No. _____

In The

# Supreme Court of the United States

MICHAEL DAVIS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI


THOMAS A. DURKIN
ROBIN V. WATERS
DURKIN & ROBERTS
2446 N. Clark St.
Chicago, IL 60614
(312) 981-0123
tdurkin@durkinroberts.com

JOHN D. CLINE
*Counsel of Record*
LAW OFFICE OF JOHN D. CLINE
235 Montgomery St.,
Suite 1070
San Francisco, CA 94104
(415) 662-2260
cline@johndclinelaw.com

## QUESTION PRESENTED

A criminal defendant has a Fifth and Sixth Amendment right to present witnesses in his defense. That right must yield, however, to a witness' valid assertion of his Fifth Amendment privilege against self-incrimination. The courts of appeals have struggled for almost three decades to determine the circumstances under which due process requires the prosecution to immunize a defense witness who asserts his Fifth Amendment privilege. That struggle has produced a clear, deeply entrenched circuit split.

The question presented is:

Whether the government violates a criminal defendant's right to due process when it immunizes a significant prosecution witness but refuses to immunize a directly contradictory defense witness solely on the ground that the prosecutor disbelieves the defense witness' proffered testimony.

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were Petitioner Michael "Mickey" Davis and Respondent United States of America.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

### CASES

**CONSTITUTION, STATUTES, AND RULES**

**OTHER AUTHORITIES**

## PETITION FOR A WRIT OF CERTIORARI

---

Michael Davis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The court of appeals' opinion (App. 1-24) is reported at 845 F.3d 282. The district court's order and oral ruling concerning immunity (App. 25-46) are unpublished.

## JURISDICTION

The court of appeals entered judgment on December 30, 2016. App. 1.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides:

"[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Compulsory Process Clause of the Sixth Amendment provides:

---

[1] The appendix to this petition is cited as "App." The trial transcript is cited as "TT"; pleadings and orders are cited as "R." followed by the district court docket number; and defense trial exhibits are cited as "DX." The government's brief in the court of appeals is cited as "G.Br."

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

Section 6002 of Title 18 provides that, upon the issuance of an immunity and compulsion order under the statute:

> [T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Section 6003 of Title 18 provides:

> (a) In the case of an individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring

> such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--
>
> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

## INTRODUCTION

The Fifth and Sixth Amendments guarantee a criminal defendant the right to call witnesses for his defense. That guarantee protects the integrity of the fact-finding process. It gives the defendant the power to place before the jury favorable testimony, including testimony that contradicts witnesses called by the prosecution. The jury assesses the credibility

of the witnesses on each side. Through this clash of evidence, the truth emerges.

Privileges and rules of evidence limit the defendant's constitutional right to present witnesses in his defense. Most of these restrictions apply equally to the parties. Neither the prosecution nor the defense, for example, can elicit evidence protected by a valid assertion of the attorney-client privilege or the psychotherapist-patient privilege. Similarly, neither party can place hearsay before the jury, unless an exception applies. Fed. R. Evid. 403 and most other evidentiary rules apply equally to both sides.

In one crucial respect, however, the prosecution enjoys a substantial evidentiary advantage over the defense. If a witness asserts his Fifth Amendment privilege, the prosecution can obtain immunity under 18 U.S.C. § 6003 and compel the witness to testify. The defense, on the other hand, has no such ability. A district court may issue an order of immunity only "upon the request of the United States attorney." *Id*. A witness' valid assertion of the Fifth Amendment, therefore, places him completely beyond the reach of the defense. The privilege against self-incrimination does not yield no matter how great the defendant's need for the testimony.

This case perfectly illustrates the unfairness that can result from this imbalance. Two witnesses--John Rovito and his brother Gigi Rovito--gave directly contradictory statements to the FBI. John's statement inculpated petitioner Davis. Gigi's

statement contradicted John's and exculpated Davis. Both witnesses asserted their Fifth Amendment privilege at trial. The government immunized John but refused to immunize Gigi. It refused immunity to Gigi for just one reason: the prosecutor did not believe his exculpatory testimony. The jury heard John's version but never heard Gigi's contradictory version.

The courts of appeals have struggled for decades with the question of immunity for defense witnesses. That struggle has produced a clear, entrenched circuit split. The majority of circuits hold that federal courts are powerless to remedy the evidentiary imbalance that results from the government's refusal to immunize a defense witness absent prosecutorial misconduct or bad faith. By contrast, the Third and Ninth Circuits hold that a district court may find a due process violation from the refusal to immunize a significant defense witness even in the absence of bad faith.

This case presents the ideal vehicle to resolve this split in the circuits and address the evidentiary imbalance that threatens the fairness of many criminal trials. The Court should grant the writ.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS.

1. In 2012, Joseph Serpico and his son Ralph "R.J." Serpico started a used car business in Melrose Park, Illinois. The largest investor was

petitioner Michael "Mickey" Davis, who provided $300,000. TT594-98.

Davis invested the money under a "secured loan agreement" that he, Joseph Serpico, and R.J. Serpico signed. The agreement provided a three-year, interest-free loan from Davis to the Serpicos' new company, Ideal Motors. In addition to the principal, the agreement required Ideal to pay Davis $300 per vehicle sold as long as the principal remained unpaid.

2. Ideal defaulted on the secured loan agreement almost immediately. Rather than use Davis' $300,000 to purchase inventory, Joseph Serpico began stealing it to feed his gambling habit. The elder Serpico's theft, coupled with slower than expected sales, caused Ideal to run low on cash within months of obtaining the loan from Davis.

By January 2013, Davis had discovered Joseph Serpico's theft of the loaned funds for gambling. Davis was, as he later told the FBI, "extremely pissed off."[2] Under the secured loan

[2] R.J. Serpico testified that Davis made veiled threats to his family during a January 2013 meeting, after Davis had discovered Joseph Serpico's theft. TT623-26. This assertion had significant weaknesses. It rested entirely on R.J. Serpico's uncorroborated testimony about what Davis said at the meeting. Although R.J. Serpico attributed many of his actions after the meeting to fear of Davis, those actions were required under the secured loan agreement. And, as discussed below, Davis' actions are inconsistent with an attempt to extort. Rather than ratchet up—or even carry through on—his alleged threat to Serpico's family, Davis set to work to rescue Ideal, pumping in more money to pay the state and the dealership that provided vehicles on consignment.

agreement, he had the right to seize and sell Ideal's inventory and to enforce the personal guarantees the Serpicos had given. Instead of exercising these rights, however, Davis undertook to keep Ideal afloat. He insisted that Joseph Serpico be removed from his position at Ideal; he paid $15,000 that Ideal owed to the state for back taxes, thus allowing the company to resume processing titles and license plates and remain in business; he agreed to pay an $80,000 debt that Ideal owed to a dealership from which it obtained vehicles on consignment; and he asserted his right under the secured loan agreement to have a joint bank account with Ideal and deposited $10,000 in the joint account.

3. Despite Davis' assistance, R.J. Serpico proved unequal to the task of salvaging Ideal. In May 2013, he walked off the Ideal lot and never returned. His abrupt departure left his business, his employees, and his creditors, including Davis, in the lurch.

