Docket No. 11-1733

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA
v.
KEENAN DANAN QUINN,

Appellant

On Appeal From
The United States District Court for the Eastern District of Pennsylvania
(Crim. No. 2-09-cr-00720-002)
District Judge: Hon. Petrese B. Tucker

BRIEF ON REHEARING *EN BANC* FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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INTEREST OF THE AMICUS CURIAE[1]

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

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. This appeal represents two such issues:

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of amicus' intent to file this brief under Sup. Ct. R. 37.2(a) and consent to the filing of this brief.

- Whether government speculation that a witness might commit perjury can override the defendant's constitutional right of access to evidence that could contribute to the establishment of reasonable doubt?
- Whether the Court should clarify the definition of "exculpatory and essential" evidence described in *United States v. Smith* to include evidence that could contribute substantially to raising a reasonable doubt?

NADCL believes that its views on these important criminal justice questions will be of value to the Court.

I. GOVERNMENT SPECULATION THAT A WITNESS MIGHT COMMIT PERJURY CANNOT OVERRIDE THE DEFENDANT'S CONSTITUTIONAL RIGHT OF ACCESS TO EVIDENCE THAT COULD CONTRIBUTE TO THE ESTABLISHMENT OF REASONABLE DOUBT.

A. The Right to Compel Witnesses to Appear and Testify Provides a Necessary Balance Within the Adversary Process.

In the fight between the United States and the individual defendant in a criminal prosecution, the government is the heavyweight. Government prosecutors wield the power to initiate and conduct investigations, to determine whether and which charges to file, to convene and direct a grand jury, and to obtain and execute search warrants. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny,* 86 IOWA L. REV. 393 (2001). This power includes the ability to obtain the cooperation of witnesses by providing benefits to witnesses, including immunity from prosecution. See Peter A. Joy & Kevin C. McMunigal, *Are A Prosecutor's Responsibilities "Special"?*, 20 CRIM. JUST. at 58 (2005) (advocating for higher ethical duties to disclose favorable evidence to counter the asymmetry in resources between the prosecution and the defense); see also R. Cary, C. Singer and S. Latcovich, *Federal Criminal Discovery* at 5 (American Bar Association, 2011) (describing the imbalance in resources between the prosecutor and defense).

In an effort to prevent an injustice that might stem from this disparate distribution of power and resources the Due Process and Fair Trial guarantees of

the Fifth and Sixth Amendments provide the defendant with the tools necessary to present a defense. See Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring) ("Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution."). These Amendments guarantee to the accused the right to a trial by jury at which the government bears the burden of proving guilt beyond a reasonable doubt, while the defense has no burden of proving innocence. In re Winship, 397 U.S. 358, 364 (1970). Notwithstanding this lack of any evidentiary burden, the accused has a right to "a meaningful opportunity to present a complete defense," California v. Trombetta, 467 U.S. 479, 485 (1984), so as to attempt to create a reasonable doubt in the minds of the jury. Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Crane v. Kentucky, 476 U.S. 683, 689 – 690 (1986). The defendant's right to compel witnesses to testify is a critical component of the fundamental right to present a defense. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("few rights are more fundamental than that of an accused to present witnesses in his own defense"). But this right is illusory unless it encompasses both the defendant's right (and ability) to compel the witness' attendance and to present the witness' testimony to the jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) ("[C]riminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination

of guilt."); Taylor v. Illinois, 484 U.S. 400, 409 (1988) (the "right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact"). Thus, the defendant's access to evidence is necessary to ensure a just outcome. Wardius, 412 U.S. at 474. The right to present a defense, including the right to present witnesses, cannot be overridden by the government's mere speculative fear that the compelled testimony will be perjurious.

As mentioned above, one of the greatest advantages the government has at trial is its ability to compel witness testimony through statutory and informal grants of immunity. In Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980), this court addressed whether and when a trial court could compel a defense witness to testify. This Court held that a defense witness may be immunized by a trial judge in two instances: first, where the government's refusal to offer immunity demonstrated a "deliberate intent to disrupt the factfinding process"; second, where the proffered testimony would be "clearly exculpatory, … essential" and not countervailed by a "strong governmental interest." 615 F.2d at 972.[2]

[2] In the instant case, the Court has indicated its intent to "reconsider 'the effective defense theory of judicial immunity' doctrine first established by this Court in Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980)." Amicus, National Association of Criminal Defense Lawyers, joins in the arguments presented by defendant Quinn's counsel in support of this Court's reaffirmance of the doctrine of judicial immunity.

