No. 12-482

In the Supreme Court of the United States

BERNARD J. BAGDIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in declining to hold an evidentiary hearing before denying petitioner's motion to dismiss the indictment based on his claim that the government had impermissibly used immunized statements against him.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is not published in the Federal Reporter but is available at 2012 WL 2914236. The order of the district court (Pet. App. 15a-18a) is not published in the Federal Supplement.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2012. The petition for a writ of certiorari was filed on October 16, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of attempting to obstruct the administration of the Internal Revenue Service

(IRS), in violation of 26 U.S.C. 7212(a); seven counts of conspiring to defraud the United States, in violation of 18 U.S.C. 371; eight counts of aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2); three counts of failing to file tax returns, in violation of 26 U.S.C. 7203; and five counts of failing to file currency transaction reports, in violation of 31 U.S.C. 5322(a), 5331. Pet. App. 4a-5a. He was sentenced to 120 months of imprisonment, ordered to pay $2.5 million in restitution to the IRS, and fined $84,000. *Id.* at 6a; Gov't C.A. Br. 73. The court of appeals affirmed petitioner's convictions and remanded for resentencing. Pet App. 14a.

1. Petitioner was a lawyer who used a number of different schemes to conceal his own income and that of his clients from the IRS. These schemes included establishing corporations as vehicles to receive personal income, using corporate accounts to pay for personal expenses, using the name and Social Security number of an unrelated individual on forms requesting corporate tax identification numbers, and using sham mortgages to conceal equity in real property. Pet. App. 2a; Gov't C.A. Br. 5-9. Petitioner described his techniques as "hiding in plain sight" and "flying under the radar." Pet. App. 2a; Gov't C.A. Br. 6. Once his clients' income was being paid to a corporation rather than to them personally, petitioner advised the clients to stop filing tax returns. Gov't C.A. Br. 6-7, 9. At the time petitioner was indicted in 2008, he had not filed a tax return since 1990 despite having earned substantial income. Pet. App. 2a.

If the IRS contacted one of petitioner's clients to inquire about missing tax returns, petitioner would request a copy of the IRS transcript for that client. Gov't C.A. Br. 11. The transcript would inform petitioner

what the IRS knew about the client's income, and petitioner would then prepare false returns for the client that reported only the income of which the IRS was already aware. *Id.* at 11-13, 15-17, 21-23.

In 2003, an undercover IRS agent posing as a businessman approached petitioner, who helped the agent create a sham trust to hide assets from the IRS. Gov't C.A. Br. 13-15. Petitioner also advised the agent to use a fake mortgage to protect his real property from creditors. *Ibid.* The undercover agent brought petitioner more than $100,000 in cash, which petitioner exchanged for checks from his various corporations made out to the sham trust. *Id.* at 14-15. Petitioner promised the agent that, in order to avoid scrutiny, petitioner would not file the required currency transaction reports. *Id.* at 15.

2. The criminal investigation into petitioner's conduct had begun in the spring of 2001. Pet. App. 17a; Gov't C.A. Br. 36. The issuance of dozens of grand jury subpoenas resulted in the production of thousands of business and other records. Gov't C.A. Br. 36. After analyzing these records, the IRS began the undercover operation against petitioner described above. *Ibid.*

On August 21, 2003, petitioner told an undercover agent that he had received immunity from a United States Attorney's office. Pet. App. 3a. The United States Attorney's Office in the Eastern District of Pennsylvania, which was investigating petitioner, immediately tried to determine whether petitioner had in fact been granted immunity. *Ibid.* The prosecutors ultimately learned that the U.S. Attorney's Office in the Eastern District of Virginia had granted petitioner use immunity in September 2002. *Id.* at 3a-4a. The Pennsylvania U.S. Attorney's Office then established procedures to ensure that the prosecutors and investigators in the instant

case did not learn anything about petitioner's immunized statements to the Virginia prosecutors. *Id.* at 4a.

