No. 16-1190

In The

Supreme Court of the United States

MICHAEL DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. THE DUE PROCESS QUESTION IS IMPORTANT AND RECURRING.

The government[1] does not dispute the significance of the question presented. In complex federal criminal cases, witnesses with any involvement in the underlying events routinely assert their Fifth Amendment privilege. 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) (quotations and ellipsis omitted; emphasis in original). Prudent counsel, wishing to prevent their clients from becoming "ensnared," advise them to invoke the Fifth Amendment's protections, even when the prospects for prosecution are remote.

Witnesses who assert the Fifth Amendment privilege are categorically unavailable to the defense. No matter how powerfully exculpatory a witness' testimony might be, the defendant's Fifth and Sixth Amendment right to present a defense cannot overcome the privilege, and neither the defendant nor the district court can grant the witness immunity. The government, by contrast, has the power to obtain immunity for witnesses who invoke the privilege and to compel them to testify. This one-sided power allows the government to

[1] Brief for the United States in Opposition ["BIO"].

shape the evidence the jury hears--to ensure that the jury hears from privilege-asserting witnesses who inculpate the defendant and that it does not hear from privilege-asserting witnesses who exculpate the defendant.

In most circuits--the circuits that refuse to find a due process violation from refusal to immunize a defense witness absent an intent to distort the fact-finding process--the prosecution's power to immunize inculpatory witnesses and refuse immunity to exculpatory witnesses is effectively unreviewable. According to our research (and, apparently, the government's), only one district court in those circuits has ever found a due process violation from the government's refusal to immunize a defense witness, and the Second Circuit vacated that decision.[2] In those circuits, immunity for defense witnesses is not merely "exceptional" (BIO 6), but non-existent. Only in the Third and Ninth Circuits--which do not require that the prosecutor intend to distort the fact-finding process--have courts found defense witness immunity required as a matter of due process. Only in those circuits, in other words, is there any possibility of remedying the enormous evidentiary advantage that the power to obtain immunity affords the prosecution.[3]

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[2] *United States v. De Palma*, 476 F. Supp. 775 (S.D.N.Y. 1979), *vacated*, *United States v. Horwitz*, 622 F.2d 1101 (2d Cir. 1980).

[3] The government notes that this Court has denied the writ in the past on defense witness immunity questions. BIO 5 & n.1. This case, however, presents a confluence of circumstances the others may have lacked: there is a clear, entrenched circuit split, the issue was preserved below and addressed in detail by the district court and the court of appeals on a full factual

II. THE CIRCUITS ARE DEEPLY SPLIT.

The government downplays the extent of the circuit split. BIO 10-14. But that split is clear, deeply entrenched, and long-standing. By now almost all circuits have weighed in. Only this Court's intervention will remedy the current disparity, under which defendants in the Third and Ninth Circuits can establish a due process violation from the government's refusal to grant immunity to a defense witness by making the requisite showing, and defendants in all other circuits can never establish a due process violation under any circumstances.

The government suggests that the Third and Ninth Circuit standards do not differ significantly from the standards in the circuits that require prosecutorial misconduct or bad faith. BIO 12-13. That is incorrect. The Seventh Circuit panel in this case held 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.'" App. 18 (quoting *United States v. Burke*, 425 F.3d 400, 411 (7th Cir. 2005)); *see, e.g., United States v.*

(continued…)

record, and the question is outcome-determinative. In any event, this Court has often let issues percolate at length before addressing them. *See, e.g., Skilling v. United States*, 561 U.S. 358 (2010) (Court addresses scope of honest services fraud statute after repeatedly denying the writ); *Sorich v. United States*, 555 U.S. 1204, 1206-08 (2009) (Scalia, J., dissenting from the denial of certiorari) (urging Court to review scope of the honest services fraud statute in light of the conflicts among the circuits and the confusion in the lower courts).

Washington, 318 F.3d 845, 855 (8th Cir. 2003) (same); *United States v. Castro*, 129 F.3d 226, 232-33 (1st Cir. 1997) (same).

The Third and Ninth Circuits, by contrast, reject any requirement that the prosecutor intended to distort the fact-finding process. In *United States v. Quinn*, 728 F.3d 243 (3d Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1872 (2014), the Third Circuit rebuffed the government's argument that no due process violation could occur absent a showing of "bad faith on the part of the Government." *Id.* at 260. The court emphasized that its "concern is with the effect of the prosecutor's actions on the process afforded the defendant." *Id.* The standard it adopted, therefore, permits a due process violation to be found both where the prosecutor committed "deliberate wrongdoing" and where the prosecutor engaged in "overzealous advocacy that distorts the factfinding function of a criminal trial." *Id.*

Similarly, the Ninth Circuit held in *United States v. Straub*, 538 F.3d 1147 (9th Cir. 2008), that to establish a due process violation based on selective immunity grants, the defendant does not have to show that the prosecution denied immunity to a defense witness "for the very purpose of distorting the fact-finding process." *Id.* at 1160. Rather, it is enough under *Straub* if the grant of immunity to a prosecution witness but not to a contradictory defense witness had "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.

Thus, the Third and Ninth Circuits focus on the *effect* of the prosecutor's refusal to immunize a defense witness on the fact-finding process, while the Seventh Circuit and most other circuits focus on the prosecutor's *intent* in refusing immunity. As noted above, this is not an academic difference. Defendants in the Third and Ninth Circuits can obtain immunity for defense witnesses in cases where fairness demands it. Defendants in other circuits can never obtain immunity for defense witnesses, regardless of the effect on the fact-finding process. Which side of this split a defendant is on can mean the difference between conviction and acquittal.

