20-3825(L)

20-3876(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

ALEXANDER MELENDEZ, AKA KIKI,
GYANCARLOS ESPINAL, AKA FATBOY, AKA SLIME,

Defendants,

ARIUS HOPKINS, AKA SCRAPPY, AKA SCRAP,
THERYN JONES, AKA OLD MAN TY, AKA TYBALLA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE*
NEW YORK COUNCIL OF DEFENSE LAWYERS
IN SUPPORT OF DEFENDANT-APPELLANT THERYN JONES
[REDACTED]

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 350 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal and state courts of New York. NYCDL's mission includes protecting the constitutional rights of defendants, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

NYCDL files this amicus brief in support of Defendant-Appellant Theryn Jones's argument on the issue of defense witness immunity.[2] NYCDL has a particular interest in this case because it directly implicates NYCDL's core concerns with protecting the procedural due process rights of criminal defendants.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), NYCDL certifies that (1) this brief was authored entirely by its counsel, and not by counsel for any party, in whole or part; (2) no party and no counsel for any party contributed money intended to fund preparing or submitting the brief; and (3) apart from NYCDL and its counsel, no other person contributed money intended to fund preparing or submitting the brief.

[2] Motions requesting leave of court to file this proposed brief, pursuant to Fed. R. App. P. 29(a)(3), and to file this brief with redactions, are being filed simultaneously herewith.

PRELIMINARY STATEMENT

NYCDL submits this amicus brief to draw the Court's attention to the troubling effort by the government in this case to use its power to grant immunity in a discriminatory fashion and withhold material and exculpatory evidence from the jury. For the criminal justice system to produce results that are both fair and accurate, and for defense attorneys to play their proper role in the adversary system, all competent exculpatory evidence must be put before the jury. This did not happen here.

In this case, the government debriefed a witness, [redacted], who told prosecutors and agents that Theryn Jones, a defendant who proceeded to trial, was not a participant in the murder of Shaquille Malcolm. When the government indicted and tried Jones for this murder, it gave cooperation agreements and immunity to those witnesses who *implicated* Jones. But when Jones asked the government to immunize [redacted] so that Jones could present [redacted]'s *exculpatory* testimony to the jury—testimony that directly contradicted that of the government's chief cooperating witness—the government refused.

The government's refusal to immunize [redacted] was not premised on any legitimate law enforcement concern. [redacted] had already pleaded guilty to the Malcolm murder and was facing a lengthy prison sentence. The government's stated rationales for opposing immunity—that [redacted] might well have committed other

crimes to which he had not yet confessed, or might lie at trial—were reasons that would apply in every case in which a defendant might seek to immunize a witness. Balancing the vital exculpatory testimony from [redacted] against the insubstantial government interest, as this Court has instructed district courts to do, it was error for the district court not to compel the government to immunize [redacted] for his trial testimony.

Nothing is more crucial to the fairness of the trial process than to allow defendants to present evidence from witnesses who will exculpate them of the charged crime. For this reason, this Court has long held that due process forbids the government from using its powers of immunity in a discriminatory manner to prevent the jury from hearing material, exculpatory testimony. Where there are valid law enforcement reasons for denying immunity, the defendant will have no cause to complain. But where, as here, any law enforcement concern was insubstantial, and the testimony is so clearly exculpatory and central to the defendant's case, due process demands that the district court afford a remedy.

Leaving Jones without a remedy would send a message to the government that it is permitted to keep exculpatory evidence from the jury even without a valid rationale, simply to insulate the credibility of its witnesses from legitimate attack and to prevent the defendant from presenting his case. Indeed, it would effectively render this Court's jurisprudence a dead letter, as it is difficult to see when defense

witness immunity would ever be required if the circumstances here are deemed insufficient. The NYCDL respectfully asks this Court to reverse the district court's denial of Jones's application for defense witness immunity.