In 2004, the IRS sought search warrants for petitioner's office and homes. Pet. App. 4a. In the affidavit establishing probable cause, "the affiant indicated being aware of the Virginia investigation and the grant of immunity but swore under penalty of perjury that no information had been shared with her." *Ibid.*

3. On June 17, 2008, petitioner and 11 co-defendants were indicted in a 96-count superseding indictment in the United States District Court for the Eastern District of Pennsylvania. Gov't C.A. Br. 3. Nine of the individuals charged in the indictment pleaded guilty, while petitioner and two co-defendants proceeded to trial. *Ibid.*

In response to a pretrial discovery request, the Pennsylvania prosecutors in this case sought a copy of the FBI interview report prepared after petitioner's meeting with the Virginia FBI agents and provided that report to petitioner and his co-defendants. Gov't C.A. Br. 37; see C.A. App. 847-848 (FBI interview report). The Pennsylvania prosecutors and case agents had not previously seen that interview report. *Id.* at 829.

The interview report described petitioner's account of a mortgage that he provided to a Richmond city council member whom the Virginia agents were investigating. Petitioner told the Virginia agents that he agreed to provide the mortgage after a friend made the request on behalf of the city council member. The mortgage at issue in the Virginia interview was not a sham mortgage designed to evade taxes. (The interview report does not mention taxes at all.) Rather, it was a real mortgage that petitioner arranged in order to prevent a foreclo-

sure on the city council member's residence. C.A. App. 847-848.

Before trial, petitioner filed a motion to dismiss the indictment, alleging that the government had violated the rule set forth in *Kastigar* v. *United States*, 406 U.S. 441 (1972). Specifically, petitioner asserted that his immunized communications with the Virginia investigators were related to the instant prosecution, and he alleged that the government had impermissibly used his immunized statements in the instant prosecution. In its response, the government provided a detailed timeline of the instant investigation and the grant of immunity in Virginia. It also attached contemporaneous emails demonstrating both that the Pennsylvania U.S. Attorney's Office had been unaware of the Virginia investigation until petitioner disclosed it to the undercover agent and that the office had established procedures to ensure that petitioner's immunized statements would not be shared with the prosecutors or investigators in the instant case. Gov't C.A. Br. 36-37; C.A. App. 827-830, 836-844. The government also provided the district court with the Virginia FBI agent's report summarizing petitioner's immunized statements. C.A. App. 847-848. As noted above, that report demonstrates that petitioner's interview with those agents did not discuss tax evasion schemes.

The district court denied petitioner's motion to dismiss. See Pet. App. 15a-18a. The court stated that "to be entitled to a pretrial evidentiary hearing, a defendant's moving papers must demonstrate a colorable claim for relief" and that "[i]n order to be 'colorable,' a defendant's motion must consist of more than mere baldfaced allegations of misconduct—there must be issues of

fact material to the resolution of a defendant's constitutional claim." *Id.* at 16a-17a n.1 (citations omitted).

The court concluded that petitioner had failed to make the showing necessary to trigger an evidentiary hearing. Pet. App. 17a n.1. It found that the instant investigation began well before petitioner was granted use immunity in Virginia, that members of the Pennsylvania investigatory team did not learn of the immunity grant until petitioner's 2003 conversation with the undercover agent, and that the government had taken steps to erect a "wall" to prevent any "taint." *Id.* at 17a-18a n.1. The court noted that the fact that some of the information that petitioner provided to the undercover agent may also have been provided to the Virginia investigators did not establish a *Kastigar* violation. *Id.* at 18a n.1. The court also found "absolutely no evidence on this record which is in any way suggestive that [petitioner's] immunized statements in that matter were in any way used here." *Ibid.*

4. After a lengthy trial, petitioner was convicted on the 27 counts described above. Pet. App. 5a. Petitioner's co-defendants, both of whom were his clients, were also convicted of conspiracy, tax evasion, and filing false tax returns. Gov't C.A. Br. 4. Petitioner was sentenced to 120 months of imprisonment and was ordered to pay $2.5 million in restitution to the IRS. *Id.* at 5, 73.

5. In an unpublished order, the court of appeals affirmed in relevant part. Pet. App. 1a-14a.

The government had made two independent arguments on appeal for why no evidentiary hearing was warranted in this case. First, the government argued that petitioner's *Kastigar* motion did not demonstrate a sufficient factual relationship between his immunized statements and his prosecution. See Gov't C.A. Br. 32-

35. Second, the government contended that, even assuming arguendo that petitioner had made such a showing, the government had proved that it had independent sources for the information. See *id.* at 35-40.

