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IN THE

Supreme Court of the United States

RANDALL CRATER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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May 22, 2024

QUESTION PRESENTED

Whether the district court's decision to quash three trial subpoenas because defendant did not comply with *Touhy* regulations violated defendant's Sixth Amendment's Compulsory Process Right warranting a new trial?

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The First Circuit's opinion is reported at 93 F.4th 591 and is reprinted in the Appendix to the Petition (Pet.App.) A1-A9.

JURISDICTION

The First Circuit issued its opinion and entered judgment on February 23, 2024. Pet. App. A1-A9. This Court has jurisdiction under 28 U.S.C. § 1254(1). Pet.App.B1

CUSTODY STATUS

Randall Crater is serving a 100-month prison sentence with a projected release date of November 17, 2029.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Pet.App. C1.

> The relevant portions of 5 U.S.C. § 301, 28 C.F.R. § 16.23, 17 C.F.R. § 144.3 and 39 C.F.R. § 265 are reproduced at Pet.App. D1-G7.

INTRODUCTION

This Court grants review to correct decisions of the First Circuit Court of Appeals in conflict with the decision of another United States Court of Appeals. Supreme Court Rule 10(a) ("Rule"); *Braxton v. United States*, 500 U.S. 344, 347 (1991); *United States v. O'Malley*, 383 U.S. 627, 630 (1966). Also, this Court grants review where the lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Rule

10(a). The district court's application of *Touhy* in this criminal case and the First Circuit Court of Appeals failure to reverse warrants this Court's intervention on this important constitutional issue.

The Compulsory Process Clause of the Sixth Amendment (Compulsory Process Clause) guarantees to "the accused" the right "to have compulsory process for obtaining witnesses in his favor." From the earliest day of the Republic, it was understood that no one, no matter how high his station, was exempt from the reach of the compulsory process rights of even the lowliest defendant. Indeed, the principle that no man is above the compulsory process of the law was burned into our early jurisprudence. Milton Hirsch, *The Voice of Adjuration: The Sixth Amendment Right to Compulsory Process Fifty Years after United States Ex Rel. Touhy v. Regan,* 30 Fla. St. U. L. Rev. 81, 85 (2002). Not even the President of the United States was excepted from this constitutional rule.

Notwithstanding this long-standing and clearly established constitutional principle, the district court prevented the defense from calling both case agents and an attorney from the Commodity Futures Trade Commission ("CFTC") in his case in chief by erroneously concluding that the defendant was first required to comply with *Touhy* regulations. Pet.App.H6. *Cf. United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).[1]

[1] Defendant notes that the First Circuit's decision affirming the conviction did not rule on the *Touhy* issue. Instead, the First Circuit erroneously dismissed defendant's argument by claiming that the *Bruen* analysis only applied to the Second Amendment. Pet.App.A6. And, while it is true that *Bruen* was not a Sixth Amendment case, the *Bruen* decision clearly stated that the textual and historical

Whether *Touhy* applies to criminal cases is a question of first impression in this Court and a question which has perplexed the lower courts for the past seventy-three (73) years. The government argued below that *Touhy* applied to criminal cases and the district court agreed. The First Circuit refused to reach the issue. As a result, the government was permitted to block the defense from reaching three witnesses who investigated the case and were not called by the government as witnesses at defendant's trial.

The federal courts of appeal are intractably divided on whether *Touhy* applies to criminal cases. The 4th, 5th, 6th and 10th Circuits have held that *Touhy* applies to criminal cases. *See United States v. Soriano-Jarquin*, 492 F.3d 495, 504 (4th Cir. 2007); *United States v. Wallace*, 32 F.3rd 921, 929 (5th Cir. 1994); *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981); and *United States v. Allen*, 554 F.2d 398, 406 (10th Cir. 1977). The 2nd and the 9th have not applied *Touhy* to criminal cases. *United States v. Bahamonde*, 445 F.3d 1225, 1229 (9th Cir. 2006)(regulation, as applied, violates due process); *United States v. Andolschek*, 142 F.2d 503, 506 (2nd Cir. 1944)(regulations should not have excluded documents requested). Finally, the First Circuit has punted on the issue on two occasions, in this case and in *United States v.*

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analysis set forth in *Bruen* applies to other rights contained in the Bill of Rights including the Sixth Amendment. See *Giles v. California*, 554 U.S. 353, 368 (2008)(declining to approve "an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter."). Accordingly, notwithstanding the First Circuit's failure to reach the *Touhy* issue, defendant continues to maintain in this petition that the *Bruen* analysis applies and that the District Court's decision to quash three subpoenas issued by defendant because he did not comply with *Touhy* violated his Sixth Amendment Compulsory Process Right.

Vazquez-Rosario, 45 F.4th 565, 572 (1st Cir. 2022)(where defendant attempted to comply with *Touhy* without success).

Defendant argued below that the Supreme Court's analysis in *New York State Rifle & Pistol Ass'n v. Bruen* controls the analysis and that applying the *Bruen* analysis to the *Touhy* regulations makes clear that the *Touhy* regulations are unconstitutional when applied to criminal proceedings because they prevent the defendant from reaching witnesses favorable to the defense.