As permitted under the secured loan agreement, Davis took possession of several vehicles that remained on the Ideal lot. He had the vehicles transported to a nearby lot. By coincidence, Serpico was coaching a little league game nearby. He recognized the vehicles and knew that (contrary to the secured loan agreement) the titles were held by an automobile financing company. Serpico contacted his lawyer, who notified the financing company. The company had the vehicles towed to its own lot. Davis called R.J. Serpico and expressed his displeasure at this further breach of the secured loan agreement.

Soon after abandoning Ideal, R.J. Serpico consulted a bankruptcy attorney. He ultimately filed for bankruptcy and listed a $150,000 debt to Davis among his liabilities. TT684-85. He received a discharge in bankruptcy. TT1100.

4. The government alleged that in July 2013, two months after R.J. Serpico abandoned Ideal, Davis contacted Gigi Rovito, who owned a restaurant where Davis dined regularly, and asked him to have Serpico's legs broken as a means of collecting the debt Ideal owed Davis. According to the government, Davis offered to pay $10,000 for the beating. The government alleged that Gigi Rovito passed Davis' request to his brother John. John Rovito passed the request to Paul Carparelli. Carparelli enlisted the aid of George Brown, who, unbeknownst to Carparelli, was cooperating with the FBI. TT991, 1145, 1797-98.

The government maintained that on July 11, 2013 Davis delivered a down payment of $5000 cash in an envelope to Gigi Rovito at Gigi's restaurant. According to the government, Gigi passed the envelope to John Rovito, who passed it to Carparelli. *E.g.*, TT1429-30, 1799-1800. The government contended that communications passed via this chain: Davis talked with Gigi Rovito; Gigi Rovito talked with John Rovito; John Rovito talked with Carparelli; and Carparelli talked with Brown. TT1797-98.

Of the four "links" in this chain (other than Davis)—Gigi Rovito, John Rovito, Carparelli, and Brown—the government called only John Rovito and

Brown as witnesses. The government did not call Carparelli or Gigi Rovito, and—as discussed below—it refused to immunize Gigi Rovito when the defense sought to present his testimony to the jury.

Neither Brown nor John Rovito could identify Davis as the person who had allegedly paid Gigi Rovito to have R.J. Serpico's legs broken.[3] Forensic evidence did not provide the missing links in the government's case. The government recovered the envelope and cash from Carparelli and tested for fingerprints. An FBI examiner found prints from John Rovito and Carparelli on the envelope, but none from Davis or Gigi Rovito. TT412, 435. A print found on one of the bills in the envelope did not belong to Davis or anyone else involved in the investigation. TT421-22, 437. The government also introduced cell site evidence, which showed only that Davis was somewhere within miles of Gigi Rovito's restaurant on the evening when the envelope containing cash was allegedly delivered to him. TT460-68, 485-90. An examination of Davis' bank records did not reveal any significant cash withdrawals near July 11. TT1662-65.

The government presented evidence from phone records that Davis contacted Gigi Rovito around the time that he purportedly delivered money to Rovito for the beating of R.J. Serpico. TT1608-09. It showed as well that Davis and Gigi

[3] Although the government had John Rovito testify about meeting a man named "Mickey" at Gigi Rovito's restaurant and even describe the man, TT1515-17, it never asked him the obvious next question: whether Davis was the "Mickey" he met.

Rovito had more than seventy phone contacts in June and July 2013. TT1605. But Davis had spoken regularly with Gigi for months—113 calls in all between January and July 2013. TT1605. Moreover, the totals the government presented included "contacts of any duration whatsoever, as small as that duration might be," even as few as zero seconds. TT1609-10. The government presented no evidence concerning the *content* of the phone contacts between Davis and Gigi Rovito. The phone records showed that Davis had zero calls with John Rovito and Paul Carparelli in June and July. DX12 (R.159-14); TT1616, 1669-70.

The district court admitted a series of telephone calls between Carparelli and Brown and between John Rovito and Brown, recorded with Brown's consent as an FBI informant. This evidence, however, was ambiguous. For example, although the recorded conversations referred to the person paying for the beating of R.J. Serpico as "Mickey," neither Brown nor John Rovito knew "Mickey's" last name or identified that "Mickey" as the petitioner, Mickey Davis. TT1275-76, 1282, 1425. In one of the calls Carparelli refers to "Mickey" as a "partner" of Solly DeLaurentis. TT1275-76. Although Davis told the FBI that he considers DeLaurentis a childhood friend, there is no evidence that they were "partners." To the contrary, phone records showed only ten contacts between the two men between January 2013 and July 2013. TT1610-11.

In addition, Carparelli told Brown during the recorded calls that "Mickey" wanted Serpico told,

"This is what you get for fucking with my sister." TT1272, 1277-78, 1336-38. If (as the government alleged and was required to prove) the purpose of the beating was to collect the debt Ideal and Serpico owed to Davis, the "sister" message would not accomplish the goal. For the beating to serve its alleged purpose, Serpico had to know that Davis was behind it. The government never resolved these gaps in its evidence.

5. Davis sat for two voluntary interviews with the FBI, in October 2013 and March 2014. He did not have counsel at either interview. Both times he described his $300,000 loan to Ideal; he explained how the Serpicos stole his money; and he acknowledged that he was "pissed off" about the theft. But he flatly denied threatening R.J. Serpico, and he denied giving anyone an envelope with $5000 to have Serpico beaten. TT224-32, 237-44, 917-27, 929, 936-37. When the agents told him—falsely—that Carparelli said Davis had provided him with cash to beat Serpico, Davis responded that Carparelli was lying. TT275, 926-27. He told the agents he was confident his fingerprints would not be on the envelope the agents said they had found at Carparelli's residence. TT927-28.

## II. PROCEDURAL HISTORY.

On April 14, 2015, a grand jury returned a superseding indictment charging Davis with one count of use of extortionate means to collect a debt, in violation of 18 U.S.C. § 894, and one count of attempting to affect commerce by extortion, in violation of 18 U.S.C. § 1951. R.58.

At trial, the government called John Rovito, for whom it had obtained immunity. Rovito testified that he learned either from his brother Gigi or from Carparelli that Serpico was to be beaten. TT1417, 1520-21. He claimed that the beating was at the request of Gigi's friend "Mickey." TT1425, 1429. Rovito testified that he received information from Carparelli about plans for the beating and passed it to Gigi, who he understood would pass it on to "Mickey." TT1514-15. Rovito described receiving an envelope from Gigi at Gigi's restaurant and passing it to Carparelli. TT1418, 1421-22, 1530, 1569.

The FBI report of Gigi Rovito's interview contradicts John's story. Gigi denied knowing that Davis was interested in having R.J. Serpico beaten. App. 50, 52. He stated that he never gave John Rovito $5,000 for that purpose. App. 52-53. When agents told him that there were fingerprints on the envelope and the bills that were yet to be identified, Gigi responded that the agents could take his restaurant and arrest him if they found his prints. App. 53.