The court of appeals did not resolve the government's first contention or decide on a standard for the kind of showing a defendant would have to make under it. See Pet. App. 8a n.3. Instead, the court assumed without deciding that petitioner's allegations about his immunized testimony were sufficient to shift the burden to the government to demonstrate that it had an independent source for the evidence at issue. *Ibid.*

"After thoroughly reviewing the full record," the court of appeals concluded that the district court did not abuse its discretion in finding that the government satisfied that burden. Pet. App. 8a. The court noted that "[t]he government submitted contemporaneous e-mails which show that the government was unaware of the Virginia investigation until [petitioner] revealed it" to the undercover agent, that the government had established procedures to erect a "wall" between the two investigations, and that the Pennsylvania prosecutors and investigators did not review the Virginia FBI report. *Id.* at 9a. In response, petitioner "present[ed] no evidence which call[ed] [the government's submission] into question or raise[d] a factual dispute that would normally warrant a hearing." *Ibid.* In the court of appeals' view, the "strong, undisputed evidence of a lack of taint coupled with [petitioner's] independent revelations to the undercover agents, was sufficient to satisfy the government's burden," and the district court did not err

by denying petitioner's motion without an evidentiary hearing. *Ibid.*[1]

ARGUMENT

Petitioner renews his contention that the district court erred by not ordering an evidentiary hearing to consider his contention that prosecutors in his case used his immunized interview against him. The court of appeals correctly rejected that factbound claim, and its non-precedential decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. In *Kastigar* v. *United States*, 406 U.S. 441 (1972), this Court held that, once a defendant establishes that he has made statements under a grant of immunity on matters "related to the * * * prosecution," the government has "the burden of showing that [its] evidence is not tainted by establishing that [the government] had an independent, legitimate source for the disputed evidence." *Id.* at 460 (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1964)).

a. Here, even assuming that petitioner's showing was sufficient to shift the burden to the government to demonstrate lack of taint, but see pp. 12-14, *infra*, the government satisfied that burden. See Pet. App. 4a, 17a-18a n.1. As an initial matter, petitioner's statements to the undercover agent in the instant investigation about his immunized statements to agents in the sepa-

[1] The court of appeals rejected most of petitioner's challenges to his sentence but ordered a limited remand to permit the district court to correct calculation errors related to the number of counts of conviction and the statutory maximum sentences for assisting in the filing of a false return and for failing to file a return. See Pet. App. 9a-14a.

rate Virginia investigation constituted an independent source of the disputed evidence because petitioner voluntarily "revealed substantially the information he now claims is immunized." *Id.* at 4a. "For example, [petitioner] revealed to the undercover agent that he used Administar Corp. to 'manage cash flow for [his] various business clients.'" *Ibid.* (quoting C.A. App. 507).

Petitioner's statements to the undercover agent were not made under a grant of immunity, and the government was fully entitled to use those statements to support its search warrant affidavit and the charges in the instant indictment. See *Kastigar*, 406 U.S. at 460 (government entitled to use evidence "derived from a legitimate source wholly independent of the compelled testimony"); *United States* v. *Lipkis*, 770 F.2d 1447, 1450 (9th Cir. 1985) ("Use immunity does not protect the substance of compelled testimony, it only protects against the use of compulsory testimony as a source for evidence."); see also *United States* v. *Slough*, 641 F.3d 544, 551 (D.C. Cir. 2011) ("Where two independent sources of evidence, one tainted and one not, are possible antecedents of particular testimony, the tainted source's presence doesn't ipso facto establish taint."), cert. denied, 132 S. Ct. 2710 (2012).

Moreover, the government established (by providing contemporaneous emails) that the Pennsylvania prosecutors learned about the Virginia grant of use immunity at the same time that defendant disclosed his immunized statements to the undercover agents. Pet. App. 8a-9a, 17a-18a n.1. Based on that evidence, both lower courts found that, upon learning of petitioner's immunized statements, the Pennsylvania prosecutors took immediate action to erect a "wall" between the two investigations. *Ibid.* Given this persuasive evidence and peti-

tioner's failure to contravene it, the court properly declined to hold a formal evidentiary hearing.