In *Bruen*, the Court announced the standard that lower courts must use to evaluate the constitutionality of regulations that burden an individual's Second Amendment right to bear arms. Under *Bruen*, if a regulation burdens conduct that falls within the plain text of the Second Amendment, then it is unconstitutional unless the government can demonstrate that its regulation is "consistent with the nation's historical tradition of firearm regulation." Id. at 24. Similarly, applying *Bruen* to the Sixth Amendment's compulsory process right, because the *Touhy* regulations burden conduct that clearly falls within the plain text of the Sixth Amendment, the regulation is unconstitutional unless the government can demonstrate that its regulation is "consistent with the nation's historical tradition" of compulsory process. Since *Touhy* clearly burdens conduct that falls within the text of the Sixth Amendment and the government cannot demonstrate that the regulation is consistent with the nation's historical tradition, this Court should find that applying *Touhy* in criminal cases violates the Sixth Amendment's Compulsory Process Right.

Nevertheless, the First Circuit avoided the issue by concluding that defendant's "argument here suffers from a fundamental flaw: The *Bruen* decision articulated a 'standard for applying the Second Amendment,' *id.*, but it did not purport to supplant existing case law on any other constitutional right." Pet.App.A.6.

While it is true that the *Bruen* decision articulated the standard for Second Amendment cases, the First Circuit erroneously concluded that the same textual and historical analysis did not apply to the Sixth Amendment. However, as clearly noted in *Bruen*, the Court highlighted the fact that the same analysis applies to the Sixth Amendment's Compulsory Process Right. *See Giles supra* at 358 (2008)("admitting only those exceptions [to the Confrontation Clause] established at the time of the founding."). *Bruen, supra* at 2030. Moreover, the *Bruen* Court further noted that the same analysis is applicable to rights under the First Amendment and the Establishment Clause. *Id.*

The First Circuit compounded its error by applying case law that is easily distinguishable from this case. Specifically, the First Circuit argued that "more than the absence of testimony is necessary to establish a violation of the [compulsory process] right," citing *Washington v. Texas*, 388 U.S. 14 (1967); *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Hoffman*, 832 F.2d 1299 (1st Cir. 1987). However, none of these cases involved the government blocking the defendant from reaching witnesses based on a defendant's failure to comply with *Touhy*. Indeed, the First Circuit's legal analysis mistakenly puts the "cart before the horse" by avoiding the issue raised, to wit, whether *Touhy* violates the Sixth

Amendment because it prevents defendant from "reaching" witnesses that are favorable to the defense and deciding instead, whether defendant's offer of proof was sufficient to show that the witnesses testimony would be relevant, material and vital to the defense. However, there is no need to reach this second issue if *Touhy* permits the government to block defendant from reaching the witnesses in the first place. Moreover, determining whether a witness has relevant and favorable information before the witness takes the stand and is questioned under oath is inconsistent with the accepted and usual course of judicial proceedings which normally requires offers of proof while the witness is actually testifying.[2] Because in the context of this case, defendant is not required to make an offer of proof before calling his witnesses, defendant cannot make an accurate offer of proof when eliciting testimony from an adverse witness favorable to the prosecution, and defendant should not be compelled to disclose attorney work-product privileged information, the First Circuit's erroneous analysis should be rejected by this Court.

In *Touhy*, the Court held that lower courts may not hold an agency employee in contempt for refusing to comply with a subpoena when he acts pursuant to a regulation centralizing the decision whether the agency will comply with the agency head. The Court did not decide whether the Attorney General himself, if served with a subpoena, could legally refuse to comply. Indeed, Justice Frankfurter emphasized

[2] Defendant notes that this is not case where the government is asserting any privilege over information in the possession of the witnesses. Rather, the government used *Touhy* to block these defense witnesses from reaching the witness stand.

the narrowness of the *Touhy* Court's holding in his concurring opinion. Justice Frankfurter explained:

> I wholly agree with what is now decided insofar as it finds that whether, when and how the Attorney General himself can be granted an immunity from the duty to disclose information contained in documents within his possession that are relevant to a judicial proceeding are matters not here for adjudication. Therefore, not one of these questions is impliedly affected by the very narrow ruling on which the present decision rests. *Specifically, the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached.* ***In joining the Court's opinion, I assume the contrary—that the Attorney General can be reached by legal process***. Though he may be so reached, what disclosures he may be compelled to make is another matter. It will of course be open to him to raise those issues of privilege from testimonial compulsion which the Court rightly holds are not before us now. But unless the Attorney General's amenability to process is impliedly recognized we should candidly face the issue of the immunity pertaining to the information which is here sought. *To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle.* (Emphasis added).

Thus, Justice Frankfurter did not understand the *Touhy* decision to shield the Attorney General, or any other government employee for that matter, from being reached by legal process in criminal cases. Nevertheless, the district court erroneously held below that the witnesses subpoenaed could not be reach by legal process because defendant did not comply with the applicable *Touhy* regulations. The district court's decision is erroneous as a matter of law.

Here, the district court's decision is irreconcilable with the text, history, and tradition of the Sixth Amendment because, in essence, the district court erroneously

ruled that the witnesses subpoenaed "could not be reached." Moreover, the district court's decision is not supported by the holding in *Touhy*.

The textual inquiry is not a close question, as the text guarantees the "accused" the right "to have compulsory process for obtaining witnesses in his favor…." The historical inquiry is no closer. Founding-era cases, commentaries, and laws confirm that the founding generation understood that no man, not even the President of the United States, was excepted from the reach of the compulsory process clause.

Because text, history, and tradition confirm that the Sixth Amendment's compulsory process permits a defendant to compel the testimony of any witness in his favor, the district court clearly violated defendant's Sixth Amendment right to compulsory process by erroneously concluding that there was no "basis for allowing departure from the *Touhy* process for constitutional reasons or allowing or compelling the witnesses to testify as a constitutional issue…." Pet.App.I3.