The defense subpoenaed Gigi Rovito. After learning that the government gave immunity to his brother John, Gigi decided that he too would assert his Fifth Amendment privilege. App. 30-31. The government refused to immunize him. App. 31. Davis moved the district court for an order granting immunity to Gigi Rovito or, alternatively, admitting his FBI 302 interview memorandum into evidence or giving a missing witness instruction. App. 32-39; R.107. In opposition, the government asserted that "John Rovito is a more truthful witness than Gigi

Rovito" and explained the respects in which it believed the evidence contradicted Gigi's proposed testimony. App. 36-37. Based on its view that John Rovito was more credible than Gigi Rovito, the government argued that it had not violated Davis' right to due process by refusing to immunize Gigi. App. 37. The government never contended that immunizing Gigi Rovito would interfere with any prosecutorial function. It never argued, for example, that Gigi was an investigatory target for whom immunity would impede prosecution.

The district court found no due process violation in the government's refusal to grant immunity to Gigi. It excluded the FBI 302 of Gigi's interview and declined to give a missing witness instruction. App. 25, 40, 44.

After a two-week trial, the jury returned a verdict of guilty on both counts. R.110. On November 17, 2015, the district court sentenced Davis to 48 months in prison. R.150.

The Seventh Circuit affirmed Davis' conviction. App. 1. As relevant here, the court of appeals upheld the district court's conclusion that the government's refusal to immunize Gigi Rovito did not violate Davis' right to due process. App. 18-19. The court declared that "[t]he government reasonably presumed that if Gigi took the stand, he would likely perjure himself. The government acted well within its discretion in declining an immunity deal that would have only facilitated such perjury." App. 19.

## REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve the entrenched circuit split over the circumstances under which the government's refusal to immunize a defense witness violates the defendant's right to due process. The issue of defense witness immunity is an important and recurring one. The majority position--that the government's refusal to immunize a defense witness does not violate due process absent prosecutorial misconduct or bad faith--gives insufficient weight to the defendant's right to present evidence in his own defense and overstates the government's concern about defense witness immunity. This case, with its fully developed record, presents the ideal vehicle for addressing the immunity issue.

### I. THE CIRCUITS ARE DEEPLY SPLIT ON THE CIRCUMSTANCES UNDER WHICH THE GOVERNMENT'S REFUSAL TO IMMUNIZE A DEFENSE WITNESS VIOLATES DUE PROCESS.

For decades the courts of appeals have grappled with the circumstances under which due process requires defense witness immunity. A clear split in the circuits has developed. A majority of circuits reject defense witness immunity absent a showing of prosecutorial misconduct or bad faith.[4]

[4] *See, e.g., United States v. Angiulo,* 897 F.2d 1169, 1192-93 (1st Cir. 1990); *United States v. Castro*, 129 F.3d 226, 232-33 (1st Cir. 1997); *United States v. Turkish*, 623 F.2d 769, 772 n.1 (2d Cir. 1980); *United States v. Dolah*, 245 F.3d 98, 105-06 (2d Cir. 2001); *United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005); *United States v. Brooks*, 681 F.3d 678, 711 (5th Cir.

The Third and Ninth Circuits, by contrast, hold that due process may require defense witness immunity without a showing of misconduct or bad faith.[5]

Within this broad circuit split are subsidiary splits. Among the circuits that require a showing of prosecutorial misconduct or bad faith, courts use several different standards. The Second and Fourth Circuits, for example, hold that the defendant must show "discriminatory use [of immunity] by the Government to gain tactical advantage, probative and exculpatory value of the expected evidence, and unobtainability from other sources." *United States v. Dolah*, 245 F.3d 98, 105-06 (2d Cir. 2001); *see, e.g., United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005) (same).

The First, Seventh, and Eighth Circuits hold that prosecutorial discretion to grant or deny immunity "is cabined only by the requirement that a prosecutor may not 'immunize witnesses with the intention of distorting the fact-finding process.'"

---

(continued…)

2012); *United States v. Emuegbunam*, 268 F.3d 377, 401 (6th Cir. 2001); *United States v. Burke*, 425 F.3d 400, 411 (7th Cir. 2005); *United States v. Washington*, 318 F.3d 845, 855 (8th Cir. 2003); *United States v. Serrano*, 406 F.3d 1208, 1218 & n.2 (10th Cir. 2005); *United States v. Merrill*, 685 F.3d 1002, 1014-15 (11th Cir. 2012); *United States v. Lugg*, 892 F.2d 101, 104 (D.C. Cir. 1989).

[5] *See, e.g., United States v. Quinn*, 728 F.3d 243, 257-61 (3d Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1872 (2014); *United States v. Straub*, 538 F.3d 1147, 1162 (9th Cir. 2008); *United States v. Wilkes*, 662 F.3d 524, 533-34 (9th Cir. 2011); *United States v. Wilkes*, 744 F.3d 1101, 1104-05 (9th Cir.), *cert. denied*, 135 S. Ct. 754 (2014).

App. 18 (quoting *United States v. Burke*, 425 F.3d 400, 411 (7th Cir. 2005)); *see, e.g., United States v. Washington*, 318 F.3d 845, 855 (8th Cir. 2003); *United States v. Castro*, 129 F.3d 226, 232-33 (1st Cir. 1997); *cf. United States v. Serrano*, 406 F.3d 1208, 1218 & n.2 (10th Cir. 2005) (leaving open whether intent to distort fact-finding process suffices for due process violation); *United States v. Emuegbunam*, 268 F.3d 377, 401 (6th Cir. 2001) (same); *United States v. Perkins*, 138 F.3d 421, 424 n.2 (D.C. Cir. 1998) (same).

The Fifth Circuit holds that due process may require defense witness immunity where the government "abuse[s] its immunity power." *United States v. Bustamante*, 45 F.3d 933, 943 (5th Cir. 2005); *see United States v. Brooks*, 681 F.3d 678, 711 (5th Cir. 2012). The Eleventh Circuit also appears to adopt this view. *See United States v. Merrill*, 685 F.3d 1002, 1014-15 (11th Cir. 2012).

Among the circuits that embrace the "intention of distorting the fact-finding process" standard, there is further disagreement. As this case demonstrates, the Seventh Circuit holds that the prosecution can rebut any inference of an intent to distort merely by asserting that the defense witness' proposed testimony is false and thus would constitute perjury. App. 18-19. Here, for example, the prosecutor maintained that John Rovito was more credible than Gigi Rovito, and that contention sufficed to defeat petitioner's request that Gigi be immunized.

By contrast, the First Circuit has expressed doubt that the prosecutor's disbelief of the defense witness' testimony, without more, suffices to rebut an inference of intent to distort the fact-finding process. As the court put it:

> The government's belief [that the defense witness would lie] would obviously be pertinent if it were considering whether to immunize witness testimony to present as part of the prosecution's case. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). But one might think that it was a matter for the jury, not the prosecutor, to decide whether testimony seemingly helpful to the defendant was actually false. Surely this would be so if the question were one of disclosing exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

*United States v. Mackey*, 117 F.3d 24, 28 (1st Cir. 1997). *Mackey* found that the government had not acted in bad faith because its "primary" reason for refusing immunity to the witness was "the risk of compromising any future prosecution" of the witness, rather than the prosecution's disbelief of the witness' proffered testimony. *Id.*

On the other side of the broad circuit split, the Third and Ninth Circuits agree that the prosecution's refusal to immunize a defense witness can violate due process without a showing of bad faith, but those courts have adopted different

standards. The Third Circuit holds that "[i]f the defendant can show, as a *prima facie* matter, a witness's testimony is available, clearly exculpatory, and essential—in effect showing that the prosecutor's actions have impaired the ability to present an effective defense—we will consider the due process concerns raised regarding the Government's discretion to grant or deny immunity." *United States v. Quinn*, 728 F.3d 243, 259 (3d Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1872 (2014). The court will be guided in the due process inquiry by five factors: "[1] [immunity was] properly sought in the district court; [2] the defense witness [is] available to testify; [3] the proffered testimony [is] clearly exculpatory; [4] the testimony [is] essential; and [5] there [are] no strong governmental interests which countervail against a grant of immunity." *Id.* at 251 (quoting *Government of Virgin Islands v. Smith*, 615 F.2d 964, 972 (3d Cir. 1980)).