RELEVANT BACKGROUND

A. The Government's Reliance On Immunized Testimony To Attempt To Link Jones To The Malcolm Murder

Theryn Jones was tried for planning the murder of Shaquille Malcolm in furtherance of a narcotics conspiracy. (A. 19-20, 342). At trial, the government sought to prove that both Jones and [redacted], another drug dealer, ordered Malcolm's murder, and that at their direction, cooperating witness Alexander Melendez and Jones's co-defendant Arius Hopkins together shot and killed Malcolm. (A. 350, 354). Jones, an alleged member of the "MacBallas" gang (A. 344), allegedly ordered the murder because Malcolm had been selling drugs to Jones's customers in the Allerton neighborhood of the Bronx (A. 343). Separately, [redacted], a member of the "New Jack City" gang—which Melendez, Hopkins, and the other players were members of—purportedly wanted Malcolm dead because Malcolm slashed [redacted]'s face at a bodega as part of an unrelated drug dispute. (A. 115-17, 143-52, 202).

The government's case primarily rested on the testimony of a single cooperator, Melendez, who testified pursuant to an agreement in which the government immunized him from further prosecution for a host of unrelated crimes

so long as he gave truthful testimony and otherwise complied with the terms of his cooperation agreement. (A. 102, 184, 438-44). At trial, Melendez testified that [redacted] and Jones both asked Melendez to kill Malcolm. (A. 128-29; 153-54). Critically, Melendez testified that Jones and [redacted] met and spoke before the Malcolm murder. For instance, he testified that Jones called [redacted] after the slashing incident at the bodega, and that [redacted] came to meet both Jones and Melendez, at which point [redacted] reiterated that he would pay for Melendez and Hopkins to kill Malcolm. (A. 153-54).

Apart from Melendez, the only other testimony to implicate Jones came from another cooperating witness, Jamal Costello, who testified pursuant to a non-prosecution agreement that provided him with immunity for more than a dozen shootings, stabbings, robberies, and other acts of violence. (A. 445-47). Costello had no direct involvement in the murder. His relevant testimony was limited to stating that Jones was displeased with an unnamed individual who was selling drugs on Jones's turf and that Jones once said Hopkins had "handled" some unidentified problem for him. (A. 238-39).

On the government's motion, the district court granted statutory use immunity to another witness, Joel Riera, pursuant to 18 U.S.C. § 6003. (A. 224-31, 180-81). Riera testified about surveilling Malcolm on the night of the murder. (A. 224-31). The government used this testimony to bolster Melendez's credibility. (A. 355).

B. [redacted]'s Statements In Proffer Sessions That Jones Played No Role In Malcolm's Murder

Prior to trial, [redacted] met with the government for proffer sessions in an attempt to cooperate. (A. 368; SA 36-38). In those sessions, [redacted] made a variety of detailed and consistent statements that Jones had nothing to do with Malcolm's murder.

Most critically, [redacted] told the government that [redacted], thus directly contradicting Melendez's trial testimony. (SA 36). Indeed, [redacted] told the government that [redacted] (SA 36-39). [redacted] said [redacted] the place where Melendez claimed that he, Jones, and [redacted] had hatched the murder plot. (SA 39).

Not all of [redacted]'s testimony would have been to Jones's advantage. For example, [redacted] proffered that [redacted] (SA 37). He also would have testified that [redacted]. (A. 371; SA 31, 36). These points, however, Jones did not contest at trial. What Jones disputed was the allegation that he conspired to murder Malcolm, and on this point, [redacted]'s testimony was plainly exculpatory.[3]

[3] Even [redacted]'s statement to law enforcement that [redacted]

The government disbelieved [redacted] and made clear that, in order to obtain a cooperation agreement, [redacted] would have to implicate Jones. (SA 10). Even after learning it was not in his self-interest to do so, [redacted] reaffirmed his statements about [redacted], telling one of the case agents that [redacted]. (SA 39).

Ultimately, the government elected not to offer a cooperation agreement to [redacted]. [redacted] pleaded guilty without a cooperation agreement to conspiring to murder through use of a firearm and dealing drugs. [redacted]. The parties stipulated that the Guidelines range was 300 months' imprisonment because the otherwise applicable range was capped by the statutory maximum penalty of 25 years' imprisonment. *Id.* at 16:19-25.

C. The District Court's Denial Of Jones's Motion To Immunize [redacted]

Jones's counsel learned about [redacted]'s exculpatory testimony when the government produced its Jencks Act materials shortly before trial. Inasmuch as

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falls far short of the government's theory that Jones ordered Malcolm's murder—and was inconsistent with Melendez's account of how the murder was planned. (A. 160, 371; SA 31, 36-37).