Indeed, the *Touhy* Court made it clear that its holding had nothing to do with criminal cases. Indeed, the *Touhy* Court said so: "Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States." *Touhy, supra* at 467. For emphasis, the *Touhy* Court cited approvingly *Andolshek, supra* at 506 (Treasury [*Touhy*] regulation suppressing documents and testimony do not apply to criminal prosecutions). As a result of the district court's erroneous decision to apply *Touhy,* defendant's right to compulsory process and to present a defense was violated and, accordingly, his trial was fundamentally unfair and requires a new trial.

Accordingly, this Court should grant this petition so this Court can vacate defendant's conviction and remand the case to the district court for a new trial.

STATEMENT OF THE CASE

On January 18, 2022, a grand jury returned an eight-count Superseding Indictment charging Randall Crater ("Crater") with wire fraud (counts one through four; 18 U.S.C. § 1343), unlawful monetary transactions (counts five through seven; 18 U.S.C. § 1957) and operating an unlicensed money transmitting business (count eight; 18 U.S.C. § 1960(a) and (b)(1)(B)). Pet.App.A5.

The government's case was premised on a tripod of allegedly false claims including: (1) that My Big Coin was a cryptocurrency that could be bought, sold, or traded on any identifiable market; (2) that My Big Coin was backed by gold reserves; and (3) that My Big Coin had a partnership with Mastercard. According to the government, these claims were false when made by Crater and others in verbal statements, emails, social media, and on the My Big Coin's website. Pet.App.A4.

The defense case was focused on rebutting the claims that the government alleged were false and by attacking the government's investigation. First, Crater was not the principal owner or operator of My Big Coin Pay, Inc. ("My Big Coin"). Rather, an individual named John Roche, was the owner and principal operator of My Big Coin, Inc. and My Big Coin Pay, Inc. (collectively, "My Big Coin"). He neither owned nor controlled My Big Coin's website or My Big Coin's various social media platforms.

Crater also contested the government's allegation that My Big Coin was not a cryptocurrency between 2014 and 2017. Crater asserted that the government never

proved what, in fact, the My Big Coin platform was during the 2014-2017 time-period and never proved that it was not a cryptocurrency. Crater presented expert testimony to prove his point that My Big Coin could have been a private peer-to-peer cryptocurrency platform.

Crater also asserted that the government's investigation of MBC was woefully inadequate. Indeed, during trial, there was evidence that government's star witness, John Lynch, was in possession of a thumb drive which contained a backup of his My Big Coin account during the relevant period and the government never requested or received a copy of the thumb drive. More importantly, the government never forensically examined Mr. Lynch's thumb drive.

Crater also contested the government's allegation that Crater knew, during the relevant time period, that My Big Coin was not "backed by gold." Rather, Crater asserted that he believed, in good faith, that MBC was backed by gold. During the trial, the government took the position that the out-of-court statement that My Big Coin was "backed by gold" was not admitted for its truthfulness. Rather, the government alleged that these statements were admitted for their effect on the listener.

To rebut the government's claim that My Big Coin did not have a partnership with MasterCard, there was evidence that My Big Coin issued debit cards with MasterCard logos to individuals who had purchased MBC coins. Crater also presented evidence that individuals with a My Big Coin Mastercard could use the card like a prepaid credit card.

Finally, Crater attempted to prove that the government's investigation into My Big Coin was inadequate and constituted a rush to judgment by attempting to call the two case agents and an attorney who worked for the CFTC. However, Crater was prevented from doing so by the district court's erroneous Sixth Amendment and *Touhy* rulings. ("I don't see a compelling reason not to follow the majority of circuits that follow *Touhy* applying it also in the criminal context."). Pet.App.I3.

Specifically, Crater subpoenas both case agents: Special Agent David Cirilli of the FBI and Special Agent Jan Kostka of the U.S. Postal Service. SA Cirilli testified in the grand jury prior to Crater's original indictment in February 2019. SA Kostka was originally listed as a government witness, *see* D.E. 141-2 and, after he was listed as a defense witness, he was removed from the government's witness list. D.E. 149. Because the government did not call either case agent, the government did not produce any *Jencks* materials for these witnesses.

Had the defense been able to call SA Cirilli as a witness, some of the relevant and favorable evidence he would have provided was that he did not start his investigation until after the Commodity Futures Trade Commission "CFTC" had filed its civil suit against Crater and others. Pet.App.J3-J5.

Contrary to the government's allegation that Crater was the owner and principal operator of My Big Coin, SA Cirilli would have testified, as he did in the grand jury, that Crater was merely the "creator and developer" of My Big Coin and My Big Coin Pay. Pet.App.I6. He would have further testified that John Roche was an officer and director of My Big Coin and the president of My Big Coin Pay and that

John Roche used the titled of Chief Executive Officer in his email signature. *Id.* These admissions were relevant, material, and inconsistent with the government's theory at trial.

SA Cirilli would have testified that a cryptocurrency is similar to a virtual currency but that it has an encrypted aspect to the currency. Cirilli would have further testified that a cryptocurrency or a virtual currency can be traded on a virtual currency forum or a digital exchange. Id. I9. Cirilli would have further testified that there was a price, a current value, which was published about the coins on the MBC website. Id. I.12. These facts were relevant, material, and inconsistent with the government's theory that the price was not accurate and was manipulated by Crater.