The Ninth Circuit, like the Third Circuit, does not require a showing of bad faith for a due process violation based on refusal to grant immunity to a defense witness. But that court has established a different test:

> [F]or a defendant to compel use immunity the defendant must show that: (1) the defense witness's testimony was relevant; and (2) . . . the prosecution granted immunity to a government witness in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have directly

> contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial.

*United States v. Straub*, 538 F.3d 1147, 1162 (9th Cir. 2008); *see United States v. Wilkes*, 662 F.3d 524, 533-34 (9th Cir. 2011); *United States v. Wilkes*, 744 F.3d 1101, 1104-05 (9th Cir.), *cert. denied*, 135 S. Ct. 754 (2014). In other words, the Third Circuit focuses on the nature of the proposed defense testimony, and the Ninth Circuit focuses on the prosecution's selective grant of immunity to a key prosecution witness while withholding immunity for a directly contradictory defense witness.

These disparate standards have a concrete impact on criminal cases. As of 2012, outside the Third and Ninth Circuits there had been only one reported grant of defense witness immunity, by a district court in the Second Circuit. Nathaniel Lipanovich, *Note: Resolving the Circuit Split on Defense Witness Immunity: How the Prosecutorial Misconduct Test Has Failed Defendants and What the Supreme Court Should Do About It*, 91 Texas L. Rev. 175, 178 (2012) ["Lipanovich"]. That single immunity grant--in *United States v. De Palma*, 476 F. Supp. 775 (S.D.N.Y. 1979)--was later vacated by the Second Circuit. *United States v. Horwitz*, 622 F.2d 1101 (2d Cir. 1980). By contrast, there have been a significant number of reported immunity

grants in the Third and Ninth Circuits. Lipanovich, *supra*, 91 Texas L. Rev. at 178.[6]

The circuit split had a direct impact on petitioner's trial. If Davis had been tried in the Third or Ninth Circuits--and possibly in the First Circuit--he would have been able to place Gigi Rovito's clearly exculpatory testimony before the jury. The jury may well have believed Gigi's testimony rather than the testimony of immunized prosecution witness John Rovito. But because Davis was tried in the Seventh Circuit, the government's refusal to immunize Gigi denied him that ability, and the jury heard only John's version of what occurred between the Rovito brothers.[7]

The deep and entrenched circuit split over defense witness immunity requires this Court's resolution.[8]

---

[6] Outside the Third and Ninth Circuits, no reported federal case since 2012 (when the Lipanovich Note was published) has found a due process violation based on the government's refusal to immunize a defense witness.

[7] For a description of the difference defense witness immuity can make in a trial, see Richard Marmaro and Matthew E. Swan, *Obtaining Defense Witness Immunity: Lessons From the Broadcom Trial*, 37 Litigation 21 (Spring 2011) (describing Broadcom trial, in which Judge Cormac Carney required immunity grants for two defense witnesses).

[8] Legal scholars as well are deeply divided over the proper approach to defense witness immunity. *See, e.g.,* Leonard N. Sosnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 Temple L. Rev. 171, 174 n.14 (2000) (collecting literature); *see also* Reid H. Weingarten and Brian M. Heberlig, *The Defense Witness Immunity Doctrine: The Time Has Come to Give It Strength to Address Prosecutorial Overreaching*, 43 Am. Crim. L. Rev. 1189 (2006).

## II. DEFENSE WITNESS IMMUNITY IS AN IMPORTANT AND RECURRING ISSUE THAT THE MAJORITY OF CIRCUITS HAVE DECIDED INCORRECTLY.

Courts have grappled for decades with the defense witness immunity issue, beginning with then-Judge Burger's opinion in *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966). The interests at stake are substantial. On one side, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see Washington v. Texas*, 388 U.S. 14, 19 (1967). Due process "speak[s] to the balance of forces between the accused and his accuser," *Wardius v. Oregon*, 412 U.S. 470, 475 (1973), and the government's power to immunize witnesses selectively skews those forces heavily in the prosecution's favor.

On the other side of the balance is "the risk that immunity will frustrate the Government's attempts to prosecute" the witness receiving immunity. *United States v. Doe*, 465 U.S. 605, 616 (1984).

In the majority of circuits--the circuits that require prosecutorial misconduct or bad faith--the government's interest *always* receives decisive weight. None of those courts has ever found defense witness immunity required. These courts under-value the criminal defendant's (and the public's) fundamental interest in a fair trial. As the Ninth Circuit observed, "where two eyewitnesses tell conflicting stories, and only the witness testifying for

the government is granted immunity, the defendant would be denied any semblance of a fair trial." *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991) (quotation omitted). That is essentially what happened here. Only John and Gigi Rovito know what occurred between them. The government's decision to immunize John but not Gigi denied petitioner a fair trial.

The "prosecutorial misconduct" circuits also overstate the government's concern about preserving future prosecutions of immunized witnesses. Many witnesses assert the Fifth Amendment privilege out of an abundance of caution; as this Court has observed, "one of the Fifth Amendment's basic functions is to protect *innocent* men who otherwise might be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam) (quotation and ellipses omitted; emphasis in original). It is unlikely that the government would ever prosecute these "innocent" witnesses who nonetheless assert the Fifth Amendment privilege. Similarly, the government may have no intention of prosecuting even culpable witnesses. Gigi Rovito, for example, is alleged to have played a key role in an extortion conspiracy, and yet the government has never charged him with any crime--not for extortion, and not even under 18 U.S.C. § 1001 for making what the government considers false statements to the FBI. For defense witnesses whom the

government has no intention of prosecuting, an immunity grant costs the government nothing.[9]

Even for witnesses whom the government may wish to prosecute, immunity does not create an insuperable barrier. Dozens of cases have permitted prosecution of defendants who had previously given immunized testimony. *See, e.g., United States v. Slough*, 641 F.3d 544 (D.C. Cir. 2011), *on remand*, 36 F. Supp. 3d 37 (D.D.C. 2014); *United States v. Cozzi*, 613 F.3d 725, 728-33 (7th Cir. 2010); *United States v. Orlando*, 281 F.3d 586, 593-95 (6th Cir. 2002); *United States v. Daniels*, 281 F.3d 168, 180-82 (5th Cir. 2002); *United States v. Crowson*, 828 F.2d 1427, 1430 (9th Cir. 1987); *United States v. Allen*, 160 F. Supp. 3d 684 (S.D.N.Y. 2016); *United States v. Blowers*, 2005 U.S. Dist. LEXIS 30525 (W.D.N.C. Nov. 22, 2005). Immunity requires the prosecution to demonstrate that its evidence "was derived from legitimate independent sources," *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972), but--as the cited cases demonstrate--the government often has the means at its disposal to meet that burden.

