Jones's constitutionally-guaranteed right to present a defense in a case for which his subsequent conviction resulted in *life imprisonment*.

The witness's guilty plea here starkly demonstrates the vanishingly small government interest that stood in the way of defense witness immunity by virtue of the Second Circuit's overly strict approach. But it is by no means unusual that merely theoretical risks to the government's ability to prosecute defense witnesses are permitted to outweigh far more substantial interests in a fair trial. It is unlikely that the government would ever prosecute innocent witnesses who nonetheless assert the Fifth Amendment privilege. Similarly, the

government often has no intention of prosecuting even culpable witnesses.

Even for witnesses whom the government may wish to prosecute, immunity does not create an insuperable barrier. Dozens of cases have permitted prosecution of defendants who had previously given immunized testimony. *See, e.g., United States v. Slough*, 641 F.3d 544 (D.C. Cir. 2011), *on remand*, 36 F. Supp. 3d 37 (D.D.C. 2014); *United States v. Cozzi*, 613 F.3d 725, 728-33 (7th Cir. 2010); *United States v. Orlando*, 281 F.3d 586, 593-95 (6th Cir. 2002); *United States v. Daniels*, 281 F.3d 168, 180-82 (5th Cir. 2002); *United States v. Nanni*, 59 F.3d 1425, 1431 (2d Cir. 1995); *United States v. Crowson*, 828 F.2d 1427, 1430 (9th Cir. 1987); *United States v. Blowers*, 2005 U.S. Dist. LEXIS 30525 (W.D.N.C. Nov. 22, 2005). Immunity requires the prosecution to demonstrate that its evidence "was derived from legitimate independent sources," *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972), but—as the cited cases demonstrate—the government is capable of meeting that burden. Defendants, on the other hand, hardly ever meet the impossibly stringent tests most circuits have adopted for defense witness immunity.

### D. A Prosecutor's View that a Defense Witness Is Not Reliable Is an Improper Basis for Withholding Immunity

In *Jones*, the government and the district court appeared to base the denial of immunity for the proposed defense witness at least in part on a belief that the witness would lie to help Jones's defense, which should never be a valid basis for withholding immunity. Neither the government's, nor the court's, asserted interest in preventing perjury by a proposed defense witness should ever overcome a defendant's right to present exculpatory testimony at trial. The Constitution assigns the jury—not the prosecutor or the court—the responsibility to assess the credibility of defense witnesses—and cross-examination provides an ample protection against unreliable testimony.

The Court has emphasized this point repeatedly. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court overruled its prior cases which permitted Confrontation Clause challenges to be resolved based on a *judicial* finding of reliability. Justice Scalia, writing for the Court, declared that the Confrontation Clause's "goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. So too here—the Framers' chosen method for ensuring

the reliability of criminal prosecutions is to test incriminating and exculpatory evidence against and for the accused *in the crucible of trial*, not by a prosecutor's or judge's assessment of what is reliable. *See id.*; *see also United States v. Gaudin*, 515 U.S. 506, 509-11 (1995) (emphasizing primacy of jury in deciding questions of fact); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (same); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (stating that "exclusion of . . . exculpatory evidence [regarding the credibility of a confession] deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing'" (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984))). This is especially so because the prosecutor's reliability assessment will inevitably favor inculpatory evidence over exculpatory evidence, and therefore to permit that assessment to control immunity decisions means that immunized testimony will always be one-sided.

The trial process provides the prosecution ample means of exposing false testimony, including cross-examination and the presentation of contradictory evidence. And if a defense witness commits perjury, the government can prosecute him under 18 U.S.C. § 1623—the immunity statute expressly allows use of immunized testimony in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002.

These tools adequately safeguard the sanctity of the fact-finding process while protecting the defendant's Fifth and Sixth Amendment rights. Neither the prosecution nor the court should substitute itself for the jury in assessing the credibility of defense witnesses.

* * * *

More than two centuries ago, Chief Justice Marshall declared that "[t]he genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial." *Burr*, 25 F. Cas. at 33. In one of the earliest interpretations of the Compulsory Process Clause, the Chief Justice indicated that the accused is entitled to "the like process to compel [defense] witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against him." *Id.*[4]

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[4] In *Burr*, Chief Justice Marshall quoted an early statute that only applied in capital cases, but he reasoned that, in light of the Compulsory Process clause, the same principle applies more broadly because the statute was "declaratory of the common law." *Id.*

The Second Circuit's prosecutorial misconduct standard for defense witness immunity provides no such fair treatment. As the facts of this case show, the Second Circuit and the other circuits adopting similarly restrictive standards afford the prosecution not only subpoenas but also immunity and compulsion orders to obtain and present evidence against the defendant, but they block the defendant from using those same compulsory processes to present evidence in his favor to the jury. This result undermines the Court's insistence on preserving the "balance of forces" between the prosecution and defense. *Wardius*, 412 U.S. at 474.

## CONCLUSION

The petition for a writ of certiorari should be granted. On review, the Court should adopt the Ninth Circuit standard for determining when the denial of immunity for a defense witness violates the defendant's constitutional rights.

Dated: March 23, 2023

Respectfully submitted,

JOHN D. CLINE
*Counsel of Record*
Law Office of John D. Cline
600 Stewart Street
Suite 400
Seattle, WA 98101
(360) 320-6435
cline@johndclinelaw.com

JUSTIN S. WEDDLE
BRIAN WITTHUHN
JULIA I. CATANIA
Weddle Law PLLC
250 West 55th Street, 30th Floor
New York, NY 10019
(212) 997-5518
jweddle@weddlelaw.com

JEFFREY T. GREEN
Co-Chair, Amicus
Committee
National Association of
Criminal Defense Lawyers
1660 L Street, N.W.
Washington, Dc 20036
(202) 872-8600

*Counsel for Amicus Curiae*
*National Association of*
*Criminal Defense Lawyers*