SA Cirilli would have also testified that a "virtual currency, sometimes referred to as a 'cryptocurrency' is a digital asset or digital representation of value that can be electronically traded and exchanged online." Id. I9. This admission would have been significant because prior to June 2017, the MBC website referred to MBC coins as a "virtual currency" and not a cryptocurrency.

SA Cirilli would have testified that the @MyBigCoin Twitter handle was associated with the email address mybigcoin@gmail.com and that John Roche controlled this email address and account. Id. I.16. SA Cirilli would have also testified that he reviewed a tweet from March 6, 2014 on MBC's Twitter account that said, "My Big Coin has entered into a contract where all My Big Coin's will be backed by 100% gold" and that at the time of his testimony in February 2019 the tweet had not been removed. Id. I.16-17. Notably, SA Cirilli did not testify that Crater had any

control over the content for the MBC website, or Twitter account or Facebook account, which was relevant, material, and inconsistent with the government's theory of the case.

Finally, since SA Cirilli would have been subject to cross-examination as a hostile witness, it is difficult to state with any certainty which additional admissions he would have made that would have been favorable to the defense. However, that is exactly why *Touhy* should not be used defensively by the government to shield its witnesses from testifying and being subject to cross-examination.

> In the pressure-cooker of the trial courtroom, it is difficult enough for a trial lawyer to know where his own carefully-prepared witness testimony will lead. To ask defense counsel to state with the level of specificity demanded by the court what he will ask the witness with whom he has never been permitted to discuss the facts of the case is wholly unworkable. Hirsch, *supra* at 117.[3]

With respect to SA Kostka, it is likely that he would have either corroborated SA Cirill's testimony or, during his direct exam, testify to facts that were inconsistent with SA Cirilli's testimony. Also, which questions Crater's counsel would have asked SA Cirilli and SA Kostka had they taken the stand would have depended in part on the answers to the questions that would have been asked. However, as the case agents who investigated the case, it is clear that they had relevant and material information

[3] A related issue is whether defense counsel would be bound by any proffer his makes to satisfy *Touhy*. For example, if the summary of testimony is limited to the issue of the execution of a search warrant and, during cross examination, the government agent references corruption in connection with executing search warrants in general, will defense counsel be precluded from following up on the grounds that the issue is beyond the scope of the Touhy summary?

that would have been helpful to Crater's defense had he been permitted to question them under oath about their investigation. Indeed, the district court and First Circuit Court of Appeals' conclusion that the case agents did not have relevant and material information about their own investigation is preposterous.

Finally, the defense wanted to call Jason Mahoney, an attorney with the CFTC for the purpose of showing that he issued a subpoena to John Roche in September 2016 requesting various documents relevant to his investigation into My Big Coin. Also, one year later, Attorney Mahoney prepared a draft of a "proposed sworn statement" based on his communications with Mr. Roche. Said declaration alleged that Mr. Roche's live-in girlfriend "went through his office and threw away all of my business and personal paperwork." Said declaration further alleged the live-in girlfriend also "logged onto my computer and deleted documents and changed passwords for my business and personal sites." Said declaration further alleged that "I do not have any documents in my custody or control responsive to the subpoena served on me by the U.S. Commodity Futures Trading Commission on September 27, 2016." Had the defense been permitted to call Mr. Mahoney as a witness, questions would have been asked about this Declaration, the reasons Mr. Mahoney drafted it for Mr. Roche and whether Mr. Mahoney took any steps to verify the truthfulness of Mr. Roche's statement. Depending on the answers received, Mr. Mahoney would have been subject to cross-examination concerning his less than stellar behavior. Whether this information would have made an impression on the jury is a question that cannot be answered on this record but should warrant a new trial.

SUMMARY OF THE ARGUMENT

The district court's decision to prevent the defense from calling the case agents and Attorney Mahoney as witnesses denied Mr. Crater his right to present a defense and violated his Sixth Amendment right to compulsory process. The Sixth Amendment right to present a defense and to compulsory process forecloses preclusion of defense witness testimony except under the most extreme circumstances, which are not present in this case. The district court erred by concluding that *Touhy* is applicable to criminal cases and preventing defendant from calling the case agents based on defendant's noncompliance with the so-called *Touhy* regulations. The district court further erred by requiring Mr. Crater to make an offer of proof before allowing him to call these witnesses to the witness stand.

The district court's erroneous decision to apply *Touhy* as a pre-condition to the defense calling defense witnesses and the resulting preclusion of their testimony violated defendant's right to compulsory process and caused his trial to be fundamentally unfair. Thus, a new trial is required. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT'S DECISION TO PREVENT THE DEFENDANT FROM CALLING THREE WITNESSES VIOLATED DEFENDANT'S SIXTH AMENDMENT COMPULSORY PROCESS RIGHT.

A. *Touhy* Does Not Apply To Criminal Cases.

Whether *Touhy* applies to criminal cases is a question of first impression in this Court. The government argued below that *Touhy* applied to criminal cases and the district court agreed. As a result, the government successfully prevented the defendant from calling the two case agents who investigated the case as well as the CFTC attorney who had communications with an alleged co-conspirator during the conspiracy even though these witnesses were not called by the government as witnesses at defendant's trial.

Roger Touhy had been convicted in state court and was serving time in a state penitentiary. He initiated a civil habeas corpus proceeding in the U.S. district court and caused a subpoena duces tecum to be served on the agent in charge of the Chicago office of the FBI. The agent appeared in court, but when directed by the district court to produce the documents called for in the subpoena, declined to do so, in reliance on Department Rule No. 3229.[4] Note that this regulation speaks only to a subpoena *duces tecum*. It is silent on the issue of a subpoena *ad testificandum*.

