No. 18-772

In the Supreme Court of the United States

ERASMO AVILES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's constitutional rights by failing to order the government to grant use immunity to a prospective defense witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not published in the Federal Reporter but is available at 749 Fed. Appx. 263.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2018. A petition for certiorari was filed on December 11, 2018. 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 Western District of Louisiana, petitioner was convicted on one count of conspiracy to possess methamphetamine and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846; one count of possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and one count of

possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 19-20; Gov't C.A. Br. 9-10. The district court sentenced him to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-14.

1. On May 12, 2016, petitioner and his co-conspirator Francisco Guardiola drove two separate cars along Interstate 20 in Louisiana. Pet. App. 2. Two Louisiana State Police troopers who were monitoring the highway observed that, when petitioner passed them, he braked heavily and "leaned back in his seat," "thus hiding himself from view." *Ibid.* Guardiola, who was "traveling behind" petitioner, likewise "hid himself from view when passing the troopers." *Ibid.* "The troopers followed the two cars, which appeared to be traveling together." *Ibid.* Eventually, the troopers pulled over both drivers. *Ibid.*

Guardiola, the driver of the car in the back, appeared nervous. Pet. App. 2-3. He told the trooper who stopped him that "he was on his way to meet his brother to see about a job in a refinery," but he could not state "where the refinery was located, what town he was meeting his brother in, or the name of the company." *Id.* at 2. He also stated that his car belonged to his uncle and that he was traveling alone, but the trooper learned from running the license plate that the car belonged to petitioner, and from speaking to his colleague that petitioner was driving the other car. *Id.* at 3. A drug-detection dog dispatched to the scene "gave a positive alert." *Ibid.* A search of the car revealed 975 grams of methamphetamine, 315 grams of cocaine, and a two-way camouflage radio. *Ibid.* Guardiola was arrested. *Ibid.*

In the meantime, another trooper stopped the car in the front, driven by petitioner. Pet. App. 3. Petitioner, who "appeared extremely nervous," answered "questions with questions," a tactic the trooper "knew from training" that people use "to buy time to come up with an answer." *Id.* at 3-4. When "asked * * * for paperwork for the vehicle," petitioner first handed over an insurance card for the car Guardiola was driving, but then realized his mistake and provided an insurance card for his own car. *Id.* at 3. And when asked whether he owned the other car, petitioner "began sweating," admitted ownership, and stated that "his cousin was driving it." *Id.* at 4. Upon learning that the police found drugs in Guardiola's car, the trooper arrested petitioner. *Ibid.* A consensual search of petitioner's car turned up two cell phones and a two-way camouflage radio identical to the radio found in Guardiola's car. *Ibid.*

2. A grand jury sitting in the Western District of Louisiana returned a three-count indictment charging petitioner and Guardiola with one count of conspiracy to possess methamphetamine and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846; one count of possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. Br. 9-10.

Guardiola pleaded guilty to all three counts without a plea agreement. Pet. App. 4. At his plea hearing, the government asked the district court to postpone sentencing until after petitioner's trial because "it would be interested in Mr. Guardiola's role at that trial, if any, in terms of making a sentencing recommendation." *Ibid.* (internal quotation marks omitted). Guardiola's lawyer

stated that a continuance was unnecessary because "Mr. Guardiola is not planning on participating in that trial." *Id.* at 17. But "after being assured that [a continuance] could only benefit Guardiola, [counsel] and the district court agreed to postpone Guardiola's sentencing." *Id.* at 4-5.

Petitioner's case went to trial. Pet. App. 5. In a pretrial interview with a private investigator acting on petitioner's behalf, Guardiola "allegedly stated that [petitioner] did not know about the drugs in Guardiola's car." *Ibid.* Guardiola also allegedly told the investigator that "he was supposed to call someone when he got close to the drugs' delivery destination," but that he "swallowed" a piece of paper with that person's phone number after being pulled over. *Ibid.* Petitioner subpoenaed Guardiola to testify. *Ibid.* Guardiola invoked his Fifth Amendment privilege against self-incrimination, and petitioner moved to compel his testimony. *Ibid.*

After an evidentiary hearing, the district court found that Guardiola had properly invoked the privilege against self-incrimination. Pet. App. 5. The court determined that Guardiola's testimony could expose him to an increased sentence and even to further prosecution (because Guardiola had not entered into a plea agreement foreclosing further prosecution). See Gov't C.A. Br. 14-15 (citing C.A. ROA 424-425, 434, 459-460).