[redacted] was not a government witness, the government likely produced [redacted]'s proffer notes because they were exculpatory of Jones and, therefore, constituted *Brady* material. (SA 2).

Jones thereupon subpoenaed [redacted] to testify at trial, and when [redacted] indicated that he would invoke his Fifth Amendment privilege against self-incrimination, Jones asked the district court to compel the government to grant [redacted] immunity so that he could testify notwithstanding his Fifth Amendment invocation. (SA 1-6). The government opposed Jones's motion (SA 7), and the district court denied it. (A. 296).

During a subsequent colloquy on a motion made by both Jones and Hopkins for a missing witness jury charge related to [redacted], the district court discussed its view of the impact of [redacted]'s hypothetical testimony. (A. 368; SA 28). The court explained that it believed [redacted]'s testimony would not have been exculpatory, but instead on balance "would have been significantly inculpatory." (SA 30-32). But in making this finding, the district court focused on the effect of [redacted]'s testimony on Hopkins and Jones *collectively*—in particular, what it viewed as the "extremely inculpatory" nature of [redacted]'s testimony *as to Hopkins*. (A. 370-71; SA 30-31).

The district court noted minimal inculpatory evidence *as to Jones*, saying only that it would have been "very damaging . . . because it helps establish motive for Jones to order the hit." (SA 31). The issue at trial, however, was not whether Jones

had a motive to orchestrate Malcolm's killing, but whether he in fact plotted with Melendez and [redacted] to do so. As to that issue, there can be no question that [redacted]'s testimony would have been highly exculpatory.

Similarly, the district court anticipated that, had [redacted] testified as a defense witness, he "would have been destroyed on cross-examination" in light of "the evidence of [his] lies in the proffer sessions, the admissions of lies by him in the proffer sessions." (A. 374-75, SA 34-35). But [redacted] had only admitted to [redacted] and [redacted] (SA 32-33); [redacted] never admitted to lying about *Jones*'s non-involvement. To the contrary, he reaffirmed his statements about Jones even after the government informed [redacted] that it had decided not to move forward with the cooperation process because it disbelieved him (SA 2, 10, 39), a fact that strongly *reinforced* the credibility of [redacted]'s testimony as to Jones.

The district court did not address whether the government had acted in a discriminatory fashion or discuss whether there were appropriate law enforcement reasons for not immunizing [redacted]. (A. 375). The district court's omission prompted the government, likely in anticipation of this very appeal, to request a ruling as to whether the government "used immunity in a discriminatory fashion." (A. 375). The district court then made a rote finding that, "for all the reasons [the

government] argued in [its] . . . letter," the government had not employed immunity in a discriminatory or improper manner. (A. 375).

ARGUMENT

THE DISTRICT COURT VIOLATED JONES'S DUE PROCESS RIGHTS IN DENYING THE APPLICATION FOR DEFENSE WITNESS IMMUNITY

A. Due Process Requires Immunity For Defense Witnesses Who Offer Material And Exculpatory Testimony Where the Government Has No Legitimate Law Enforcement Reason To Deny Immunity

This Court has long recognized that "the ability to give immunity to one witness but not another is a potentially powerful tool for a prosecutor, particularly in light of the prosecutor's ability to create incentives for witnesses to invoke the privilege against self-incrimination." *United States v. Ebbers*, 458 F.3d 110, 118-19 (2d Cir. 2006). When the government "us[es] the immunity device in a one-sided manner," the result can be "a basic unfairness that rises to the level of a violation of procedural due process." *United States v. Dolah*, 245 F.3d 98, 106 (2d Cir. 2001).

Given this potential for the deprivation of procedural due process, this Court has imposed "limits on the government's use of immunity." *Ebbers*, 458 F.3d at 119. In particular, there are circumstances in which the government must "choose between forgoing the testimony of an immunized government witness or granting use immunity to a potential defense witness." *Id*.

