No. 07-31

In the Supreme Court of the United States

EMILE FORT, AKA TWIN AND EDGAR DIAZ, AKA HOOK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether local police reports that were prepared before the initiation of a federal investigation and were subsequently turned over to a federal prosecutor are exempt, pursuant to Federal Rule of Criminal Procedure 16(a)(2), from discovery in the ensuing federal prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-64a) is reported at 472 F.3d 1106. The opinion of the district court (Pet. App. 65a-81a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2007. A petition for rehearing was denied on March 8, 2007 (Pet. App. 1a-18a). On May 22, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 6, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A district judge in the United States District Court for the Northern District of California imposed sanctions on the government for failing to disclose in discovery unredacted copies of local police reports in the government's possession in connection with a federal prosecution of petitioners for racketeering crimes, including predicate acts of murder, attempted murder, drug offenses, and firearms offenses. The government brought an interlocutory appeal, challenging the district court's sanction order and its underlying orders requiring disclosure of the local police reports. The court of appeals reversed the district court's sanction and disclosure orders, concluding that the reports were protected from disclosure by Federal Rule of Criminal Procedure 16(a)(2). Pet. App. 19a-64a.

1. As relevant here, Federal Rule of Criminal Procedure 16(a)(1)(E) requires the government, upon the defendant's request, to "permit the defendant to inspect and to copy or photograph * * * documents * * * or copies or portions of any of these items, if the item is within the government's possession, custody, or control and * * * the item is material to preparing the defense." Federal Rule of Criminal Procedure 16(a)(2) provides an exception to the discovery obligations specified in Rule 16(a)(1):

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of

> statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Fed. R. Crim. P. 16(a)(2).

2. A federal grand jury in the Northern District of California returned an 86-count superseding indictment charging petitioners and others with, inter alia, murder, attempted murder, and armed assault in aid of racketeering, in violation of 18 U.S.C. 1959(a); conspiring to participate in a Racketeer Influenced and Corrupt Organization (RICO), in violation of 18 U.S.C. 1962(d); using, carrying, and possessing firearms during a crime of violence and conspiring to do so, in violation of 18 U.S.C. 924(c) and (*o*); and conspiring to possess crack cocaine, marijuana, and ecstasy with the intent to distribute them, in violation of 21 U.S.C. 846. Gov't C.A. E.R. 6-100; see Pet. App. 21a. The alleged racketeering acts included numerous violent offenses that the local police had investigated. See *id.* at 42a-43a. The indictment alleged that petitioners were leaders of the Down Below Gang, a violent street gang that operated in a public housing development in Sunnyvale, California. Gov't C.A. E.R. 21, 25-26. The indictment also charged that one of the purposes of the enterprise was to prevent others from becoming witnesses against members of the gang and that some of the murders and attempted murders were committed in furtherance of that purpose. *Id.* at 11-12, 18, 56-57, 74-75.

The government provided extensive discovery, totaling approximately 22,858 pages, to petitioners and their co-defendants. Inter alia, the government provided almost every police report in its possession to the defense in redacted form. The government's disclosures omitted only the names and other identifying information of civilian witnesses. Gov't C.A. Br. 15-16.

The district court ordered the government to disclose the redacted information. See Gov't C.A. E.R. 112-117; Pet. App. 82a-85a. The court held that the local police reports were "documents" within the meaning of Rule 16(a)(1)(E). Gov't C.A. E.R. 113-114. The court further concluded that the reports were not exempt from compelled disclosure under Rule 16(a)(2). See *id.* at 114-117; Pet. App. 82a-83a. The district court ordered the government to disclose the redacted portions of the police reports subject to an accompanying protective order. See *id.* at 22a; Gov't C.A. E.R. 118-125.[1]

Shortly thereafter, the government filed a notice of noncompliance with the district court's protective order. Pet. App. 22a; Gov't C.A. E.R. 262-266. In response, the district court held that the government would be precluded from using the testimony of all civilian witnesses whose names were redacted from the police reports unless the government could demonstrate that the redactions were harmless. Pet. App. 22a, 65a-81a.

