

No. A-\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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JESUS ARLEY MUNERA-GOMEZ,  
*Applicant,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Application for Extension of Time

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI**

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To the Honorable Ketanji Brown Jackson, Associate Justice of the United States Supreme Court and Circuit Justice for the First Circuit:

Pursuant to Supreme Court Rule 13.5, applicant Jesus Arley Munera-Gomez respectfully requests a 59-day extension of time, until Friday, November 3, 2023, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the First Circuit issued its opinion in this case (Appendix, *infra*) on June 7, 2023. Unless extended, the time for filing a petition for a writ of certiorari will expire on September 5, 2023. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

This case raises important questions about defendants' Sixth Amendment right to have compulsory process for obtaining defense witnesses and their Fifth

Amendment right to a fair trial. More specifically, this case concerns the circumstances under which the need for a defense witness's exculpatory testimony may warrant granting use immunity for that testimony, where without immunity the government will be able to block the defense witness from testifying—and exonerating the defendant—by threatening to prosecute him, too.

1. This case squarely presents a question that has divided the courts of appeals. Mr. Munera-Gomez was charged with drug offenses and raised an entrapment defense, but the key witness whose testimony he needed could not testify without a grant of use immunity.

In August 2019, a confidential source of the U.S. Drug Enforcement Administration (DEA) approached Mr. Munera-Gomez in a bar. App. 2. After the confidential source pressured Mr. Munera-Gomez on several occasions, Mr. Munera-Gomez agreed to conduct a drug transaction with the confidential source and others who turned out to be undercover DEA agents, and he was arrested. App. 3, 5-6.

The confidential source later testified that he had approached Mr. Munera-Gomez because he recognized his nickname, “Pikachu,” as belonging to someone who had supplied cocaine to one of the confidential source's former business partners, Fabio Quijano, in 2016 and 2017. App. 3, 6. When interviewed, however, Quijano confirmed that he knew Mr. Munera-Gomez but denied that Mr. Munera-Gomez conducted drug transactions with him. But Quijano was under indictment for other offenses he committed between 2018 and 2020, App. 7, so he was likely to invoke the Fifth Amendment privilege against self-incrimination if called to testify. Mr.

Munera-Gomez therefore requested use immunity for Quijano. After the government refused to confer this immunity, Mr. Munera-Gomez requested that the district court order the government to do so. The district court denied Mr. Munera-Gomez's request at the final pretrial conference, reasoning that there was no evidence that the government was withholding immunity "in an attempt to distort the factfinding process." App. 7.

At trial, Mr. Munera-Gomez conceded the underlying offense conduct, but he raised an entrapment defense. App. 7. After a four-day jury trial, Mr. Munera-Gomez was convicted of one count of attempting to possess with intent to distribute five kilograms or more of cocaine and was sentenced to 120 months of imprisonment. App. 2, 7-8.

On appeal, Mr. Munera-Gomez argued, among other things, that the district court committed constitutional error in failing to order the government to grant Quijano use immunity. *See* App. 8. Mr. Munera-Gomez argued that Quijano's testimony would have directly contradicted the confidential source's testimony with respect to Mr. Munera-Gomez's predisposition (or lack thereof) to engage in drug trafficking, a key aspect of the entrapment defense. App. 8.

The court of appeals affirmed. Relevant here, it rejected Mr. Munera-Gomez's use-immunity argument, reasoning that, in the First Circuit, a "district court may circumvent the government's discretionary call [on providing immunity] only in the rare circumstance that a prosecutor abuses his or her discretion by intentionally attempting to distort the fact-finding process." App. 9 (citation, alteration, and

quotation marks omitted). Although the First Circuit acknowledged that its precedent on use immunity takes a narrower view of defendants' due process rights than the Ninth Circuit's precedent, App. 11 n.3, the court concluded that the government's "stated reason for refusing to give Quijano use immunity -- avoiding potential obstacles to Quijano's prosecution on pending federal charges -- [was] exactly the type of rationale that [the court has] continuously recognized as fending off a claim of prosecutorial misconduct," App. 10. The First Circuit noted that it had "repeatedly rejected" the "effective defense" theory—a theory that "posits that a strong need for exculpatory testimony can override even legitimate, good faith objections by the prosecutor to a grant of immunity"—and explicitly "reject[ed]" the Ninth Circuit's approach "[t]o the extent the Ninth Circuit's doctrine embraces the effective defense theory." App. 11 (citation omitted).

2. The courts of appeals are split on when the government violates the Constitution by withholding use immunity and thus causing an exculpatory witness not to testify. Use immunity allows a defendant to exercise his right to compulsory process, and compel a witness to testify, because the grant of immunity avoids any Fifth Amendment issue. *See Kastigar v. United States*, 406 U.S. 441, 453 (1972) (use immunity "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect" (emphasis added)). But in the First, Second, Fourth, Sixth, Seventh, and Tenth Circuits, the government is essentially free to withhold use immunity from even an exculpatory defense witness, unless the government's actions rise to the level of prosecutorial misconduct. By contrast, in the Third and Ninth

Circuits, due process and the Sixth Amendment may require use immunity in circumstances where the prosecution did not act in bad faith, such as when the testimony would have been essential and clearly exculpatory or would have directly contradicted a government witness's testimony, respectively.