To determine whether those circumstances exist, the Second Circuit has established a two-part test: the defendant must show that "(1) the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment; and (2) the witness's testimony will be material, exculpatory and not cumulative and is not obtainable from any other source." *Id.* at 118 (quoting *United States v. Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982)); *accord, e.g., United States v. Stewart*, 907 F.3d 677, 685 (2d Cir. 2018); *United States v. Ferguson*, 676 F.3d 260, 291 (2d Cir. 2011); *Dolah*, 245 F.3d at 105.

As this Court recognized in *Ebbers*, the district court must apply a balancing test in deciding whether the government used immunity in a discriminatory way to prevent the defense from presenting exculpatory evidence. The district court should "find facts as to the government's acts and motives and then balance factors relating to the defendant's need for the evidence and its centrality . . . to the litigation." *Ebbers*, 458 F.3d at 118. The district court's factual findings are reviewed for clear error, and the balancing by the Court is subject to the abuse of discretion standard. *Id*.

While this Court has yet to find the "exceptional" circumstances necessary to reverse a conviction based on this type of deprivation of due process, *see Stewart*, 907 F.3d at 685, as described below, the factual circumstances are starkly different

from those in prior decisions. In each prior case, the Court held that at least one prong of the two-part *Ebbers* test was not satisfied because the defense either had not shown that the government acted in a "discriminatory" fashion or had not shown that the testimony was material and exculpatory.

This case is different. Here, the government failed to articulate a valid law enforcement reason for immunizing numerous government witnesses while not immunizing [redacted], who already pleaded guilty to murder and drug charges and was awaiting a lengthy sentence. And [redacted]'s testimony was not only clearly exculpatory, but vitally important to Jones's defense. It was clear error for the district court to conclude otherwise. Accordingly, both prongs of the *Ebbers* test are satisfied. By denying the immunity motion in these circumstances and allowing this trial to be a "one-sided" affair, the district court deprived Jones of "basic fairness," *Dolah*, 245 F.3d at 106, and his due process right to a fair trial.

B. The Government's Discriminatory Use Of Immunity Was Not Supported By Any Legitimate Law Enforcement Rationale

Ebbers requires that a defendant first show that "[t]he government has used immunity in a discriminatory way." 458 F.3d at 119. In this context, the word "discriminatory" does not require the government to have acted with some malicious intent. Rather, it means that the government selectively granted immunity to its own witnesses while withholding immunity to defense witnesses for the purpose of "gaining a tactical advantage." *Id.* at 118; *see also id.* at 119 (a "discriminatory"

grant of immunity "arguably may be no more than 'a decision . . . to confer immunity on some witnesses and not on others'") (quoting *Dolah*, 245 F.3d at 105-06). The government can avoid such a finding if the disparate treatment is "obviously based on legitimate law enforcement concerns." *Id.* at 119; *see also Stewart*, 907 F.3d at 685 (immunity decisions not discriminatory "if they are 'consistent with legitimate law enforcement concerns'") (quoting *Ebbers*, 458 F.3d at 119).

Unlike in *Ebbers* and this Court's prior decisions on this subject, the government's decision not to grant immunity to [redacted] was supported by no "legitimate law enforcement concerns." The facts presented in this appeal are nothing like the archetype that *Ebbers* permits, where the government denies immunity to a "target of the ongoing criminal investigation." *Ebbers*, 458 F.3d at 119. On the contrary, the government here opposed granting immunity to [redacted] *after* he had pleaded guilty and hence ceased to be a target of the government's investigation.

The district court did not even address this initial part of the *Ebbers* test until the government—recognizing that there might be a viable appeal on this immunity issue—urged the district court to make a finding. This led the district court to adopt the government's arguments wholesale without offering an explanation of its own. (A. 375). None of the reasons advanced by the government support the district

court's finding, and none of this Court's decisions involved facts anything like those presented here.