The jury found petitioner guilty on all counts. The district court sentenced him to 240 months of imprisonment on each count, to be served concurrently. Pet. App. 5.

3. The court of appeals affirmed. Pet. App. 1-14.

Petitioner first argued that the district court should not have allowed Guardiola to invoke the privilege against self-incrimination, since Guardiola had "already

pled guilty to all counts in the illegal transaction." Pet. App. 7. Reviewing the district court's decision for an abuse of discretion, the court of appeals rejected Guardiola's claim. *Id.* at 9. The court explained that "'a defendant's Sixth Amendment right of compulsory process to obtain witnesses in his favor must yield to a witness's Fifth Amendment privilege against self-incrimination.'" *Id.* at 7 (quoting *United States* v. *Hernandez*, 962 F.2d 1152, 1161 (5th Cir. 1992)). Like the district court, the court of appeals found no merit in petitioner's argument that "no further self-incriminating damage could be done if Guardiola were forced to testify." *Id.* at 9. The court of appeals observed that Guardiola's testimony could expose him to further federal and state charges—for example, to a charge of obstruction of justice if he admitted to "ingesting the paper with an inculpatory phone number." *Ibid.* The court further observed that the testimony could also expose Guardiola "to adverse sentencing consequences based on obstruction of justice or failure to accept responsibility." *Ibid.*

Petitioner also argued that the government's request to postpone Guardiola's sentencing was unlawful. In petitioner's view, the request constituted a "'threat to recommend sentence enhancement (or withhold a favorable recommendation)'" and thus "substantially interfered" with Guardiola's decision whether to testify. Pet. App. 10. The court of appeals observed that Guardiola had forfeited that argument, because he "did not raise [it] in the trial court." *Id.* at 9. And the court explained that, in any event, Guardiola's characterization of the Government's request "misreads the record." *Id.* at 10. The court found the request for a postponement

to be "facially benign," citing a federal statute that allows the government to seek a sentence below the statutory minimum "'to reflect a defendant's substantial assistance in the investigation or prosecution of another person.'" *Ibid.* (quoting 18 U.S.C. 3553(e)). The court also emphasized that the government's request "did not influence Guardiola's counsel," who asserted at the plea hearing that Guardiola would not participate in petitioner's trial. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-36) that the district court should have ordered the government to immunize Guardiola in order to overcome Guardiola's privilege against self-incrimination and to enable Guardiola to testify in petitioner's favor. That contention does not warrant this Court's review. It was neither pressed nor passed on below; it lacks merit in any event; and the courts of appeals are in broad agreement that courts ordinarily may not require the government to immunize a defense witness. This Court has recently and repeatedly denied review of cases upholding the denial of immunity to defense witnesses, and the same result is appropriate here.[1]

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[1] See, *e.g.*, *Davis* v. *United States*, 138 S. Ct. 65 (2017) (No. 16-1190); *Viloski* v. *United States*, 135 S. Ct. 1698 (2015) (No. 14-472); *Wilkes* v. *United States*, 135 S. Ct. 754 (2014) (No. 14-5591); *Quinn* v. *United States*, 572 U.S. 1063 (2014) (No. 13-7399); *Walton* v. *United States*, 568 U.S. 1085 (2013) (No. 12-5847); *Phillips* v. *United States*, 568 U.S. 1085 (2013) (No. 12-5812) (companion case); *Brooks* v. *United States*, 568 U.S. 1085 (2013) (No. 12-218) (companion case); *Singh* v. *New York*, 555 U.S. 1011 (2008) (No. 08-165); *Ebbers* v. *United States*, 549 U.S. 1274 (2007) (No. 06-590); *DiMartini* v. *United States*, 524 U.S. 916 (1998) (No. 97-1809); *Wilson* v. *United States*, 510 U.S. 1109 (1994) (No. 93-607); *Whittington* v. *United States*, 479 U.S. 882 (1986) (No. 85-1974).

1. This Court's ordinary practice "precludes a grant of certiorari" where "'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner failed to press the question presented in the courts below. He never asked the government to grant immunity to Guardiola. Nor did he ask the district court to order the government to grant immunity. Nor, finally, did he ask the court of appeals to reverse his conviction on account of the failure to grant immunity. Petitioner acknowledges (Pet. 6-7) that he he "raised two claims on appeal"—that Guardiola "failed to establish any real or substantial risk of incrimination," and that "the government substantially interfered with Guardiola's decision to testify by requesting that his sentencing be postponed"—neither of which is the claim he now asserts. And the courts below accordingly did not pass on the question whether the government should have been ordered to immunize Guardiola. No sound basis exists for this Court to consider that issue in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

2. Petitioner's claim, in any event, lacks merit. The Compulsory Process Clause protects a criminal defendant's right to "have compulsory process for obtaining witnesses in his favor." *Kastigar* v. *United States*, 406 U.S. 441, 444 (1972). The Court has emphasized, however, that "the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination." *Ibid.* (footnote omitted).