Finally, the government's asserted interest in preventing perjury--its only basis for denying immunity to Gigi Rovito, App. 36-37; G. Br. 13-14, 37-39--should never overcome a defendant's right to present exculpatory testimony at trial. The Sixth Amendment assigns the jury--not the prosecutor--the responsibility to assess the credibility of defense witnesses. The prosecution has ample means of

[9] As discussed below, immunity does not protect a defense witness for perjury committed during his immunized testimony.

exposing false testimony, including cross-examination and the presentation of contradictory evidence. And if a defense witness commits perjury, the government can prosecute him under 18 U.S.C. § 1623. (The immunity statute expressly allows use of immunized testimony in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002.) These tools adequately safeguard the sanctity of the fact-finding process while protecting the defendant's Fifth and Sixth Amendment rights.

## III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT SPLIT OVER DEFENSE WITNESS IMMUNITY.

For several reasons, this case provides the ideal vehicle for resolving the circuit split that has festered and deepened over the last three decades.

First, petitioner preserved the question of immunity for Gigi Rovito in the district court and on appeal.

Second, the government had a full opportunity, in the district court and on appeal, to explain its reasons for refusing immunity. In both courts, it contended only that it believed Gigi's testimony would be false. App. 36-37; G. Br. 13-14, 37-39.

Third, the immunity question, if resolved in petitioner's favor, will require reversal of his conviction. The government did not contend on appeal that the district court's refusal to compel

immunity for Gigi amounted to harmless error, G. Br. 34-41, and the court of appeals did not make such a finding on its own, App. 18-19.

Finally, the circuits' differing standards for defense witness immunity produce different results for petitioner's due process claim. Under the Seventh Circuit's rule, which permits the government to rebuff a request for defense witness immunity merely by asserting that the witness' proffered testimony would be false, petitioner could not establish a due process violation. By contrast, petitioner satisfies the Third Circuit standard. Each of the five factors that court identified weighs in petitioner's favor: immunity was "properly sought in the district court," Gigi was "available to testify," his proffered testimony was "clearly exculpatory" and "essential," and there were no "strong governmental interests which countervail against a grant of immunity." *Quinn*, 728 F.3d at 251 (quotation omitted).

Similarly, petitioner would obtain immunity for Gigi Rovito under the Ninth Circuit's standard. Gigi's proposed testimony was clearly "relevant"--the government did not argue otherwise--and "the prosecution granted immunity to a government witness [John Rovito] in order to obtain that witness's testimony, but denied immunity to a defense witness [Gigi] whose testimony would have directly contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *Straub*, 538 F.3d at 1162.

It is unclear how petitioner would have fared in the First Circuit; as noted, that court has suggested that the government's concern about perjury may not be a sufficient basis to deny immunity to an important defense witness. *See Mackey*, 117 F.3d at 28. But given the record to date--no reported grants of defense witness immunity in the First Circuit or any of the other "prosecutorial misconduct" circuits--it is questionable whether petitioner's request for immunity for Gigi Rovito would have prevailed under any version of that standard.

For these reasons, this is an excellent case with which to resolve the circuit split over defense witness immunity.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. CLINE
*Counsel of Record*
Law Office of
John D. Cline
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 662-2260
*Counsel for Petitioner*

March 2017

**In the**
**United States Court of Appeals**
**for the Seventh Circuit**

---

No. 15-3671

United States of America,

*Plaintiff-Appellee,*

*v.*

Michael "Mickey" Davis,

*Defendant-Appellant.*

---

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 14 CR 138 – **Samuel Der-Yeghiayan**, *Judge.*

---

Argued September 27, 2016 –
Decided December 30, 2016

---

Before Bauer, Rovner, and Hamilton, *Circuit Judges.*

Hamilton, *Circuit Judge.* In June 2012, defendant Michael "Mickey" Davis made a $300,000 start-up loan to Ideal Motors, Inc., a car dealership in Melrose Park, Illinois, owned by R.J. Serpico and his father Joseph Serpico. Within a matter of months, Joseph had gambled the money away and Ideal Motors had fallen deep in arrears. The following summer, a man named

"Mickey" conspired to have R.J. Serpico's legs broken. Though the scheme was never carried out, defendant Davis was eventually convicted at trial of attempted extortion and using extortionate means to collect a loan.

Davis has appealed, raising five issues. The first is whether the district court erred by admitting against Davis the out-of-court statements by several people involved in the conspiracy to hurt Serpico. The second is whether the district court abused its discretion in allowing the prosecutors to impeach the testimony of a key prosecution witness with his prior inconsistent statements to government agents. Those two issues are substantial, but we find no reversible error. Davis raises three other issues concerning witness immunity, the scope of cross-examination, and the government's closing argument. Those issues also provide no grounds for setting aside the convictions. We affirm Davis's convictions and sentence.

## I. *Co-Conspirator Statements*

### A. *The Government's Case*

To set the stage for the legal issues, we first summarize the government's theory that Davis became angry with the Serpicos and turned to violent means to punish R.J. Serpico for the default on the outstanding debt. The scheme came to light when Paul Carparelli, a reputed Chicagoland mobster, contacted George Brown, his long-time associate. Brown was then cooperating with the FBI and recorded a number

of relevant telephone calls. Carparelli told Brown that their mutual "friend . . . in Burr Ridge" – a restaurant owner named Gigi Rovito – had a "job" for them. During a series of conversations among Carparelli, Brown, and Gigi's brother John Rovito, the details of the job came into focus. The target: R.J. Serpico, the manager of a local Ford dealership. The mission: a "thorough" beating. The payout: "ten thousand clams." And the client? The mysterious "Mickey," a "partner" of a man named Solly DeLaurentis.

The scheme was not just talk. On July 11, 2013, "Mickey" delivered a $5000 down-payment to Gigi Rovito, who forwarded the payment to Carparelli via John Rovito. On July 16, Carparelli told Brown that their client was "breathin' down my f***in' neck." Later that day, John Rovito told Brown that he would place an "anonymous phone call" to the Ford dealership to investigate R.J. Serpico's working hours. Rovito said that he would tell their client the job would be "handled" by the following weekend. On July 17, at the direction of the FBI, Brown told Carparelli that he had identified Serpico's home address. On July 21, in an effort to stall for time, Brown told Carparelli that two (fictitious) hit-men he had hired to attack Serpico had visited his home and spotted Serpico but had called off the attack after Serpico's wife and children appeared. Fortunately for Serpico, the scheme ended two days later when FBI agents arrested Carparelli and seized the $5000 down-payment from his residence.

The defendant in this case, Mickey Davis, was never recorded on any of the calls, but the government convinced a jury that Davis was the "Mickey" who had ordered the beating of R.J. Serpico and advanced the $5000 down-payment. The jury found Davis guilty of using extortionate means to collect a debt in violation of 18 U.S.C. § 894 and attempting to affect commerce by extortion in violation of 18 U.S.C. § 1951.