3. The government appealed the discovery ruling and the sanction order. The court of appeals reversed. Pet. App. 19a-64a.[2]

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[1] Under the protective order, the government was required to provide unredacted copies of local police reports containing civilian witnesses' names to the defendants' attorneys and investigators either within 90 days before trial (for "primary" witnesses most in need of protection) or within 14 days of a defense request (for all other "secondary" witnesses). The order also authorized defense counsel to share witness names, but not locator information, with defendants 21 days before trial "if counsel believes such disclosure is necessary for an effective defense." See Gov't C.A. E.R. 118-125; Gov't C.A. Br. 20.

[2] Petitioners filed a cross-appeal challenging the sanction order, arguing that the government should be precluded from seeking the death penalty. The court of appeals held that it lacked jurisdiction over the cross-appeal. See Pet. App. 23a, 46a.

a. The court of appeals held that the local police officers who had prepared the reports at issue and had shared them with federal prosecutors were "government agent[s]" within the meaning of Rule 16(a)(2). Pet. App. 26a-31a.[3] The court stated that the term "government," as it appears in Rule 16(a)(2), refers to the federal government. *Id.* at 26a-27a. The court also observed, however, that Rule 16(a)(1)(A), which requires disclosure of certain statements made to a "government agent," "has been read to require federal prosecutors to disclose statements made by defendants to local law enforcement officers so long as such statements are in the federal prosecutor's possession at the time of trial." *Id.* at 28a.[4] The court further explained that the term "government personnel" in Rule 6(e), which governs the disclosure of grand jury information, "is defined expressly to incorporate not only federal authorities, but also employees of non-federal government entities that are engaged in assisting federal criminal law enforcement." *Id.* at 30a. The court noted that the Advisory Committee's stated rationale for including such individuals within Rule 6(e)'s definition of the term "government personnel"—*i.e.*, to facilitate cooperation between federal and state law enforcement authorities—applies equally to Rule 16. *Id*. at 29a-30a. The court of appeals concluded that, "read in context," the term "government agent" in

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[3] The government did not dispute that the police reports at issue were "documents" within the meaning of Rule 16(a)(1)(E) and were therefore subject to discovery unless excepted under Rule 16(a)(2). See Pet. App. 26a.

[4] Rule 16(a)(1)(A) provides, in pertinent part, that the government must disclose to the defendant "any relevant oral statement * * * in response to interrogation by a person the defendant knew was a government agent."

Rule 16(a)(2) "includes non-federal personnel whose work contributes to a federal criminal 'case.'" *Id.* at 30a.

b. The court of appeals held that the police reports satisfied Rule 16(a)(2)'s requirement that the documents in question have been "made * * * in connection with investigating or prosecuting the case." Pet. App. 31a-43a. The court noted that Rule 16, "while encompassing government work product and having its genesis in the idea of work product, draws its boundaries more broadly than those of Civil Rule 26." *Id.* at 34a; see *id.* at 34a-36a (discussing history of Rule 16 and the Advisory Committee's deliberate deviation from Federal Rule of Civil Procedure 26). The court also noted that federal-state cooperation was particularly important in a case, like this one, where the RICO charges were based on predicate state crimes. See *id.* at 42a.

The court of appeals concluded:

> [W]e hold that Rule 16(a)(2) extends to the [local] police reports created prior to federal involvement but relinquished to federal prosecutors to support a unified prosecution of [petitioners] for the same criminal activity that was the subject of the local investigation. * * * We here address witness statements to be used in a federal criminal prosecution but initially given to [local] police officers along with the officers' case reports revealing the identities of the witnesses and summarizing their statements. These types of documents have always been protected under federal law if compiled by federal officers. Our opinion recognizes no principled reason why the law should be any different in a federal prosecution regardless of who gathered the statements.

Pet. App. 43a.

c. Judge William A. Fletcher dissented. Pet. App. 47a-64a. Judge Fletcher would have construed Rule 16(a)(2)'s exemption from discovery to be limited to documents generated by federal officers or by "state or local law enforcement personnel working alongside, or on behalf of, the federal government, as in a cooperative joint investigation." *Id.* at 53a-54a. He concluded that the reports at issue in this case were not covered by Rule 16(a)(2) because they were created by local officers "long before the involvement of the federal government in the investigation and prosecution of the [petitioners] in this case." *Id.* at 56a.

d. The Ninth Circuit denied rehearing and rehearing en banc, with six judges dissenting. Pet. App. 1a-18a.