The law enforcement concern that is most commonly cited by this Court is the one discussed in *Ebbers*: that the witness in question is the subject of an ongoing investigation. *See Ebbers*, 458 F.3d at 120-22 (affirming the denial of immunity for witnesses who were "legitimate targets of the investigation" that remained uncharged without deciding the question of whether there was a discriminatory grant); *see also United States v. Rosen*, 716 F.3d 691, 704-05 (2d Cir. 2013) ("The Government may reasonably refuse to grant immunity where a witness is a potential target of criminal prosecution."); *United States v. Viloski*, 557 F. App'x 28, 35 (2d Cir. 2014) (affirming government's decision not to immunize a proposed defense witness who was under investigation for bank fraud); *Ferguson*, 676 F.3d at 291 (prosecutor did not overreach "by refusing to immunize a legitimate target of an ongoing investigation"). This Court also has held that it was not discriminatory for the government to have refused a defense request to immunize a co-defendant (the defendant's father) who engaged in additional uncharged criminal conduct and who also obstructed justice, and instead to immunize another, less culpable co-defendant. *See Stewart*, 907 F.3d at 684-86.

No such law enforcement concerns exist here. [redacted] had already pleaded guilty to the charges the government was pursuing, including the murder-related

charge, and he faced a Guidelines sentence of 25 years' imprisonment. The government's prosecutorial objectives were already met and granting immunity could have frustrated no prosecutorial aim that outweighed Jones's interest in presenting [redacted]'s testimony. All that the government could say is that [redacted]'s case was not over, because [redacted] had not yet been sentenced. (SA 13).

This is not sufficient under *Ebbers*. The question is not whether there is some theoretical possibility that immunity will prevent the defendant from receiving additional punishment. If this rationale were sufficient, then the government would never be required to immunize a witness, as there is always a possibility that a witness could face additional punishment for uncharged conduct.

In the only cases in which this Court has concluded that law enforcement concerns were present following a proposed defense witness's guilty plea and before sentencing, the witnesses would have needed to contradict their prior statements, thereby exposing themselves to charges of obstruction or perjury. *See, e.g.*, *United States v. Bahadar*, 954 F.2d 821, 824 (2d Cir. 1992) (holding that government's refusal to grant immunity was proper where the exculpatory statement required the witness's "willingness to change his story"); *United States v. Garcia*, 242 F.3d 368 (2d Cir. 2000) (summary order) (affirming denial of motion where witness would have necessarily had to contradict sworn statements made in his guilty plea allocution); *see also United States v. Guzman*, 332 F. App'x 665, 667 (2d Cir. 2009)

(affirming denial where witness already pleaded guilty to conspiring with the defendant to distribute drugs, rendering his testimony necessarily inculpatory as to the defendant).

That is not true for [redacted]. [redacted] provided consistent statements throughout his meetings with the government; there is no evidence that he wavered from his statement [redacted]. (SA 36-39). [redacted]'s exoneration of Jones was constant even after the government told him that he would be denied a cooperation agreement. (SA 10, 39). The government's claim, which the district court adopted (A. 372; SA 32), that [redacted] had proven to be untruthful in the proffers, related not to his statements about Jones, but to his own criminal conduct (SA 9).

The district court also embraced the government's purported concern that [redacted] had a motive to lie as a basis to deny the motion. (A. 373-74; SA 33-34). But [redacted]'s veracity was a question for the jury, not for the district court. Any concerns the government had on this score were properly addressed through cross-examination, not by precluding [redacted]'s testimony altogether. This has long been the rule when the government calls witnesses who have reason to lie or made prior untruthful statements in their proffers. *See, e.g.*, *Hoffa v. United States*, 385 U.S. 293, 311 (1966) ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility

of his testimony to be determined by a properly instructed jury."); *United States v. Johnson*, 452 F. Supp. 3d 36, 68 (S.D.N.Y. 2019).[4]

The government's other articulated reasons for opposing a grant of statutory use immunity are present in every case and so logically cannot suffice under *Ebbers*. For example, the government appears to contend that [redacted] may testify as to matters currently unknown to the government, as to which he has not already proffered, thus risking a broader, unknown grant of immunity. (SA 13). But this is always a risk when a witness is given statutory use immunity. Likewise, the possibility that [redacted] may perjure himself is a risk presented with every immunized witness, and every non-immunized witness as well. If an immunized witness does testify falsely at trial, the witness can be cross-examined, and he or she can be prosecuted by the government for perjury.[5]

[4] To the extent the government argues that its cooperation agreement process ensures that its witnesses will be truthful (SA 12-13), the Supreme Court long ago rejected that self-serving notion: "Common sense would suggest that [a cooperating government witness] often has a greater interest in lying in favor of the prosecution rather than against it. . . . To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

[5] The government's concerns about [redacted]'s truthfulness may be a sufficient reason not to agree to a cooperation agreement. But they have no bearing on whether or not he should be immunized.