B. *The Co-Conspirator Statements*

To prove that Davis was the mysterious "Mickey," the government relied in large part on recorded conversations among George Brown, John Rovito, and Paul Carparelli. These recordings were admitted as co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). Davis contends the district court erred by admitting these statements because the government failed to lay a sufficient foundation to support a finding that Davis was a member of the conspiracy. We review the district court's evidentiary rulings for abuse of discretion, with any findings of fact reviewed for clear error. *United States v. Pust*, 798 F.3d 597, 602 (7th Cir. 2015).

Under Rule 801(d)(2)(E), co-conspirator statements are admissible against a defendant if the trial judge finds by a preponderance of the evidence that (1) a conspiracy existed, (2) the defendant and the declarant were involved in the conspiracy, and (3) the statements were made during and in furtherance of the conspiracy. E.g., *United States v. Haynie*, 179 F.3d

1048, 1050 (7th Cir. 1999), citing *United States v. Godinez*, 110 F.3d 448, 454 (7th Cir. 1997). Under long-settled circuit law, a district court may admit co-conspirator statements conditionally based on the government's pretrial proffer, known in this circuit as a "*Santiago* proffer." See *United States v. Santiago*, 582 F.2d 1128, 1130-31 (7th Cir. 1978), overruled in part on other grounds by *Bourjaily v. United States*, 483 U.S. 171 (1987). "If at the close of its case the prosecution has not met its burden to show that the statements are admissible, the defendant can move for a mistrial or to have the statements stricken." *Haynie*, 179 F.3d at 1050.

In considering whether to admit alleged co-conspirator statements conditionally, the district court may consider the contents of the statements themselves. See *Bourjaily*, 483 U.S. at 180. However, the record must also contain independent evidence corroborating the existence of the conspiracy and the participation of defendant and declarant. Standing alone, the statements themselves will not suffice. *United States v. Harris*, 585 F.3d 394, 399 (7th Cir. 2009).

The *Santiago* procedure requires the government to close the evidentiary loop at trial. The procedure assumes the government knows what its witnesses will say at trial. Cooperating witnesses, however, can be unpredictable. This case poses the problem of a *Santiago* proffer that the government could not satisfy completely.

In this case, the government's detailed *Santiago* proffer described the evidence it intended to introduce at trial to show that Davis conspired with the men whose telephone calls were recorded. The proffer highlighted the expected testimony from John Rovito, including the following:

- That Gigi Rovito asked John Rovito to recruit Carparelli to conduct the beating, and that John did so;
- That John Rovito observed Davis at Gigi Rovito's restaurant on the night of the down-payment; and
- That Carparelli told John Rovito that "the beating was in relation to a car dealership."

Rovito's trial testimony differed from the government's proffer in several respects. He testified, for instance, that he first learned about the beating conspiracy from either Carparelli or Brown and that he did not recall "having a conversation with Gigi about a beating or his friend Mickey about a beating." John Rovito acknowledged that Gigi had introduced him to a "Mickey" at one point, but he testified that he did not recall seeing "Mickey" at Gigi's restaurant the night he retrieved the down-payment. John Rovito later repeated that he "recall[ed] meeting the gentleman one time," perhaps as early as two weeks before he retrieved the down-payment. Most significant, Rovito flatly denied any knowledge that the beating had anything to do with a car dealership, testifying variously that he did not

know "what was going on, what it was for," that he had "no knowledge" of "Mickey's" and R.J. Serpico's involvement with a car dealership, that he did not "recall any dealership," and that he did not recall telling the FBI any differently.

When the government's evidence does not fulfill its *Santiago* proffer in key respects, the trial judge must take a fresh look at the admissibility of co-conspirator statements to decide whether the evidence actually offered at trial satisfies the government's burden under Rule 801(d)(2)(E). At various points during Davis's trial, in response to defense objections, the judge determined that the government had carried its burden. Those determinations were not an abuse of discretion. Even without John Rovito's testimony on those several points the government had expected from him, the government offered sufficient evidence to support the district court's finding that Rule 801(d)(2)(E) was satisfied so as to allow the co-conspirator evidence.

First, it is beyond dispute that *somebody* called "Mickey" wanted R.J. Serpico's legs broken and that a group had formed to carry out the attack. John Rovito and Paul Carparelli were unquestionably part of the conspiracy, and they implicated Gigi Rovito. George Brown acted the part, though as noted above he was an FBI cooperator. In a July 16, 2013 call, John Rovito told Brown that he expected to see their "friend" shortly and that he would tell the friend the job would be handled by the following weekend. At trial, John Rovito testified that he had been referring in that

conversation to "Gigi's friend . . . Mickey."[1] John also testified that Gigi told him "Mickey" was the person who wanted the beating. In another call, Carparelli told Brown that the client was "Solly D's partner. . . . Mickey, partner, Mickey, Solly DeLaurentis." Davis himself acknowledged in a statement to the FBI that he frequented Gigi's restaurant, that he knew both Rovitos, and that DeLaurentis was his good friend.

The government also offered evidence of Davis's motive to pursue the beating. Davis lost $200,000 on the Ideal Motors loan, and he told the FBI himself that he was "extremely pissed off." He demonstrated that anger on at least two occasions. In January 2013, Davis confronted R.J. Serpico in his office at the Ideal Motors facility. As Serpico described it, Davis had "what looked to be like a sheet of . . . gambling bets in his hand and he put it down on [the] desk and leaned over and sa[id] this wasn't the f***ing agreement." (Recall that Serpico's father Joseph had gambled away the loan proceeds.) Davis then asked a series of personal questions about Serpico's wife and children. The questions showed that Davis knew a great deal about Serpico's family and their activities and movements that Serpico had never told him. For instance, Davis asked whether the Serpicos still lived in Park Ridge; he also asked

[1] John Rovito's testimony on this point, like much of his testimony, was equivocal. At first, he implausibly testified that the "friend" was Gigi Rovito; he then said that he had been referring to "Gigi's friend . . . Mickey." When the prosecutor pressed him to clarify whether the "friend" he expected to see was in fact "Mickey," Rovito said: "It is possible, yes. I'm not 100 percent sure."

about the ages of Serpico's children and whether his wife still owned a beauty salon in a particular suburb. Serpico testified that he had never told Davis where he lived, how old his children were, or where his wife's salon was located. Serpico perceived that he was "getting threatened," and that his "wife and . . . kids were getting threatened."

Later, after Serpico left Ideal Motors and alerted another creditor about vehicles that Davis had arranged to have towed to a different lot, Davis called Serpico and demanded an explanation. The conversation ended cryptically, with Davis saying: "If that's the way it is going to be, then, okay, fine, f*** it, that's the way it is going to be."[2]

Additional circumstantial evidence tied Davis to the conspiracy. Cell phone records indicate that he and Gigi Rovito were in frequent, increasing contact from January through July 2013, with 113 calls during that period and 47 in July alone. On July 2, 2013 – the same day that Carparelli first contacted Brown about the

[2] The government highlights a series of actions Davis took after the Serpicos fell behind on their payments. For example, Davis directed R.J. Serpico to fire his father Joseph; Davis had his assistant monitor the Ideal Motors bank statements and inventory; he required Ideal Motors to conduct business using a bank account that he jointly owned; and he seized a 1971 Chevrolet that R.J. Serpico had purchased and restored. The government characterizes these measures as escalating steps culminating in the extortion conspiracy. We express no specific view on the legality or contractual propriety of these actions, but we do not believe that Davis's exercise of rights as a secured creditor adds any weight to the government's case that he later engaged in the criminal conspiracy to beat R.J. Serpico.