The district court found that Department 3229 did not excuse compliance with the subpoena and held the FBI agent in contempt. *Id.* at 465. The court of appeals

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[4] Department Order 3229 provided, inter alia, that:

> Whenever a subpoena duces tecum is served to produce any of the [the department's] files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified there in, on the ground that the disclosure of such records is prohibited by this regulation. *See* 11 Fed. Reg. 4920 (May 2, 1946)).

reversed, finding that the "housekeeping" statute (5 U.S.C. § 22) and Department Order 3229, taken together, rendered the subpoenaed documents privileged. *Id.* at 465-466.

The Supreme Court found the case entirely controlled by the *Boske v Comingore* case. 177 U.S. 459 (1900). It saw "no material distinction between that case and this" and particularly noted that the regulation at issue in *Boske* was "of the same general character as Order No. 3229." As it had been half a century earlier in *Boske*, the Court construed the question narrowly and concluded that Order 3229 was a valid exercise of power properly delegated to the attorney general by the "housekeeping" statute. The effect of the order was to centralize control of, and decision-making power as to departmental documents. Order 3229, as interpreted by the Court in *Touhy*, meant the FBI agent was not subject to punishment for non-compliance with the subpoena for the simple reason that the subpoena should have been directed to someone else. The Court went no further.

Whatever may be said in defense of 28 C.F.R. § 16.23 and 17 C.F.R. § 144.3, and 39 C.F.R. § 265.12(c)(2)(iii), these regulations, which purport to prevent "oral testimony," cannot be justified by reference to *Boske* or *Touhy*. Indeed, the reach of these regulations extend far beyond the reach of these two Supreme Court cases. Pet.App.D1-G7.

The principal objection to applying *Touhy* regulations in a manner not authorized by the legislature nor approved by the Supreme Court is that it burdens the proper exercise of a criminal defendant's Sixth Amendment Compulsory Process

right. Moreover, the *Touhy* Court made it clear that its holding had nothing to do with criminal cases. Indeed, the *Touhy* Court said so: "Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States." *Touhy, supra* at 467. For emphasis, the *Touhy* Court cited *United States v. Andolshek,* 142 F.2d 503, 506 (2nd Cir. 1944); *supra* at n. 6. *Andolshek* involved an I.R.S. regulation similar to the one considered in *Boske*. In *Andolshek,* the Second Circuit recognized the precedential effect of *Boske*, but held:

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. *Andolshek, supra* at 506.

see also, United States v. Beekman, 155 F.2d 580, 584 (1946)(same); *cf. United States v. Reynolds*, 345 U.S. 1, 12 (1953)(in criminal cases the government can invoke its evidentiary privileges only at the price of letting the defendant go free). The *Reynolds* Court explained the reasoning in *Andolshek* and *Beekman* as follows:

> The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. *Id.*

In sum, these regulations seek to create an evidentiary privilege that cannot be derived from *Boske* or *Touhy*.

More importantly, these regulations extend to subpoenas *ad testificandum* as fully as to subpoena *duces tecum*, which extension has no support in *Boske* or *Touhy* and runs afoul of the Sixth Amendment's compulsory process right.

Also, the regulations require a criminal defendant, as a condition precedent to the exercise of his Sixth Amendment rights, to provide adverse counsel his (or his attorney's) mental work product in the form of an "affidavit or statement" appended to the subpoena. "This limitation on the exercise of a constitutional right cannot by any hermeneutics be derived from *Boske* and *Touhy*." Hirsch, *supra* at 99. By requiring defense counsel to provide a summary of the specific testimony he hopes to elicit from a Department of Justice or CFTC witness, the regulations also compel the defendant to sacrifice his work-product privilege for the possibility (but not the certainty) that defendant's exercise of a right secured to him by the Constitution will be honored. Hirsch, *supra* at 118; *see also United States v. Feeney*, 501 F.Supp. 1324, 1325 (D. Colo. 1980)(Chief Judge Winner, commenting on regulations that purport to entitle a federal prosecutor to be told before the fact what testimony his adversary hoped to adduce as a condition precedent to his adversary's adducing that testimony, observed that "it would be Valhalla for a private lawyer to be able to get a preview of an adverse witness's cross-examination.").

The work-product privilege received the imprimatur of the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). In criminal cases, the "opinions, judgments, and thought processes of counsel" are protected. *In re Sealed Case*, 124 F.3d 230, 235 (D.C. Cir. 1997)(*quoting In re Sealed Case*, 676 F.2d 793, 809-

10 (D.C. Cir. 1982). Courts refer to the privilege as extending, in criminal cases, to "mental impressions, opinions, conclusions, and legal strategies formed in anticipation of specific litigation," *United States v. One Tract Real Prop.*, 95 F.3d 422, 428 (1996). "Opinion work-product, however, … is more scrupulously protected as it represents the actual thoughts and impressions of the attorney." *In Re Grand Jury Proceedings*, 102 F.3d 748, 750 (4th Cir. 1996). Such mental impression work-product is entitled to the very highest level of protection from invasion.

The "statement or affidavit" required by the *Touhy* regulations in this case required a summary of the testimony sought from a witness in the adversary's camp. Such a statement totally eviscerates the privilege for mental impressions, strategies, and theories. The forfeiture of this valuable privilege is the price the district court required Crater to pay, not to assure that an executive-branch officer will honor a subpoena for testimony he is constitutionally bound to honor; but merely to assure that the executive branch will consider complying with a subpoena he is constitutionally bound to honor. Thus, to the extent that an agency regulation purports to condition compliance with a subpoena *ad testificandum* upon the surrender of defendant's work-product privilege, such regulations are an invalid burden upon the Sixth Amendment right to compulsory process and cannot be justified by a "housekeeping" statute. As such, *Touhy* and its progeny has no place in the criminal justice system.