The prosecutor argued below, and in its brief here, Gov't Br. at 45 – 46, that immunity would provide the witness here, and co-defendants in general, an "opportunity to lie with impunity." Id. As discussed more fully, infra, defense witness immunity does not create the danger of perjury any more than does a grant of government immunity. Further, any danger that does exist is a concern for the judge, supervising the trial, and the jury, determining the credibility of the witness, not the prosecutor. The government's argument should be rejected and the trial court's ability to compel defense witnesses to testify, resulting in fruits and use immunity for the witness, should be affirmed.

B. The Government's Argument that it has an Interest in Preventing Perjury Misconstrues the Role of the Prosecutor.

The prosecution's argument that the government's interest in preventing an immunized witness from possibly testifying falsely outweighs the defendant's right to present potentially favorable testimony is a usurpation of the trial court's role as evidentiary gatekeeper. Though representing a powerful entity, the prosecutor is an equal party to the defendant, subject to the evidentiary rulings of the court. The burden of determining what evidence may be admitted rests on the judge's shoulder just as the burden of determining what evidence persuades beyond a reasonable doubt rests with the jury. See Nardone v. United States, 308 U.S. 338, 342 (1939) ("The civilized conduct of criminal trials … demands the authority of limited direction entrusted to the judge presiding in federal trial … in ruling upon

preliminary questions of fact. Such a system as ours must … rely on the learning, good sense, fairness and courage of federal trial judges."). The role of regulating the presentation of the evidence rests firmly with the trial court, not the prosecutor.

The government's argument also assumes that any version of the facts that is inconsistent with its own interpretation of the evidence is false. Not only does this assumption negate any possibility of a meaningful adversarial process but it also ignores the reality that no party is infallible. Indeed, the government has often been proven wrong, as juries say with their verdicts of not guilty, and as this Court regularly finds in reversing convictions based on insufficient evidence. See, *e.g.,* United States v. Richardson, 658 F.3d 333, 342 (3d Cir. 2011); same United States v. Thomas, 114 F.3d 403 (3d Cir. 1997); United States v. Jenkins, 90 F.3d 814 (3d Cir. 1996); United States v. Brown, 3 F.3d 673, 684 (3d Cir. 1993); United States v. Wexler, 838 F.2d 88 (3d Cir. 1988). Appellate reversals of guilty verdicts do not prove prosecutorial misconduct; these reversals only demonstrate that prosecutors sometimes err in their credibility judgments and make mistakes in assessing the facts and the law.

Another area where prosecutors have proven all too fallible is in the fulfillment of their obligations to produce favorable (often called "exculpatory") evidence to the defense as required by longstanding Supreme Court precedent. Brady v. Maryland, 373 U.S. 83 (1963); Pyle v. Kansas, 317 U.S. 213 (1942);

Mooney v. Holohan, 294 U.S. 103 (1935). Recent litigation has shown that the United States Department of Justice has been slow to recognize favorable information and has at times failed to provide required evidence to defendants. See United States v. Mahaffy, 693 F.3d 113 (2d Cir. 2012) ("The government's failures to comply with Brady were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or consciously avoided its responsibilities to comply with Brady."); see also United States v. Aguilar, 831 F. Supp.2d 1180, 1206 (C.D. Cal. 2011) ("[T]he Government's misconduct went way beyond the delayed and incomplete production of the Guernsey grand jury transcripts. It included procuring search and seizure warrants through materially false and misleading affidavits; improperly obtaining attorney-client privileged communications; violating court orders; questioning witnesses improperly; failing timely to produce information required under *Jencks;* and engaging in questionable behavior during closing arguments."); United States v. Stevens, Case No. 08-231, 2009 WL 6525926 (D.D.C. Apr. 7, 2009) ("At the direction of the Attorney General, on April 1, 2009, a newly-appointed team of prosecutors filed a Motion to Set Aside the Verdict and Dismiss the Indictment, citing the failure to produce notes taken by prosecutors in an April 15, 2008 interview of Bill Allen. … The Court will grant the Motion."). Whether these cases are anomalies or evidence of systemic failure has yet to be revealed,

but they are living examples of the Supreme Court's teaching that "increasing the evidence available to both parties, enhances the fairness of the adversary system." Wardius, 412 U.S. at 474.