"job" – Davis and Gigi had multiple phone conversations; John Rovito and Carparelli were in close contact that day as well. Historic cell site location data placed Davis in the general vicinity of Gigi's restaurant on the evening of July 11, 2013, the night that Gigi delivered the down-payment to John Rovito. At 8:54 that evening and again at 9:19, Gigi spoke with Davis. At 9:27, John Rovito called Gigi. Minutes later, John called Carparelli – and at 9:50, while Davis was still within a couple of miles of Gigi's restaurant, Carparelli texted George Brown to tell him that "the package" had been delivered. These phone records were not conclusive by themselves, but they added weight to the government's theory.

Finally, although the government never asked John Rovito to identify Davis in court as the "Mickey" with whom he was familiar, Rovito did testify concerning "Mickey's" appearance, describing him as a "big guy . . . like a body builder," with "slick black hair" and a tan complexion. Davis, of course, was sitting in court, and the jury and the district judge had an opportunity to observe him and to compare his appearance with Rovito's description of the "Mickey" in the conspiracy. (Consistent with Rovito's testimony, the presentence investigation report described Davis as six feet tall and weighing 232 pounds.)

To be sure, none of the evidence we have just recounted proves definitively Davis's role in the beating conspiracy. But definitive proof or proof beyond a reasonable doubt is not the standard for admissibility under Rule 801(d)(2)(E), nor is the judge's consideration

limited to the independent evidence of the conspiracy and the defendant's role in it. Rather, the district judge must be persuaded by a preponderance of the evidence that both the defendant and the declarant were involved in a conspiracy and that the out-of-court statements were made in furtherance of that conspiracy. *Bourjaily*, 483 U.S. at 176; *Haynie*, 179 F.3d at 1050. The government is entitled to have the judge consider the contents of the alleged coconspirator statements in making the preliminary determination under Rule 801(d)(2)(E). *Bourjaily*, 483 U.S. at 181 (rejecting "bootstrapping" rule that would bar consideration of statements themselves in deciding their admissibility).

The government's case would have been stronger if John Rovito had testified in a manner entirely consistent with the government's pretrial *Santiago* proffer. Still, the evidence supporting admission of the co-conspirator statements was strong enough to survive Rovito's often evasive testimony. The circumstantial evidence was substantial – and the out-of-court co-conspirator statements themselves, coupled with that circumstantial evidence, provided a sufficient foundation from which the district judge could conclude that Davis was more likely than not a member of the conspiracy to beat R.J. Serpico. Those out-of-court statements, spanning 76 pages of telephone transcripts, cast light on the membership, scope, and objectives of the conspiracy. The conspirators spoke about their victim's identity, his home and workplace, and his schedule; about their client, "Mickey," the "partner" of Solly DeLaurentis; about the "thorough" beating that

"Mickey" had ordered and the (fictitious) hit-men George Brown claimed to have hired; about the $10,000 fee and how it would be apportioned; and about the increasing urgency of the assignment and the potential consequences of failure.

Considering the independent evidence that the conspiracy existed and tending to show that Davis participated in it, as well as the out-of-court statements themselves, there was a sufficient basis to justify placing the out-of-court statements before the jury. The district judge did not err in admitting the co-conspirators' statements into evidence under Rule 801(d)(2)(E).

## II. *Impeachment of John Rovito*

Davis next argues that the district court erred in allowing the government to question John Rovito about his prior inconsistent statements to law enforcement and compounded its error by failing to issue a contemporaneous limiting instruction. We review these decisions for abuse of discretion. See *United States v. Spiller*, 261 F.3d 683, 689 (7th Cir. 2001).

John Rovito was, to put it mildly, a difficult witness for the government. During his two days of testimony, he answered the government's questions over one hundred times with some variation of "I don't recall," "I'm not 100 percent sure," or an ambivalent "it's possible." At certain points, his testimony departed materially from statements he had given earlier to FBI investigators. Three of these differences were discussed in Part I above in connection with the

government's *Santiago* proffer (whether Gigi Rovito asked John Rovito to recruit Carparelli; whether John observed Davis at Gigi's restaurant the night of the down-payment; and whether John understood that the beating concerned a car dealership). Other inconsistencies emerged at trial. For example, Rovito denied using a special term to refer to broken legs when he had previously told the FBI that "the big guy" (the client) wanted "lowers." To impeach some of his testimony, the government questioned Rovito about some of his out-of-court statements, which were memorialized in FBI FD-302 reports. Davis objected to the use of those out-of-court statements at trial, and he maintains that objection on appeal.

Under Federal Rule of Evidence 607, any party – including the party that called a witness – may attack the witness's credibility. See *United States v. Bileck*, 776 F.2d 195, 198 (7th Cir. 1985) ("[T]he government had no choice in whom the defendant chose as his compatriots, and should not be required to vouch for their credibility."). We have long recognized, however, that it would be an abuse of Rule 607 for the prosecution to "call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence – or, if it didn't miss it, would ignore it." *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984); see also *United States v. Kane*, 944 F.2d 1406, 1411 (7th Cir. 1991) ("Impeachment of one's own witness cannot be permitted where employed as a

mere subterfuge to present to the jury evidence not otherwise admissible."). The exception identified in *Webster* and *Kane* is a narrow one. The test is "whether the prosecution calls the witness in bad faith." *United States v. Burt*, 495 F.3d 733, 737 (7th Cir. 2007), citing *Kane*, 944 F.2d at 1412, and *Webster*, 734 F.2d at 1193.

In this case, before John Rovito took the stand, his own lawyer advised the court, the prosecution, and defense counsel that Rovito disagreed with some of the material in the FD-302 reports. According to his lawyer, Rovito feared a "perjury trap." Davis argues that the prosecution acted in bad faith in questioning Rovito on matters he discussed with the FBI despite knowing he would dispute the contents of the FD-302 reports. After Rovito's first day of testimony, however, the government told the district court that Rovito's lawyer had provided just one example of a statement with which Rovito disagreed. That statement concerned Paul Carparelli's alleged drug dealing, a topic that was never broached at trial and that had nothing to do with Davis's case. The defense conceded that Carparelli's drug dealing was the only example the lawyer had provided, and the district judge rightly concluded that there was "no issue there." Moreover, Rovito had refused to meet with government counsel during the weeks leading up to trial. Although the prosecutors might have hoped and expected that he would testify consistently with his prior statements, they had no opportunity to review the proposed line of questioning with him or to address any concerns he might have raised.

Since the government did not know in advance the particular aspects of the FD-302s that John Rovito would disclaim, we find no evidence that the government acted in bad faith by calling him as a witness. Despite Rovito's evasiveness, he provided helpful testimony on several critical aspects of the government's case. For instance, he described retrieving an envelope from Gigi Rovito at the restaurant and then forwarding the envelope to Paul Carparelli, and he acknowledged that the envelope contained the $5000 down-payment for the beating. He described how the $10,000 total fee was to be allocated – $2000 each to himself, to George Brown, to Carparelli, and to any others involved in the conspiracy. He also corroborated Brown's testimony that the client was a man named "Mickey," an especially salient detail since so much of the evidence against Davis was circumstantial or indirect.