Applying *Touhy* to criminal cases raises other concerns for the trial process. A defendant may lose the opportunity to present evidence that is exculpatory and in the

possession of the government. For example, in this case, defendant was prevented from questioning the case agents about the missing thumb drive and its contents. Moreover, the government refused to produce any *Jencks* materials because the witness did not testify. Whether there is any information favorable to the defense in the *Jencks* materials of these witnesses is unknown because defendant was prevented from calling these witnesses.

Preventing defense counsel from calling government witnesses without complying with *Touhy* will not only weaken the defense's ability to defend against the government's case but it will also put the government in the superior position of blocking evidence favorable to the defense, a position that is antithetical to the compulsory process rights enshrined in the Sixth Amendment.

Moreover, a defense attorney's failure to comply with *Touhy* could also place defense counsel in a tricky Catch-22 situation. If he complies with *Touhy*, he risks disclosing his privileged work-product and if he does not comply, he risks being sued for ineffective assistance of counsel claim. This Hobbesian choice is not one defense counsel should be compelled to choose between on the eve of trial.

Finally, as noted above, preventing the defense from calling witnesses for failing to comply with *Touhy* clearly prejudices defendant's right to a fair trial, undermines fundamental principles of due process and the adversarial system, and could also affect the sentencing phase of a criminal case if, without mitigating evidence, defendant receives a harsher sentence, in this case 100 months of incarceration, than he otherwise would have.

In sum, non-compliance with *Touhy* regulations can significantly impact a defendant's ability to mount an effective defense and receive a fair trial. As such, they should not apply to criminal cases.

B. The Sixth Amendment Right To Compulsory Process Mandates That The Accused, In A Criminal Trial, Has The Right To Have Compulsory Process For Obtaining Witnesses in His Favor.

Compulsory process was a relative late comer to the English common law. The modern notion of witnesses at trial did not exist in the 1400s and did not become an important part of the fact-finding process until the 1500s. *See* Major Clay A. Compton, *Putting Compulsory Process Back in Compulsory Process*, 215 Mil. L. Rev. 133, 137 (2013). A shift began when Parliament adopted a statute in 1606 which allowed English subjects accused of committing crimes in Scotland to present witnesses at trial. Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials,* 9 Ind. L. Rev. 711, 719 (1976). The accused was allowed to present his own witnesses to testify in his defense, and the witnesses were allowed to be sworn, *Id.*

In 1695, Parliament passed a statute expanding procedural protection for an accused facing a charge of treason and related crimes. *Id.* at 720. The statute gave an accused the right to obtain a copy of the indictment against him, the right to counsel, the right to produce witnesses and have them testify, the right to compulsory process to compel attendance of witnesses, and the right to obtain a list of the jurors prior to trial. *Id.*

By the eighteenth century, the colonies, in a reflection on their dissatisfaction with English colonial rule, expanded the accused's rights even further. Thus, the underlying principles for the Compulsory Process Clause were well-established before American independence came about. Peter Westen, *The Compulsory Clause*, 73 Mich. L. Rev. 71, 91 (1974).

Joseph Story, in his famous *Commentaries on the Constitution of the United States*, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. *Washington v. Texas,* 388 U.S. 14, 19 (1967). "[T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury." *Id*. at 20.

In 1789, James Madison drafted much of what would become the Bill of Rights. Many of his proposals, including the Sixth Amendment, were adopted with little debate. Madison used the term compulsory process to describe the accused's right to obtain witnesses in his favor. Congress adopted the Compulsory Process Clause as part of the Sixth Amendment without modifying Madison's language. Madison achieved this success because the language was understood to address the critical concerns of each individual state: the right to call for evidence, the right to compel witnesses, and the right to parity with the government. *See* Janet C. Hoeffel, *The*

Sixth Amendment's Lost Clause: Unearthing Compulsory Process, 2002 Wis. L. Rev. 1275, 1286 (2002).

C. The Sixth Amendment Compulsory Process Clause Requires The Defendant To Be Placed On An Equal Footing With The Government.

The Sixth Amendment declares:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

From the earliest days of the Republic, it was understood that no one, however lofty his station, was exempt from the reach of the compulsory process rights of even the lowliest defendant. *Cf. Bruen*, *supra* at 2127 (analysis demands a test rooted in amendment's text, as informed by history); *Range supra at 101* (after *Bruen*, we must first decide whether the text of the amendment applies to a person and his proposed conduct, *cite omitted*, [i]f it does, the government now bears the burden of proof: it "must affirmatively prove" that its regulation is "part of the historical tradition that delimits the outer bounds of the right…"). Deriving the same principle from English cases in 1827, Jeremy Bentham-in much-quoted language wrote:

> What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves,-are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary,-they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of

> Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimneysweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.
> John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, § 2192 (1904)(quoting *The Works of Jeremy Bentham* 320-21 (John Bowring ed., 1843).

The defendant in *United States v. Cooper,* 4 U.S. 431 (C.C.D. Pa.) (1800), was "indicted for a libel on the President." *Id*. at 341. He sought, at a time when Congress was in session, to compel the testimony of several congresspeople at his trial. Justice Chase's terse opinion includes the following dictum: "The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a subpoena, in such cases." *Id*.