These cases also support this Court's rejection of the notion that the prosecutor's speculative fear of perjury is a legitimate government interest that should be permitted to prevent the defense from offering evidence that a trial judge has determined is admissible and relevant. Validating this "interest" – as actively sought by the government in the instant case – gives the prosecution authority that rightfully belongs only to the court or to the jury, and provides too tempting an opportunity for a strategic advantage during trial. This interest, which can be adequately protected by a neutral arbiter, cannot override the defendant's fundamental right to present favorable testimony.

C. The Government's Argument Ignores the Realities of Post-Sentencing Guidelines Practice.

In its brief, the government argues that "defense immunity" will create the danger that individuals who are "caught red-handed" will agree to "take the fall" for co-defendants. This purported evil directly contradicts the current realities of federal criminal practice. Both cases cited by the prosecutor in support of its dire predictions, United States v. Turkish, 623 F.2d 769, 775-76 (2d Cir. 1980) and United States v. Lowell, 649 F.2d 950, 961 (3d Cir. 1981), pre-date the sea change that occurred in criminal practice with the advent of the Sentencing Guidelines and

the prevalence of mandatory minimums. Rather than "taking the fall" for co-defendants, defendants are racing to point the finger at each other in order to earn motions for sentencing reduction pursuant to USSG § 5K1.1 and 18 U.S.C. § 3553(e). From 2009-2011, 93.3 percent of all criminal prosecutions in the Third Circuit resulted in guilty pleas; 25.1 percent of these defendants earned § 5K1.1departures by cooperating with the government in its investigation and prosecution of other individuals. See, e.g., United States Sentencing Commission, *Statistical Information Packet for Fiscal Year 2009, Third Circuit*, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2009/3c09.pdf. [3]

The government's concern that the "effective defense immunity" doctrine approved by Smith creates opportunities for co-defendants to falsely exculpate each other is simply not realistic in today's criminal justice system. Even after United States v. Booker, 543 U.S. 220 (2005), Guidelines sentencing still remains

[3] Ironically, it is the use of these cooperators that has created a real risk of perjury infecting the criminal justice system and tainting its results. See Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 109 - 110 (2006) (collecting data regarding wrongful convictions stemming from informant testimony); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 926 (1999-2000) ("There is serious concern that this unregulated process … 'encourage[s] … defendants to … falsify information' in order to obtain their 5K1.1 letter" from the government.") (quoting The Substantial Assistance Staff Working Group, U.S. Sent. Comm., *Federal Court Practices: Sentence Reductions Based on Defendants' Substantial Assistance to the Government*, at 43 (May 1997)).

fairly inflexible and far too harsh to credit a fear that co-defendants will use defense immunity in an attempt to routinely and falsely trying to exculpate each other – at grave risk to themselves at their own sentencings.

Of course, it is impossible to argue that immunized testimony, like all other testimony, could not possibly ever include perjurious statements. But our justice system contemplates that judges will be able to provide juries with adequate instructions on how to measure witness bias and that our juries, as always, will be able to make legitimate credibility determinations. In weighing the risk of perjury against the impairment of a fundamental constitutional right to present a defense, the scales must be heavily tipped in favor of the defense, cf. United States v. Lowell, 649 F.2d 950, 963 (3d Cir. 1981) ("an absolute curtailment of abuse is possible only at the risk of substantial curtailment of the constitutional protection of the self-incrimination clause").

II. IN REAFFIRMING THE DEFENDANT'S RIGHT TO COMPEL WITNESS TESTIMONY, THE COURT SHOULD MAKE CLEAR THAT "EXCULPATORY AND ESSENTIAL" EVIDENCE IS EVIDENCE THAT COULD CONTRIBUTE SUBSTANTIALLY TO RAISING A REASONABLE DOUBT.

In Smith, the Court described the substance of the type of testimony that would be compelled, and thus immunized, as both "exculpatory" and "essential." 615 F.2d at 972. However, the panel decisions of this Court have sometimes held the defense to a higher standard and approved immunity only for testimony that is

beyond dispute or which, standing alone, proves innocence. See United States v. Perez, 280 F.3d 318, 348 (3d Cir. 2002) ("The District Court concluded that, because any exculpatory testimony that Del Rosario might offer on behalf of Perez would be severely impeached by his prior inculpatory statement against her, Perez could not establish that the proffered testimony was "clearly exculpatory" or "essential to her defense."); United States v. Lowell, 649 F.2d at 965 ("Moreover, Montalbano's expected testimony, even if believed, would not in itself exonerate.").