As demonstrated here, district courts are fully capable of evaluating such evidence and exercising discretion in determining whether a hearing or further evidentiary development is appropriate. Petitioner's proposed approach, which would require "an adversarial, fact-finding hearing" in every case involving a *Kastigar* claim (Pet. 12), would be needlessly burdensome. Such a hearing would seemingly require the government to present all of the evidence it planned to introduce at trial and would impose a significant burden on district courts, witnesses, and prosecutors. Nothing justifies making such hearings mandatory, and the court of appeals correctly determined that the decision whether to hold such a hearing thus properly lies within the district court's discretion. See Pet. App. 7a & n.2 (citing *United States* v. *Hines*, 628 F.3d 101, 104 (3d Cir.), cert. denied, 131 S. Ct. 2134 (2010); *United States* v. *Lacey*, 86 F.3d 956, 973 (10th Cir.), cert. denied, 519 U.S. 944 (1996); *United States* v. *Montoya*, 45 F.3d 1286, 1291 (9th Cir.), cert. denied, 516 U.S. 814 (1995); *United States* v. *Dynalectric Co.*, 859 F.2d 1559, 1578-1579 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989)).

b. Petitioner contends that there is a conflict in the circuits on the question presented in his petition, but he fails to cite any case from a court of appeals that reversed a district court for declining to hold an evidentiary hearing when it had before it the kind of compelling contemporaneous evidence of lack of taint present in this case. As petitioner concedes (Pet. 14-15), the Ninth and Eleventh Circuits have held that a district court does not abuse its discretion when it determines that the government has met its burden of proving an

independent source for the disputed evidence without holding an evidentiary hearing. See *Montoya*, 45 F.3d at 1297-1299; *Dynalectric Co.*, 859 F.2d at 1578-1580 ("[I]t is clear that an evidentiary hearing is not mandated for all *Kastigar* motions and that whether a hearing is necessary to properly resolve a *Kastigar* claim depends on the particular facts of the case."). The Tenth Circuit has also affirmed a district court's decision not to hold a *Kastigar* hearing, see *Lacey*, 86 F.3d at 972-973, and the Second Circuit has likewise recognized that the government may carry its burden of demonstrating lack of taint even without a *Kastigar* hearing, see *United States* v. *Blau*, 159 F.3d 68, 73 (1998) (district court did not err "by making factual findings based on the trial record, rather than by holding a *Kastigar* hearing"). While the First Circuit has said that "[t]he question of whether any use, derivative or otherwise, was made of the compelled testimony by the prosecution, is one of fact on which * * * the district court *ordinarily* holds a separate hearing," *United States* v. *Romano*, 583 F.2d 1, 7 (1978) (emphasis added), petitioner cites no decision from that court describing such a hearing as mandatory or reversing a district court for relying on evidence of lack of taint without holding such a hearing. Thus, contrary to petitioner's assertion (Pet. 13), the determination by the court of appeals in this case that the district court did not abuse its discretion when it decided the motion to dismiss without holding an evidentiary hearing does not conflict with the approach of the First, Second, Ninth, Tenth, and Eleventh Circuits.

In *United States* v. *Cantu*, 185 F.3d 298 (1999), the Fifth Circuit stated that *Kastigar*'s "burden" requires the government "to give the defendant a chance to cross-examine relevant witnesses, to ensure the lack of

tainted evidence." *Id.* at 304; see Pet. 13. But the court cautioned that "[t]he focus of the *Kastigar* inquiry should remain on whether the evidence was tainted, and not on the procedures by which the court comes to this conclusion." *Cantu*, 185 F.3d at 304. The Fifth Circuit in *Cantu* thus affirmed the district court's decision to allow the government to supplement the record with documentation provided after the hearing was complete, and it declined to require the district court to hold a second evidentiary hearing. *Ibid.* And in a subsequent case, the Fifth Circuit found no error where the government introduced a handwritten transcript of a defendant's immunized statement but did not make the agent who prepared the transcript available for cross-examination. See *United States* v. *Jimenez*, 256 F.3d 330, 348-349 (2001), cert. denied, 534 U.S. 1140 (2002). Petitioner cites no decision from the Fifth Circuit finding that a district court abused its discretion by denying a *Kastigar* motion based on evidence other than that derived from an evidentiary hearing. Accordingly, no actual conflict exists between the Fifth Circuit and the Third Circuit's (non-precedential) decision in this case.