ARGUMENT

Petitioners contend (Pet. 9-18) that the police reports at issue in this case are not exempt from discovery under Federal Rule of Criminal Procedure 16(a)(2). The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court");

American Constr. Co. v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893).

In the instant case, the court of appeals vacated the discovery and sanction orders issued by the district court and remanded the case for further proceedings. Pet. App. 47a. Petitioners have not yet been tried for the charged offenses, and it is unclear what, if any, impact the court of appeals' ruling will have on the outcome of the prosecution. If petitioners are acquitted at trial, they will have no continuing interest in the disposition of their current claim. If petitioners are convicted, they may again assert that they were wrongly denied access to the redacted information in the local police reports, together with any other challenges to their convictions and sentences they may have, in a new petition for a writ of certiorari.

2. As petitioners acknowledge (Pet. 21), the Ninth Circuit is the only court of appeals that has addressed the question whether Rule 16(a)(2) exempts local police reports from discovery under the circumstances presented here. Only a handful of published district court decisions have addressed the application of Rule 16(a)(2) to local police reports, see Pet. App. 30a n.6, 33a (summarizing cases), and only *United States* v. *Cherry*, 876 F. Supp. 547, 551-552 (S.D.N.Y. 1995), analyzes the issue in any detail. The absence of any circuit conflict or developed body of analysis in the lower courts counsels against review in this case.

Petitioners contend (Pet. 21) that immediate guidance from this Court is necessary because pre-trial orders granting or denying defendants' discovery requests are not ordinarily subject to immediate appeal. But even with respect to interlocutory orders that are immediately appealable, this Court's usual practice is to defer

review until entry of final judgment. See pp. 7-8, *supra*. In future cases, as in this one, defendants whose discovery requests are denied may raise the issue as grounds for appeal if they are subsequently convicted. Although petitioners express concern (Pet. 21) that defendants may suffer "potentially unfair conviction[s]" before they can pursue their discovery claims on appeal, that risk is an unavoidable feature of our legal system's wholly justifiable preference for deferring appeals until entry of final judgment.

Petitioners also contend (Pet. 18-21) that immediate review is necessary because the decision affects "a substantial number of criminal cases." Pet. 18. The small number of relevant published decisions casts serious doubt on that assertion. The prospect that numerous prosecutions will raise the question presented here is particularly unlikely in light of the limited nature of the disagreement between the court of appeals majority and dissent in this case.

Rule 16(a)(2) requires not only that the allegedly exempt documents have been "made by an attorney for the government or other government agent," but also that they have been made "in connection with investigating or prosecuting the case." In concluding that the latter requirement was satisfied here, the court of appeals explained that "[l]ocal police reports that result in a federal investigation or prosecution of the same defendant for the same acts are part of 'the case'" for purposes of Rule 16(a)(2). Pet. App. 33a.[5] The court further explained that the argument for applying Rule 16(a)(2) "is particularly compelling when evidence of state crimes

[5] Petitioners do not seek review of the court of appeals' holding that the documents at issue here were "made * * * in connection with investigating or prosecuting the case" for purposes of Rule 16(a)(2).

such as drug dealing, robbery, and murder are predicate acts under RICO to establish a 'pattern of racketeering activity' in violation of federal law." *Id.* at 41a (quoting 18 U.S.C. 1961 (2000 & Supp. IV 2004)). For his part, the dissenting panel member did not construe Rule 16(a)(2) as categorically excluding protection against the disclosure of local police reports, but rather acknowledged that "[t]he term 'agent' [in the Rule] is sufficiently broad to encompass state or local law enforcement personnel working alongside, or on behalf of, the federal government, as in a cooperative joint investigation." *Id.* at 53a-54a.