Similarly, in *Respublica v. Duane,* 4 Yeates 347 (Pa. 1807), the issue was whether the immunity from arrest granted to U.S. congressmen when Congress is in session included immunity from the compulsory process of a trial subpoena. The Pennsylvania Supreme Court had no difficulty concluding that it did not; the constitutional privilege from arrest is not a general immunity from all judicial visitorial powers. The court went further: If a congressman were to ignore a subpoena, the constitutional immunity from arrest might not protect him from bodily "attachment . . . [for] neglecting or refusing to attend in consequence of a subpoena properly served." *Id.*

The treason trial of Aaron Burr, former Vice President of the United States, in 1807 provided another early opportunity to address the meaning and significance of

the Compulsory Process Clause. Presiding as circuit judge, Chief Justice John Marshall issued a comprehensive review of the Compulsory Process Clause. Burr sought to subpoena President Thomas Jefferson to present evidence that "may be material in his defense." *United States v. Burr*, 25 F. Cas. 30, 31 (1807). President Jefferson objected on a number of grounds. Notably, however, the President did not object to the subpoena *ad testificandum*. *Id.* at 34 ("If, then, as is admitted by the counsel for the United States, a subpoena may issue to the president, the accused is entitled to it of course: …").

With respect to the subpoena *ad testificandum*, Chief Justice Marshall reasoned that "[t]he fair construction of this clause would seem to be, that with respect to the means of compelling the attendance of witnesses to be furnished by the court, *the prosecution and defense are placed by law on equal ground*." (Emphasis added) *Id.* at 33."Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of the opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of witnesses." *Id.* Marshall also warned that the rights contained within the Compulsory Process Clause "must be deemed sacred by courts" and they "should be so construed to be something more than a dead letter. *Id.* at 33. More recently, the rule that the President enjoys no general immunity from compulsory process has been affirmed. *See Clinton v. Jones*, 520 U.S. 681, 703-704 (1997); *United States v. Nixon*, 418 U.S. 685, 706 (1974).

The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that the Supreme Court has previously held applicable to the States. *Washington supra* at 18. *In re Oliver*, 333 U.S. 257, 273 (1948), the Supreme Court describe what it regarded as the most basic ingredients of due process of law. It observed that:

> A person's right to reasonable notice of a charged against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

And, in *Washington*, *supra* at 19, the Supreme Court explained the significance of a defendant's compulsory process right. The Court said:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *This right is a fundamental element of due process of law*. (Emphasis added).

Indeed, the Sixth Amendment's text, as informed by history, is so fundamental and essential to a fair trial that it is a fundamental element of due process of law. *See Washington supra* at 18-19(right to present witnesses to establish a defense is a fundamental element of due process); *see also Bruen supra* at 2127 ("We looked to history because 'it has always been widely understood that the Second Amendment …. codified *pre-existing right*.'") *quoting District of Columbia v. Heller,* 554 U.S. 570, 592 (2008); *see also, Crawford v. Washington*, 541 U.S. 36, 50 (2004)(examining the historical background of the Confrontation Clause and concluding that "the principal

evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused ….The Sixth Amendment must be interpreted with this focus in mind..."). In sum, the Compulsory Process Clause was intended to place the prosecution and defense on equal ground during trials.

D. Requiring Defendant to Comply with *Touhy* Violated Defendant's Sixth Amendment Compulsory Process Right.

The district court's decision to quash defendant's subpoenas is irreconcilable with the text, history, and tradition of the Sixth Amendment. The textual inquiry is not a close question, as the text guarantees the right "to have compulsory process for obtaining witnesses in his favor…." The historical inquiry is no closer. Founding-era cases, commentaries, and laws confirm that the founding generation understood that no man, not even the President of the United States, was excepted from the reach of the compulsory process clause.

Because text, history, and tradition confirm that the Sixth Amendment's compulsory process permits a defendant to compel the testimony of any witness in his favor, the district court obstructed and violated defendant's Sixth Amendment right to compulsory process and to present a defense by erroneously concluding that there was no "basis for allowing departure from the *Touhy* process for constitutional reasons or allowing or compelling the witnesses to testify as a constitutional issue." J.A. 536.

When the United States is a party to litigation, "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United*

States v. Reynolds, 345 U.S. 1, 9–10, 73 S.Ct. 528, 97 L.Ed. 727 (1953). This would create a significant separation of powers problem. *See* *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793–94 (D.C.Cir.1971) ("[N]o executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task."). Similarly, as the court stated in *EEOC v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373, 1375 (D.N.M.1974), "[w]hen the government or one of its agencies comes into court ... it is to be treated in exactly the same way as any other litigant. Appointment to office does not confer upon a bureaucrat the right to decide the rules of the game applicable to his crusades or his lawsuits."

E. The Sixth Amendment Does Not Require An Offer of Proof; It Requires Only A Good Faith Basis That The Witness Will Have Evidence Favorable To The Defense.

The text and historical tradition do not require the defendant or his counsel to make an offer of proof as a condition to calling defense witnesses. *But see, United States v. Valenzuela-Bernal*, *supra* at 867 (requiring defendant to make some plausible showing of how testimony would have been material and favorable to the defense); *Cf. Vazquez-Rosario, supra* at 572 (government moved to quash even when defendant attempted to comply with *Touhy*).

First, the *Burr* Court accepted defendant's statement under oath that he had "great reason to believe [that certain documentary evidence] may be material to his defense." *Burr, supra* at 31. No such statement, however, was necessary in connection with the subpoena *ad testificandum*.