a. As the First Circuit itself recognized, it stands on one side of a clear circuit "split." See App. 11 & n.3 (noting disagreement with Ninth Circuit). Defendants prosecuted within the First Circuit have narrower due process and Sixth Amendment rights. They are unable to show that the government's denial of use immunity violated their due process and Sixth Amendment rights unless the prosecutor "intentionally attempt[ed] to distort the fact-finding process" by, for instance, "purposefully withhold[ing] use immunity to hide exculpatory evidence from the jury," App. 9 (quoting *United States v. Angiulo*, 897 F.2d 1169, 1191-92 (1st Cir. 1990); *United States v. Berroa*, 856 F.3d 141, 159 (1st Cir. 2017)), or by "intimidat[ing] or harass[ing] potential defense witnesses to discourage them from testifying," *Angiulo*, 897 F.2d at 1192. The Second, Fourth, Sixth, Seventh, and Tenth Circuits have similarly construed defendants' rights this narrowly. See, e.g., *United States v. Dalton*, 918 F.3d 1117, 1131 (10th Cir. 2019) (leaving "open the possibility" of courts requiring governments to confer immunity "where the prosecutor's denial of immunity is a deliberate attempt to distort the fact finding process" (citation omitted)); *United States v. Stewart*, 907 F.3d 677, 685 (2d Cir. 2018) (requiring defendants to show that "government has used immunity in a discriminatory way, has forced a potential witness to invoke the Fifth Amendment

through overreaching, or has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining tactical advantage through such manipulation” (citation omitted); *United States v. Abbas*, 74 F.3d 506, 512 (4th Cir. 1996) (requiring defendant to “make[] a decisive showing of prosecutorial misconduct or overreaching”); *United States v. Taylor*, 728 F.2d 930, 935 (7th Cir. 1984) (requiring showing that “prosecutor intends to use his authority under the immunity statute to distort the judicial fact-finding process”); *see also United States v. Emuegbunam*, 268 F.3d 377, 401-02 & n.5 (6th Cir. 2001) (questioning whether immunity claims are cognizable and leaving open possibility of effective-defense theory but ultimately requiring defendant to “establish that the prosecution has deliberately distorted the judicial fact-finding process”); *United States v. Dierling*, 131 F.3d 722, 732-33 (8th Cir. 1997) (concluding that district court did not err in “declining to grant judicial immunity” where “there was no deliberate distortion of the truth-finding process by the government, and no government misconduct or threats to witnesses”).

b. On the other side of the split, the Third and Ninth Circuits have concluded that denying use immunity for defense witnesses in certain circumstances may violate defendants’ due process and Sixth Amendment rights, even where the prosecution did not act in bad faith. The Ninth Circuit has recognized that the “right to compel use immunity because of selective denial of immunity is a right to due process ‘inside the courtroom,’ where the Constitution focuses [the court’s] attention on the fundamental fairness of the trial more than on the intentions—whether good or bad—of the prosecution.” *United States v. Straub*, 538 F.3d 1147, 1161 (9th Cir.

2008). Accordingly, defendants' due process and Sixth Amendment rights allow "defendant[s] to compel use immunity" if they can show that the defense witness's testimony would have been relevant and "either (a) the prosecution intentionally caused the defense witness to invoke the Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding process; *or* (b) 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." *Id.* at 1162 (emphasis added). Put differently, "a showing that the selective denial of immunity had the effect of distorting the fact-finding process is sufficient." *Id.* at 1158.

The Third Circuit likewise has concluded that "ensur[ing] the defendant's right to present an effective and meaningful defense when the prosecutor refuse[s] to immunize a witness" requires more than allowing use immunity in only cases involving prosecutorial "acts taken with an intent to distort the factfinding process." *United States v. Quinn*, 728 F.3d 243, 247-48 (3d Cir. 2013). Instead, prosecutorial misconduct extends beyond prosecutorial "intent" or "bad faith" and encompasses the prosecution's decision to deny use immunity where the defense witness's testimony is "clearly exculpatory" and "essential" and there are "no strong governmental interests which countervail against a grant of immunity." *Id.* at 247-48, 251, 260.

3. Applicant respectfully requests a 59-day extension of time to file his petition for a writ of certiorari from the First Circuit's decision, to and including November 3, 2023. An extension of time is warranted because the undersigned counsel from Goodwin Procter LLP were recently retained, on a pro bono basis, to assist with preparing a petition for a writ of certiorari in this matter. An extension of time is therefore warranted to allow Mr. Munera-Gomez's new counsel to familiarize themselves with the record and the relevant law and to prepare and file the petition. Pro bono counsel have a number of other professional and personal commitments that further justify the extension, including two oral arguments in the Ninth Circuit's Alaska sitting on August 15, 2023 (and the associated travel); a preliminary-injunction hearing in the District of Minnesota on August 30, 2023; a potential oral argument in the Third Circuit the week of October 2, 2023; and an oral argument in the Fourth Circuit on October 24, 2023.

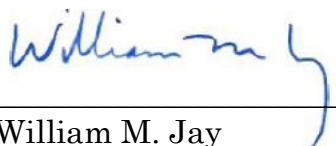
For the foregoing reasons, applicant respectfully requests that the Court extend the time to file a petition for a writ of certiorari to November 3, 2023.

August 21, 2023

Respectfully submitted,

Murat Erkan  
ERKAN & ASSOCIATES, LLC  
300 High St.  
Andover, MA 01810  
*murat@erkanlaw.com*  
(978) 474-0054

*Counsel for Applicant*  
*Jesus Arley Munera-Gomez*

  
\_\_\_\_\_  
William M. Jay  
*Counsel of Record*  
Andrew Kim  
Rohiniyurie Tashima  
GOODWIN PROCTER LLP  
1900 N Street, N.W.  
Washington, DC 20036  
*wjay@goodwinlaw.com*  
(202) 346-4000