Thus, the disagreement between the court of appeals majority and the dissenting judge was limited to state and local police reports that involve the same individuals and the same criminal acts as a subsequent federal prosecution, that are created before the commencement of active collaboration between state and federal authorities, and that are subsequently provided to federal attorneys to assist in the federal prosecution. There is no reason to suppose that discovery disputes concerning documents within that category will arise with great frequency. The practical significance of the question presented is further reduced by the fact that federal prosecutors often voluntarily provide defendants with materials that need not be disclosed under Rule 16. See, *e.g.*, *United States* v. *Moussaoui*, 483 F.3d 220, 238 (4th Cir. 2007) (noting that "the Government often tries cases under an open file policy" under which "the defendant is typically provided with all material that is legally required, as well as additional material that, although not legally required, might in the end be beneficial to the defendant"). Indeed, in the instant case, the government disclosed virtually all police reports related to the

charged crimes and redacted only witness-identifying information. See Gov't C.A. Br. 15 & n.5.

Finally, petitioners' contention (Pet. 16-18) that the court of appeals' decision will have adverse policy consequences would be better addressed through the process by which this Court considers proposed amendments to the Federal Rules of Criminal Procedure. See 28 U.S.C. 2072-2074; cf. *Crawford-El* v. *Britton*, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process."); Pet. App. 30a n.6 (noting that Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) was amended to clarify the definition of "government personnel" in light of a conflict among the courts on the meaning of that phrase). In such a proceeding, the Advisory Committee and this Court could consider not only how competing policy considerations bear on the proper interpretation of Rule 16(a)(2)'s current language, but also whether those considerations warrant changes to the text of the Rule.

3. The court of appeals' decision is correct.

a. Rule 16(a)(2) generally exempts from discovery "internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." Petitioners contend that, under the "plain language" of the Rule, the term "other government agent" refers only to agents of the federal government. Pet. 10; see Pet. 9-16. That is incorrect.

The local police officers who prepared the reports at issue here were "government agent[s]" under a literal understanding of that term. Petitioners contend (Pet. 10) that the term should be given a narrower meaning

when it appears in the Federal Rules of Criminal Procedure, on the ground that "the term 'government' * * * is used as shorthand throughout the Rules for 'federal government.'" As petitioners acknowledge (Pet. 11), however, Rule 6(e)(3)(A)(ii) authorizes disclosure of grand-jury matters, under specified circumstances, to "any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government." The term "government agent" in Rule 16(a)(1)(A) has similarly been construed to encompass state and local law enforcement officers. See Pet. App. 28a-29a. Thus, use of the term "government" in the Federal Rules of Criminal Procedure is not categorically limited to the federal government.[6]

Even if the term "other government agent" in Rule 16(a)(2) were limited to agents of the federal government, the Rule's exemption from discovery would apply to the police reports at issue here.[7] Whether or not the

[6] Petitioners argue (Pet. 11) that Rule 6(e)(3)(A)(ii)'s express reference to state and local governments reflects a background understanding that such bodies are not otherwise encompassed by the term "government" as used in the Federal Rules of Criminal Procedure. The history of Rule 6(e)(3)(A)(ii)'s development contradicts that inference. The authorization to disclose grand-jury matters to other "government personnel" in addition to the "attorney for the government" was added to Rule 6(e)(3)(A)(ii) in 1977. The Rule at that time did not contain the current language "including those of a state, state subdivision, Indian tribe, or foreign government." When that language was added to the Rule in 1985, the Advisory Committee's Notes explained that "[c]ourts have differed over whether employees of state and local governments are 'government personnel' within the meaning of the rule," and that "[t]he amendment clarifies the rule to include state and local personnel." See Pet. App. 30a n.6.