Second, since the Founders believed that the Sixth Amendment placed the defendant on an "equal footing" with the government, requiring the defendant to make offers of proof for its witnesses when no such requirement is imposed on the government would be inconsistent with the Sixth Amendment's text and historical background which the *Bahamonde* Court recognized ("it is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State"). *Bahamonde supra* at 1229.

Finally, the government cannot affirmatively prove that an Offer of Proof was part of the historical tradition that limited the Sixth Amendment's Compulsory Process Right. *Bruen, supra* at 2127 (once defendant proves that the text of the … Amendment applies to a person and his proposed conduct…the government … bears the burden to proof: it "must affirmatively prove that its … regulation is part of the historical tradition that delimits the outer bounds of the right…." *Id.*

F. Courts That Have Held A Defendant Must Comply With *Touhy* To Preserve His Compulsory Process Claim Are Legally Incorrect.

Some federal courts inexplicably have held that the *Touhy* applies to all testimony by federal employees. *See Soriano-Jarquin*, *supra* at 504; *Wallace*, *supra* at 929; *Marino, supra* at 1125; *Allen, supra* at 406. However, contrary to the 4th, 5th, 6th, and 10th Circuits, the Ninth Circuit has correctly concluded that "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *See United States v.*

Bahamonde, *supra* at 1229 *citing Wardius v. Oregon*, 412 U.S. 470 (1973);; see also *Andolschek, supra* at 506.

Indeed, the courts that claim that *Touhy* applies to criminal cases are saying, in effect, because you have not told us what you want to ask and why you think it matters, we will instruct the witness to ignore your subpoena. This is Alice-through-the-looking-glass jurisprudence. Moreover, standing legal analysis on its head, these same courts have taken the erroneous position that it is only by complying with the *Touhy* conditions that a defendant can preserve his entitlement to a judicial determination of the constitutionality of the regulations. *Marino*, *supra* at 1125.

However, if Crater complied with these procedures, as the government requests, he would have waived his constitutional objections to these procedures. Indeed, if Crater had complied with the regulations in this case and the DOJ and/or the CFTC refused to honor the subpoenas anyway, Crater would have waived his objections on Sixth Amendment grounds and would have been relegated to objecting to noncompliance with the regulations themselves. Only by refusing to comply with these regulations, as Crater has done, did he preserve his Sixth Amendment right to compulsory process claim that the *Touhy* regulations constitute an unlawful burden upon his Sixth Amendment right – a claim that neither the *Touhy* Court nor any other Court, to my knowledge has reached to date. Thus, at the end of the day, this Court may conclude that the conditions precedent imposed by *Touhy* and its progeny are constitutionally permissible, or it may conclude the opposite. In any event, the issue is squarely before this Court and the text and historical background of the Sixth

Amendment compels the conclusion that the 4th, 5th, 6th, and 10th Circuits are legally incorrect.

II. THE DISTRICT COURT'S VIOLATION OF DEFENDANT'S SIXTH AMENDMENT COMPULSORY PROCESS RIGHT RENDERED DEFENDANT'S TRIAL FUNDAMENTALLY UNFAIR AND WARRANTS A NEW TRIAL.

In *Chapman v. California*, 386 U.S. 18 (1967), the Court made clear that "[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. *Id.* at 22. In *Chapman*, the Court announced a very exacting test that must be satisfied before a constitutional error could be regarded as harmless. The burden is on the government to establish the harmlessness of the error and reversal is required unless the court is "able to declare a belief that it was harmless beyond a reasonable doubt. *Id*. at 24.

Since *Chapman*, the Court has refined the analysis by distinguishing between "trial error," which can be found to be harmless, and "structural error," which cannot be harmless. *See Arizona v. Fulminante*, 499 U.S. 279 (1991). In *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017) the Court explained "the purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any trial." *Id*. at 1907. The *Weaver* Court explained that there are three different rationales for why an error is deemed structural: "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but

instead protects some other interest," such as the right of self-representation; "Second, an error has been deemed structural if the effects are simply too hard to measure," such as a right to counsel of choice; "Third, an error has been deemed structural if the error always results in fundamental unfairness," such as a complete denial of counsel to an indigent or a flawed reasonable-doubt instruction. *Id.* at 1983.

A. The District Court's Exclusion Of Three Defense Witnesses Was A Structural Error That Was Fundamentally Unfair And Requires Reversal Of Defendant's Convictions.

Applying the *Weaver* tests to this case makes clear that the district court's exclusion of three defense witnesses was a structural error and not harmless error beyond a reasonable doubt. As noted above, the exclusion of these witnesses made defendant's trial fundamentally unfair as he was deprived of a constitutional due process right. Moreover, it is impossible to measure the effect of the district court's decision to prevent defendant from calling these witnesses in his case-in-chief. This is particularly important where the evidence of defendant's guilt was not overwhelming. Finally, violating defendant's Compulsory Process Right will always result in fundamental unfairness particularly when said deprivation went to the essence of defendant's due process rights.

Accordingly, because the government cannot carry its burden to establish the harmlessness of the error, reversal and a new trial is required.

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT AND THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING IT.

Resolving the conflicts in the circuits is critically important. Beyond addressing the fundamental unfairness of defendant's trial, review is warranted to

preserve the balance between a defendant's ability to put forth an adequate defense. This case presents the ideal opportunity to correct the error inherent in applying *Touhy* regulations to criminal cases. The lower courts have waited more than 70 years for some guidance from this Court in this constitutional issue. It is time for this Court to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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