Although the Executive Branch may compel the testimony of a witness who invokes his privilege against

self-incrimination by immunizing the witness against the future use of his testimony or its fruits in criminal prosecutions, see *Kastigar*, 406 U.S. at 443-447, "[n]o court has authority to immunize a witness," *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). The decision to seek use immunity requires making policy judgments that are ill-suited to the Judicial Branch, because it "necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation." *United States* v. *Doe*, 465 U.S. 605, 616 (1984). Prosecutorial decisions are "the special province of the Executive Branch," the branch "charged by the Constitution to 'take care that the Laws be faithfully executed.'" *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985) (quoting U.S. Const. Art. II, § 3). And the federal use-immunity statute gives "the Department of Justice exclusive authority to grant immunities." *Doe*, 465 U.S. at 616 (citation omitted); see 18 U.S.C. 6003.

Notwithstanding the absence of authority for judicial grants of immunity, some courts of appeals have stated (or declined to rule out the possibility) that a court may, as a due-process "remedy" for certain forms of "prosecutorial misconduct," order the government to choose between immunizing a witness and taking some other action (such as dismissing the charges). *United States* v. *Quinn*, 728 F.3d 243, 260 (3d Cir. 2013) (en banc), cert. denied, 572 U.S. 1063 (2014). Such an approach would not aid petitioner, who has not shown that the government has engaged in any misconduct at all, much less misconduct so serious that it warrants the extraordinary remedy of compelling the government to grant

immunity on pain of dismissal. To the extent that petitioner contends that the government did so when it sought postponement of Guardiola's sentencing, the court of appeals correctly found that "[t]his contention misreads the record." Pet. App. 10. The government's comments that it might consider Guardiola's role at trial when formulating a sentencing recommendation were neither a warning against testifying nor a threat of retribution if Guardiola did testify. Instead, the government's comments were, at most, an indication that, if Guardiola provided truthful testimony that helped the government, the government might recommend a lower sentence (a permissible practice under 18 U.S.C. 3553(e)). The court of appeals' factbound conclusion that the government's comments were "benign" (Pet. App. 10) does not merit further review.

3. Petitioner contends (Pet. 8-19) that the circuits are divided about the circumstances in which a prosecutor's decision not to immunize a defense witness might violate due process. Petitioner's case is an unsuitable vehicle for addressing any such disagreement, because he cannot show that any circuit would recognize a claim in the circumstances here.

The courts of appeals uniformly agree that the courts may not grant defense witnesses use immunity on their own authority.[2] The courts further agree that

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[2] See, *e.g.*, *United States* v. *Castro*, 129 F.3d 226, 232 (1st Cir. 1997), cert. denied, 523 U.S. 1100 (1998); *United States* v. *Turkish*, 623 F.2d 769, 773 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *Quinn*, 728 F.3d at 252-257 (3d Cir.); *United States* v. *Moussaoui*, 382 F.3d 453, 466 (4th Cir. 2004), cert. denied, 544 U.S. 931 (2005); *United States* v. *Brooks*, 681 F.3d 678, 711 (5th Cir. 2012), cert. denied, 568 U.S. 1085 (2013); *United States* v. *Pennell*, 737 F.2d 521, 527-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Herrera-Medina*, 853 F.2d 564, 568 (7th Cir. 1988); *United*

a court may order the government to choose between granting immunity and taking some other act (such as dismissing the charges), if ever, only in narrow circumstances. Specifically, most courts to consider the issue have concluded that a district court may issue such an order only to provide a remedy for certain forms of prosecutorial misconduct.[3]

In *United States* v. *Straub*, 538 F.3d 1147, 1166 (2008), the Ninth Circuit ruled that a court may require a grant of immunity even without a showing of misconduct in extraordinary circumstances where "the fact-finding process" is "distorted through the prosecution's decisions to grant immunity to its own witness[es] while denying immunity to a witness with directly contradictory testimony." The Ninth Circuit found that the defendant had satisfied this standard in *Straub*, where the

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States v. *Capozzi*, 883 F.2d 608, 613-614 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States* v. *Serrano*, 406 F.3d 1208, 1217 (10th Cir.), cert. denied, 546 U.S. 913 (2005); *United States* v. *Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990); *United States* v. *Perkins*, 138 F.3d 421, 424 (D.C. Cir.), cert. denied, 523 U.S. 1143 (1998).