[7] In its brief in the court of appeals, the government argued that "the most reasonable interpretation of" the term "other government agent" in Rule 16(a)(2) "is that it refers to any 'other government agent,'

local police officers were acting as federal "agents" when they drafted the reports, they were acting as such when they shared the reports with federal authorities during the collaborative phase of the investigation. The dissenting judge would have distinguished between reports created by local officers while engaged in a joint federal/state investigation (which the dissenting judge agreed would be exempted from discovery by Rule 16(a)(2), see Pet. App. 53a), and records created before the joint investigation began but transferred to federal authorities thereafter (which the dissenting judge viewed as non-exempt, see *id.* at 54a). If Rule 16(a)(2) were construed in that fashion, however, local officers could simply incorporate the substance of pre-existing records into newly-created documents after the commencement of a joint investigation and could transmit those documents to federal prosecutors.[8]

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regardless of whether that agent works for federal, state, or local government." Gov't C.A. Br. 25. As petitioners emphasize (Pet. 10), the court of appeals stated that the term "'government' means 'federal government' in Rule 16(a)(2)." Pet. App. 27a. The court also noted, however, that "[t]he government's proposed reading of 'government agent' is consistent * * * with decisions implementing the same phrase in Rule 16(a)(1)(A)," *id.* at 29a, and that the term "government personnel" in Rule 6(e)(3)(A)(ii) "is defined expressly to incorporate not only federal authorities, but also employees of non-federal government entities that are engaged in assisting federal criminal law enforcement," *id.* at 30a.

[8] Contrary to the contention of petitioners and the dissent, see Pet. 16 (quoting Pet. App. 63a (Fletcher, J., dissenting)), the court of appeals did not construe Rule 16(a)(2) to encompass every case-related document that "comes into" a federal prosecutor's possession. Rather, it was central to the court's decision that the officers who prepared the police reports were "employees of non-federal government entities," Pet. App. 30a; that the local investigation involved the same suspected wrongdoers and the same unlawful conduct as the federal prosecution,

b. Petitioners contend (Pet. 14) that the court of appeals' interpretation "decouple[s] Rule 16(a)(2) from its work product foundations" and thereby disserves the Rule's purposes. That claim lacks merit. Although "Rule 16(a)(2) is often referred to as a 'work product' rule," Pet. App. 34a, and serves in part to prevent discovery of documents that reflect counsel's mental processes, its drafters consciously departed from existing formulations of the "work product" rule and defined the Rule 16(a)(2) privilege more broadly. See *id.* at 35a; H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 12 (1975); compare Fed. R. Civ. P. 26(b)(3) (stating that the district court in supervising discovery in civil cases "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"); cf. *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947). For that reason, the inquiry turns not on whether the police reports are exempt "work product" as that term has historically been understood, but on whether they fall under Rule 16(a)(2)'s broader exemption for "case"-related reports prepared by government agents.

c. Petitioners contend (Pet. 16-17) that the court of appeals' decision, by treating local officers who provide information to federal prosecutors as the federal government's "agents," will expand the federal government's obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny. The court of appeals cautioned, however, that this case "does not involve the government's disclosure obligations under" *Brady*. Pet. App.

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see *id.* at 33a, 41a, 43a; and that local officials voluntarily transmitted the reports to the federal government, "allowing their work to be subsumed within a single, unified prosecution of [petitioners] by the federal authorities," *id.* at 42a-43a.

24a. The two judges in the majority of the Ninth Circuit panel, concurring in the denial of rehearing en banc, reiterated that "[t]he parties did not raise an issue about, and [the court] did not rule on, the scope or application of *Brady* disclosure requirements." *Id.* at 2a.

d. The court of appeals' analysis and holding are consistent with this Court's observation in *United States* v. *Nobles*, 422 U.S. 225, 238 (1975), that the work-product doctrine "is an intensely practical one, grounded in the realities of litigation in our adversary system." One of those "realities" is that information provided by state and local police officers is often integral to the prosecution of federal crimes. See, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 211 (1960) (describing cooperation between federal and state agents "in the investigation and detection of criminal activity" as "entirely commendable"); *United States* v. *Leathers*, 354 F.3d 955, 960 (8th Cir.) (describing cooperation between federal and state officials as "commonplace and welcome"), cert. denied, 543 U.S. 844 (2004); Fed. R. Crim. P. 6(e)(3)(A)(ii) advisory committee's note (1985) (Amendment) (stating that "[i]t is clearly desirable that federal and state authorities cooperate, as they often do"). Petitioners' interpretation of Rule 16(a)(2) would hinder such cooperative efforts by burdening the provision of information by state and local law enforcement officials to their federal counterparts with a risk of disclosure that could imperil witnesses or damage investigations and prosecutions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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