2. Petitioner contends that the court of appeals here "held" that he "successfully demonstrated that he provided information to the government under a grant of immunity on matters relating to his later prosecution and thereby shifted the burden of proof to the government to show its case was untainted by the immunized information it received." Pet. 12; see Pet. 17. Petitioner is incorrect: the court of appeals expressly declined to reach that question. See Pet. App. 8a n.3 ("Because we find that the government has met its burden of establishing an independent and legitimate source for the disputed evidence, we do not need to decide what stand-

ard would apply [to shift the burden to the government] and assume that [petitioner] has satisfied it."). In fact, petitioner's showing was insufficient to shift the burden to the government, and the presence of this alternative ground for affirmance is a further reason why review is not warranted in this case.

In *Murphy*, this Court stated that a defendant must demonstrate that he has given immunized testimony on "matters related to the federal prosecution" in order to shift the burden to the government to prove that its evidence is independent from the immunized statements. 378 U.S. at 79 n.18; see *Kastigar*, 406 U.S. at 460 (quoting *Murphy*, 378 U.S. at 79 n.18). Accordingly, a defendant cannot carry his initial burden by simply demonstrating that he has given immunized testimony at some point in the past; he must show instead that the immunized testimony had a sufficient connection to the prosecution at issue. See *Blau*, 159 F.3d at 72; see also *United States* v. *North*, 920 F.2d 940, 949 n.9 (D.C. Cir. 1990) ("Of course, to be entitled to a hearing on whether immunized testimony was before the grand jury, a defendant must lay a firm 'foundation' resting on more than 'suspicion' that this may in fact have happened."), cert. denied, 500 U.S. 941 (1991) (citation omitted).[2]

Petitioner's motion to dismiss on *Kastigar* grounds did not demonstrate that his immunized testimony in

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[2] The court of appeals suggested that two circuits do not require a defendant to make such a showing before shifting the burden to the government. Pet. App. 8a n.3 (citing *United States* v. *Cozzi*, 613 F.3d 725, 728 (7th Cir. 2010), cert. denied, 131 S. Ct. 1472 (2011); *United States* v. *Streck*, 958 F.2d 141, 144 (6th Cir. 1992)). But neither of the cases cited by the court of appeals squarely addresses this question; in both cases it was undisputed that the immunized testimony was related to the prosecution at issue. See *Cozzi*, 613 F.3d at 726-728; *Streck*, 958 F.2d at 142-144.

Virginia was related to the instant prosecution. The motion alleged that he made immunized statements to the FBI in a Virginia investigation of a "suspect loan transaction allegedly between defendant or a holding company and a public official in Virginia." Gov't C.A. Br. 32. In his reply to the government's response to that motion, petitioner alleged for the first time that his immunized statements to the Virginia FBI agents involved several of his false names and included references to entities that were mentioned in the instant indictment. *Ibid.* In support of this allegation, however, petitioner did not cite to any evidence that arose directly out of his contacts with the Virginia investigators, but instead to his August 21, 2003 conversation with the undercover agent investigating the instant case. Petitioner did not attach an affidavit or provide any other evidence in support of his claim that Virginia FBI agents sought immunized statements about anything other than the (non-tax-related) loan transaction with a Virginia public official. *Ibid.*

These allegations were insufficient to shift the burden to the government. As discussed previously, the conversation with the undercover agent constituted an independent source of the information that petitioner allegedly communicated to agents investigating the Virginia matter under the grant of immunity. Moreover, the FBI interview report from the Virginia investigation reveals that it had nothing to do with the kind of tax avoidance schemes at issue in this case. Finally, petitioner's assertions that the prosecutors in the instant case had access to his immunized statements amounted to nothing more than unfounded "suspicion" that the Virginia investigators had communicated with the Pennsylvania prosecutors. *North*, 920 F.2d at 949 n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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