[3] See, *e.g.*, *United States* v. *Angiulo*, 897 F.2d 1169, 1191-1192 (1st Cir.), cert. denied, 498 U.S. 845 (1990); *United States* v. *Ebbers*, 458 F.3d 110, 118-120 (2d Cir. 2006); *United States* v. *Washington*, 398 F.3d 306, 310 (4th Cir.), cert. denied, 545 U.S. 1109 (2005); *United States* v. *Taylor*, 728 F.2d 930, 935 (7th Cir. 1984); see also, *e.g.*, *Brooks*, 681 F.3d at 711 (leaving open the possibility that compelled immunity may be an appropriate remedy for prosecutorial misconduct); *United States* v. *Emuegbunam*, 268 F.3d 377, 401 & n.5 (6th Cir. 2001) (same), cert. denied, 535 U.S. 977 (2002); *United States* v. *Blanche*, 149 F.3d 763, 768-769 (8th Cir. 1998) (same); *Serrano*, 406 F.3d at 1218 n.2 (same); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986) (per curiam) (same), cert. denied, 479 U.S. 1069 (1987).

government had denied immunity to the "only defense witness listed"; it had granted immunity or other benefits to 12 prosecution witnesses; the defense witness's testimony would, if believed, "make the government's key witness both a perjurer and possibly the actual perpetrator of the crime"; and the prosecution "claimed it had no interest in prosecuting that [defense] witness." *Id.* at 1162, 1164. The Ninth Circuit warned, however, that compulsory immunity is reserved for "exceptional cases," and that courts should be "extremely hesitant to intrude on the Executive's discretion." *Id.* at 1166. In the decade since *Straub*, the Ninth Circuit has repeatedly rejected claims that the government's refusal to immunize a defense witness violated due process. See, *e.g.*, *United States* v. *Kuzmenko*, 671 Fed. Appx. 555, 556 (2016); *United States* v. *Lopez-Banuelos*, 667 Fed. Appx. 959, 960 (2016); *United States* v. *Miller*, 546 Fed. Appx. 709, 710 (2013). And petitioner's claim would fail even under the Ninth Circuit's standard, since petitioner does not contend that the government selectively immunized *any* prosecution witnesses.

Petitioner errs in asserting (Pet. 19) that under the Third Circuit's decision in *Quinn*, *supra*, "the prosecution violates due process if it refuses to seek immunity for a crucial defense witness without a strong reason," even if no prosecutorial misconduct occurred. Pet. 17. In *Quinn*, the court expressly *rejected* the theory that a district court might immunize a defense witness "without evidence of prosecutorial misconduct." 728 F.3d at 247; see *id.* at 248, 261.

Quinn used a five-part test under which a defendant who seeks compelled immunity must show the following: "[1] Immunity must be properly sought in the district court; [2] the defense witness must be available to

testify; [3] the proffered testimony must be clearly exculpatory; [4] the testimony must be essential; and [5] there must be no strong governmental interests which countervail against a grant of immunity." 728 F.3d at 262 (brackets and citation omitted); see Pet. 17. Petitioner likewise errs in asserting (Pet. 17-18) that *Quinn* establishes a freestanding five-factor "balancing test" under which a district court may compel a grant of immunity even in the absence of "intentional misconduct" or "bad faith." To the contrary, the Third Circuit emphasized that the "five-factor test aids this inquiry for prosecutorial misconduct" and that the factors must be "understood as a gauge of prosecutorial misconduct." 728 F.3d at 259. In any event, petitioner cannot meet at least two of *Quinn*'s factors: that "[i]mmunity must be properly sought in the district court," and that no "strong governmental interests * * * countervail against a grant of immunity." *Id.* at 262 (citation omitted). The government had a strong interest in retaining the ability to prosecute Guardiola for additional crimes on the basis of new evidence provided by his testimony, as well as a strong interest in ensuring that Guardiola would not commit perjury after taking the stand—something Guardiola's lawyer believed was a real risk. See C.A. ROA 424 ("I'm a little concerned about perjury"); *United States* v. *Hooks*, 848 F.2d 785, 802 (7th Cir. 1988) ("It is well within the discretion of a prosecutor under 18 U.S.C. § 6003 to decline immunity to a witness who could be charged for false statement and perjury.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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