The government also attempts to differentiate its decision to immunize witnesses from its decision to sign witnesses up as cooperators or offer non-prosecution agreements. (SA 12). This is a distinction without a difference. All of these are tools the government has at its disposal to put witnesses on the stand who otherwise would have invoked their Fifth Amendment rights and refused to testify for the government. And they accomplish that end by limiting the witness's criminal exposure and providing immunity from further prosecution (or, in the case of a non-prosecution agreement, any prosecution). Also, even assuming there are meaningful differences between these tools, it is irrelevant here: the government granted statutory immunity to at least one witness, Riera.

In the absence of a legitimate law enforcement concern, it is evident that the government's real concern about [redacted]'s testimony was a tactical one: that it would have undermined the testimony of their star witness, Melendez. A prosecutor's desire to keep exculpatory evidence from the jury is not a legitimate law enforcement concern. Therefore, this Court's standard for the discriminatory use of immunity has been satisfied.

C. [redacted]'s Testimony Was Material And Exculpatory On The Central Issue At Trial

There can be little doubt that [redacted]'s testimony was exculpatory in that it "tend[ed] to show" that Jones was not guilty. *Ebbers*, 458 F.3d at 119 (quoting *United States v. Gil*, 297 F.3d 93, 101 (2d Cir. 2002)); *see also United States v.*

Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (describing "exculpatory" evidence as that "going to the heart of the defendant's guilt or innocence"). "The bottom line at all times is whether the non-immunized witness's testimony would materially alter the total mix of evidence before the jury." *Ebbers*, 458 F.3d at 119.

In many cases, a witness who has asserted his or her Fifth Amendment rights has not yet previewed the substance of his or her testimony, making it difficult for a defendant to show that the testimony would be material and exculpatory. *See, e.g.*, *United States v. Triumph Cap. Grp., Inc.*, 237 F. App'x 625, 630 (2d Cir. 2007) ("[N]o one knows what Wilfred and Alfeld would have testified to since they refused to comment on the matter."). Other times, the testimony would be clearly inculpatory rather than exculpatory. *See, e.g.*, *Guzman*, 332 F. App'x at 668 (finding "no indication" that the testimony would be exculpatory).

Those scenarios are not this case. In an attempt to cooperate, [redacted] made statements to government agents that cleared Jones of the murder charge against him. [redacted]'s statements that [redacted] (SA 39), directly contradicted the government's theory of the case that *two separate people*, Jones and [redacted], directed Melendez's murder of Malcolm. Testimony from [redacted]—after he had already pleaded guilty to the crime—that Jones was not involved is the type of

exculpatory evidence that every defense lawyer hopes to uncover. That [redacted]'s testimony would have impacted the jury's deliberations is also not *post hoc* speculation; the jury even sent a note asking for [redacted] to testify. (A. 236).

Indeed, this expected testimony would have demolished the testimony of the government's key cooperator, Melendez, who said that [redacted] and Jones discussed the murder in advance. In the face of Melendez's testimony, [redacted]'s testimony plainly would have altered the mix of evidence before the jury, since the jury would have had to decide which witness to believe. *See also United States v. Straub*, 538 F.3d 1147, 1160 (9th Cir. 2008) ("In those cases where the government has liberally used its discretion to grant immunity to numerous witnesses, and the defendant's witness could offer relevant testimony that would directly contradict that of an immunized government witness, the trial may become so fundamentally unfair that the defendant's due process rights are implicated.").

While the district court recognized that [redacted]'s testimony was exculpatory, it erred when it negated the exculpatory nature of the testimony by pointing to other testimony [redacted] gave in his proffer that the district court labeled as inculpatory. That [redacted] made statements during his proffer that inculpated Hopkins, or suggested that Jones and Malcolm were rival drug dealers, did not lend any material support to the murder charge against Jones. The district court clearly erred in

concluding that these statements would outweigh or even significantly detract from the import of [redacted]'s exculpatory testimony.