III. THIS CASE IS AN EXCELLENT VEHICLE.

The government maintains that this case presents a poor vehicle for resolving the circuit split. BIO 15-18. The government does not contend that petitioner failed to preserve the due process issue below, or that the lower courts did not fully consider it, or that the record is not adequately developed. Nor has the government maintained, either in the court of appeals or in this Court, that the refusal to immunize Gigi Rovito was harmless error.

The government contends instead that petitioner could not establish a due process violation even under the Third and Ninth Circuit standards. But those standards are fact-intensive and require careful analysis of the record. In accordance with its usual practice, the Court should grant the writ, determine the correct standard, and then--if it

rejects the Seventh Circuit's "intent to distort the fact-finding process" test--remand for further consideration. *See, e.g., Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (vacating and remanding for further consideration under correct intellectual disability standard); *Boulware v. United States*, 552 U.S. 421, 439 (2008) (vacating and remanding for further consideration under correct return of capital standard).

In any event, the government misreads *Quinn* and *Straub*. Under the *Quinn* standard, the government insists it had a "strong countervailing reason" for refusing immunity to Gigi Rovito--its asserted "interest in preventing Gigi Rovito from perjuring himself." BIO 15 (quoting *Quinn*, 728 F.3d at 248). But *Quinn* requires the government's "countervailing reason" to be "unrelated to the defendant's trial." 728 F.3d at 259. The most common such reason is the government's intent to prosecute the witness in the future.

Here, the government has never suggested that it intends to prosecute Gigi Rovito, or that immunizing him would interfere with any such prosecution. The government asserts only its purported concern that Gigi Rovito would perjure himself. Because that concern is not "unrelated to [petitioner's] trial," it does not constitute a "strong countervailing reason" under *Quinn*. As the petition explains (at 23-24), concerns that a defense witness might commit perjury should never suffice to deny the witness immunity. The government has ample tools--including cross-examination, the presentation of contrary evidence, and the potential for a perjury

prosecution--to avoid the risk of "fabricated evidence." BIO 9.

The government's purported perjury concerns are especially weak with respect to Gigi Rovito. The evidence on which it relies to establish the falsity of his proposed testimony (summarized at BIO 4) consists primarily of the testimony of the government's cooperating witnesses, whose own credibility is very much in doubt. The government also cites cell phone records, but those records merely show that petitioner and Gigi Rovito spoke regularly, including on the night petitioner allegedly delivered an envelope containing cash. The records say nothing about the content of the calls. The government ignores evidence that powerfully supports Gigi Rovito's proposed testimony: his insistence to the FBI agents that they could take his restaurant and arrest him if his fingerprints were found on the envelope in question, App. 53, and the fact that neither his fingerprints nor petitioner's were found on the envelope, TT412, 435. It is noteworthy, given the government's insistence that Gigi Rovito's testimony would have been perjurious, that it has never prosecuted him under 18 U.S.C. § 1001 for giving that version of events to the FBI.

The government contends as well that Gigi Rovito's proffered testimony was not "clearly exculpatory" under *Quinn*. BIO 15 (quoting *Quinn*, 728 F.3d at 262). That is incorrect. The government's theory at trial rested on a chain that ran from petitioner Davis to Gigi Rovito to John Rovito to the actual leg-breakers, Paul Carparelli and George Brown. TT1798-99 (government's

closing argument advancing this theory). The government maintained, for example, that on July 11, 2013 Davis delivered a down payment of $5000 cash in an envelope to Gigi Rovito at Gigi's restaurant. According to the government, Gigi passed the envelope to John Rovito, who passed it to Carparelli. *E.g.*, TT1429-30, 1799. The government contended that communications likewise passed via this chain: Davis talked with Gigi Rovito; Gigi Rovito talked with John Rovito; John Rovito talked with Carparelli; and Carparelli talked with Brown. TT1797-98. If the jury believed Gigi Rovito's testimony that he had no part in delivering cash or otherwise arranging an attack on R.J. Serpico, the government's chain would have been broken, and its theory would have collapsed. It is hard to imagine more clearly exculpatory evidence.

As for *Straub*, the government maintains that, because John Rovito was not an ideal government witness, the refusal to immunize Gigi Rovito did not "ha[ve] the 'effect of so distorting the fact-finding process that [petitioner] was denied his due process right to a fundamentally fair trial.'" BIO 17 (quoting *Straub*, 538 F.3d at 1162). But it was John Rovito who testified that Gigi Rovito gave him an envelope to take to Carparelli. TT1418, 1421-22, 1429-30, 1530, 1569. It was John Rovito who testified that the beating was at the request of Gigi's friend "Mickey." TT1425, 1429. And it was John Rovito who testified that he learned either from Gigi or from Carparelli that Serpico was to be beaten. TT1417, 1520-21. This testimony was critical to the government's "chain" theory, and Gigi Rovito would have refuted every bit of it. Gigi's testimony would

have "directly contradicted" John's testimony, and the absence of his testimony had the "effect of so distorting the fact-finding process that [petitioner] was denied his due process right to a fundamentally fair trial." *Straub*, 538 F.3d at 1162. The jury should have heard Gigi Rovito's testimony.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2017