The Court should take this opportunity to clarify that the terms "exculpatory" and "essential," in this context, refer to testimony that, when combined with other defense evidence, including cross-examination of government witnesses, could raise a reasonable doubt in the jurors' minds as to a defendant's guilt. This clarification is necessary because the "meaningful opportunity to present a complete defense," California v. Trombetta, 467 U.S. 479, 485 (1984), guaranteed by the Compulsory Process and Due Process clauses is not limited to defenses that prove innocence, for that is not a defendant's burden. Instead a complete defense is one which successfully undermines the persuasive power of the government's evidence to the point of establishing a reasonable doubt in the jurors' minds. The panel in Smith relied heavily on Chambers v. Mississippi, 410 U.S. 284 (1973), in reaching its conclusion that "immunity may be required for a

defense witness if realistic meaning is to be given to a defendant's due process right to have exculpatory evidence presented to the jury." Smith, at 970. However, the terms "exculpatory" and "essential" are not used in Chambers, though the evidence at issue there was both. The Chambers Court simply concluded that the exclusion of "critical" evidence, coupled with the defendant's inability to cross-examine a witness, constituted a denial of due process. 410 U.S. at 302–03.

The term "exculpatory" is associated most frequently with analysis of the government's disclosure obligations under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963). But the holding of Brady refers appropriately to "favorable" evidence; it is not limited to fully "exculpatory" evidence[4]: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, citing United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 820 (3d Cir. 1952) ("We think that the conduct of the Commonwealth as outlined in the instant case is in conflict with our fundamental principles of liberty and justice. The suppression of evidence favorable to Almeida was a denial of due process."); see also United

[4] Indeed, Brady itself was a sentencing case. The evidence at issue there did not affect guilt at all, but only the appropriate degree of punishment.

States v. Acosta, 357 F. Supp.2d 1228, 1233 (D. Nev. 2005) (whether evidence is "useful," "favorable," or "tends to negate the guilt or mitigate the offense" are semantic distinctions without difference in a pretrial context).

Evidence that exonerates, of course, is also both "exculpatory" and "favorable"; evidence that is exculpatory is also favorable, but may not exonerate. Favorable evidence may undermine a part of the government's proof, even when it does not directly exculpate or exonerate. Surely, a trial court could find that the defendant has the right to present all three of these types of evidence under certain circumstances. See United States v. Mike, 655 F.3d 167, 173 (3d Cir. 2011) ("Ultimately, the question of whether clearly exculpatory evidence is necessary to present an effective defense is a decision calling upon the sound judgment of the district court judge in a position to listen to the witnesses and evaluate the tenor of trial narratives."). The Court should now take the opportunity to clarify what type of evidence will justify a trial court's granting immunity to a defense witness, by compelling the witness' testimony.

As the Supreme Court stated in Holmes v. South Carolina, "the Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose …." 547 U.S. 319, 326 (2006). When a witness has evidence that could contribute to the establishment of a reasonable doubt, sustaining a privilege claim, when fruits and use immunity is available and leaves the government and the

witness no worse off than before, Kastigar v. United States, 406 U.S. 441, 453 (1972), serves no legitimate purpose. The failure to compel the witness to testify withholds important evidence from the jury and negates the defendant's constitutional right to an effective defense. This Court should therefore hold that exculpatory, essential evidence is not limited to evidence that exonerates or cannot be impeached but also includes evidence that undermines the certainty of the government's proof so that a jury could find that it fails to persuade beyond a reasonable doubt. This is a standard that comports with the defendant's right to present a defense.

CONCLUSION

The district court's denial of Appellant Quinn's motion to compel the testimony of co-defendant Johnson, which if granted could have conferred judicial immunity for that testimony was reversible error. The case should be remanded for a new trial.

Respectfully submitted,

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CERTIFICATIONS

Certification of Bar Membership

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ *Ellen C. Brotman*
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Certification of Typeface, Word Count

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and volume limitations of Fed. R. App. 32(a)(7) and 29(d). I certify that this brief contains 3,483 words, exclusive of tables and certifications.

/s/ *Ellen C. Brotman*
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Certification of Identical Compliance of Briefs

I hereby certify pursuant to LAR 31.1(c) that the text of the electronic brief is identical to the text in the paper copies of the brief as filed with the Clerk.

/s/ *Ellen C. Brotman*
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Certification of Virus Check

I hereby certify that a virus detection program has been run on the file and that no virus was detected.

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Certificate of Service

I hereby certify that on this date the foregoing brief was served via electronic filing, which constitutes service upon:

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