The interests Jones sought to vindicate through his immunity application are central to the proper functioning of our criminal system of justice. "The right of an accused in a criminal trial . . . to call witnesses in [his] own behalf" is a component of "the right to a fair opportunity to defend against the State's accusations" and has "long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302*; see also Scrimo v. Lee*, 935 F.3d 103, 112 (2d Cir. 2019) ("The right to call witnesses in order to present a meaningful defense of a criminal trial is a fundamental constitutional right secured by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.") (quoting *Washington v. Schriver*, 255 F.3d 45, 55 (2d Cir. 2001)).

In *Washington v. Texas*, 388 U.S. 14 (1967), the defendant was convicted of murder in connection with the fatal shooting of his ex-girlfriend's new boyfriend. The defendant sought to present the testimony of a co-defendant, who had already been convicted of firing the fatal shot and who would have testified that the defendant sought to prevent the shooting. *Id.* at 15-16. Although indisputably relevant, material, and "vital to the defense," *id.* at 16, the testimony was barred

under a state rule that prevented co-participants in the same crime from testifying on behalf of one another. The Supreme Court struck down the rule as an impermissible infringement of "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"—a right that is "a fundamental element of due process of law." *Id.* at 19, 23. In pointing out the arbitrary nature of the rule, the Court underscored that an accused accomplice could be called *by the prosecution* to testify against the defendant, despite the fact that an accomplice "often has a greater interest in lying in favor of the prosecution rather than against it." *Id.* at 22.

The government's actions in this case subjected Jones to the very same type of injustice. As in *Washington*, Jones was prevented from introducing powerfully exculpatory testimony from a participant in the murder that, if believed by the jury, surely would have resulted in his acquittal. Yet the prosecution, through its selective use of immunity, was able to present *its* version of the facts through the testimony of *other* participants in the crime. The use of state power in this discriminatory manner is an affront to a central tenet of our criminal justice system—that "the truth is more likely to be arrived at by hearing the testimony of *all persons* of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court." *Id.* (emphasis added).

This is not to say that a defendant's right to present exculpatory testimony can override a witness's Fifth Amendment privilege against self-incrimination or require the government as a matter of routine to immunize potential defense witnesses. *See United States v. Turkish*, 623 F.2d 769, 77-743 (2d Cir. 1980). But it is to say that when analyzing whether the government's selective use of immunity runs afoul of due process, a critical consideration is the impact on the defendant's right to present exculpatory testimony—which is itself a cornerstone of due process. Where, as here, a decision to refuse immunity strikes at the core of the defendant's ability to present a defense, the government must present a legitimate justification for its selective use of immunity that goes beyond its tactical interest as a party in keeping damaging evidence away from the jury.

The Supreme Court has consistently required the state to provide such a sufficient justification for infringing upon a defendant's right to present a defense. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) ("[T]he Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose."); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (exclusion of competent, reliable evidence "central to the defendant's claim of innocence" is invalid "[i]n the absence of any valid state justification"); *Davis v. Alaska*, 415 U.S. 308, 320 (1974) (state's interest in protecting confidentiality of juvenile offenders was "outweighed by" and "must fall before" defendant's right "to seek out the truth in the process of

defending himself"). This Court's jurisprudence, in requiring district courts considering defense witness immunity applications to engage in a "balancing analysis," weighing the government's acts and motives in engaging in selective immunity against "the defendant's need for the evidence and its centrality . . . to the litigation," *Ebbers*, 458 F.3d at 118, keeps faith with this Supreme Court teaching.

As applied to the facts of this case, the outcome of this balancing analysis is clear. On the one hand, the government had no legitimate law enforcement reason for denying immunity to the already-convicted [redacted] while simultaneously immunizing numerous other participants to the crime. On the other hand, [redacted]'s testimony was of crucial importance to Jones in defending himself against a charge carrying a sentence of life imprisonment. Accordingly, this is a case where the government's discriminatory use of immunity has violated the defendant's due process right to a fair trial under the standard articulated by this Court.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's denial of Theryn Jones's application for defense witness immunity.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5746 words, calculating by the word processing system used in its preparation, and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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