John Rovito was much less cooperative on other points. Perhaps most problematic for the government's case, Rovito insisted – even when confronted with his out-of-court statements to the contrary – that he was not aware that the beating conspiracy had anything to do with a car dealership. But even if the prosecution had been on notice that Rovito might vacillate, it "cannot be that any time the government suspects that a witness will lie on some aspect of his testimony that it is barred from using the witness." *Burt*, 495 F.3d at 737. Rather, the government may elicit testimony from its witnesses in good faith and may use the impeachment tools that are available to any litigant if a

witness becomes uncooperative. See *Kane*, 944 F.2d at 1412 ("When a government witness provides evidence both helpful and harmful to the prosecution, the government should not be forced to choose between the Scylla of [forgoing] impeachment and the Charybdis of not calling the witness at all.").[3]

As a fallback, Davis argues that if the judge did not err by allowing the government to question John Rovito about his out-of-court statements, then at the very least the judge should have given a contemporaneous limiting instruction telling the jury that it could not consider those statements as substantive evidence. If we had been presiding over the trial, we might well have agreed that a contemporaneous instruction would have been preferable, though the judge did properly advise the jury on the use of impeachment evidence during final instructions the next day. Our precedents make clear, however, that whether to give a contemporaneous limiting instruction is "committed to

---

[3] Davis identifies one instance where the government's impeachment effort plainly *was* improper. In what the district judge treated as an unfortunate slip of the tongue, the prosecutor asked John Rovito whether he recalled telling the FBI about a conversation between "Davis" and Gigi Rovito. John Rovito never mentioned Davis's surname to the FBI. He testified that he learned the surname only when he was subpoenaed to appear in court. If the district judge had ignored this error, Davis's argument on appeal would have greater force. But the judge handled the mistake appropriately, instructing the jury to disregard both the question and any reference by the prosecutor to Davis's surname. The judge also reminded the jury that "lawyers' statements are not evidence." Given the judge's prompt response to the government's error, we do not think Davis was unduly prejudiced by the error.

the discretion of the district court . . . and our review is deferential." *United States v. Van Waeyenberghe*, 481 F.3d 951, 956 (7th Cir. 2007) (citations and internal quotation marks omitted); see also *United States v. Oxford*, 735 F.2d 276, 280 (7th Cir. 1984) ("[T]he trial judge must determine on the facts of each case whether interim instructions are necessary . . . . Once the judge makes a determination regarding instructions, we will reverse that decision only on a showing of an abuse of discretion.").

In this case, in denying Davis's request for a contemporaneous limiting instruction, the judge explained that he preferred not to "bring to the attention of jurors as the fact finders" that he thought somebody was "lying or is inconsistent." While a contemporaneous instruction might have been helpful, we cannot say that the judge abused his discretion in declining to give one. He was, after all, in a "better position than we to determine whether a contemporaneous instruction would unduly emphasize the evidence in the minds of the jury," *United States v. Dabish*, 708 F.2d 240, 243 (6th Cir. 1983). The district court did not commit a reversible error by allowing the government to impeach John Rovito with his prior statements to the FBI and by deferring its limiting instruction until the close of trial.

## III. *Additional Issues*

### A. *Use Immunity*

Davis makes three additional arguments on appeal. None has merit. Davis first contends that his due process rights were violated when the government granted immunity to John Rovito but not to John's brother Gigi. After learning that Gigi Rovito had invoked his Fifth Amendment privilege, Davis filed a "Motion for Defense Immunity" asking the district court to grant use immunity to Gigi. In denying that motion, the district judge explained that the decision whether to grant immunity is one for the government, not the court.

The judge was right. Prosecutors have "significant discretion to decline immunity to a witness, especially when it is likely that the witness will perjure himself." *United States v. Lake*, 500 F.3d 629, 633 (7th Cir. 2007). That prosecutorial discretion is cabined only by the requirement that a prosecutor may not "immunize witnesses with the intention of distorting the fact-finding process." *United States v. Burke*, 425 F.3d 400, 411 (7th Cir. 2005). Even in a case involving such distortion, a district court cannot simply order the government to immunize a defense witness. While the court could theoretically dismiss the indictment as a sanction, *id.*, Davis cites no case in which any court in this circuit has taken that drastic step. Cf. *United States v. Chapman*, 765 F.3d 720, 732 (7th Cir. 2014) ("As far as we can tell, this court has never found that the failure to

grant immunity to a defense witness deprived the defendant of due process.").

We see no evidence that the government acted improperly here. During his FBI interviews on March 26 and May 6, 2014, Gigi Rovito denied any knowledge of the beating conspiracy, and he specifically denied forwarding the down-payment from Davis to his brother John. Those denials are inconsistent with other evidence that the government acquired, including the extensive testimony by George Brown and John Rovito and the inculpatory cell phone records. The government reasonably presumed that if Gigi took the stand, he would likely perjure himself. The government acted well within its discretion in declining an immunity deal that would have only facilitated such perjury. See *United States v. Wright*, 634 F.3d 917, 921 (7th Cir. 2011) ("[A]voiding future violations of the law, such as potential perjury, is hardly an unjustifiable and illegitimate government objective.").[4]

---

[4] Davis argues in the alternative that the district court should have either admitted Gigi Rovito's FD-302 reports or given a missing witness instruction. But as substantive evidence, the FD-302s were plainly inadmissible hearsay. Whether to give a missing witness instruction rests within the sound discretion of the district court. "To 'establish entitlement to a missing witness instruction, a defendant must prove two things: first, that the absent witness was peculiarly within the government's power to produce; and second, that the testimony would have elucidated issues in the case and would not merely have been cumulative.'" *United States v. Foster*, 701 F.3d 1142, 1154 (7th Cir. 2012), quoting *United States v. Gant*, 396 F.3d 906, 910 (7th Cir. 2005). We do not see how Gigi Rovito was "peculiarly within the government's power to produce" any more than any other witness who is

B. *Scope of Cross-Examination*

Davis next argues that the district court erred when it precluded him from cross-examining George Brown about his past extortion tactics. As with the other evidentiary issues in this appeal, we review the district court's ruling for abuse of discretion. *United States v. Williamson*, 202 F.3d 974, 977 (7th Cir. 2000).

The defense theory was that the planned beating of R.J. Serpico, discussed in such detail in the recorded phone calls, had nothing to do with debt collection. That theory would not only tend to refute elements of both counts of the superseding indictment but also remove Davis's apparent motive for participating in the conspiracy: anger about the money lost on the Ideal Motors loan. The defense wanted to question Brown about his past practices because, the defense said, Brown would testify that he typically "sent very specific messages to the victims to pay back the debt they owed," and that in several cases he had performed these extortions on commission. In this case, by contrast, the job paid a flat $10,000, and the only message the conspirators were asked to deliver was a puzzling invective: "This is what you get for f***in' my sister."

---

closely connected to criminal activity and is therefore reluctant to testify. See *id.* at 1155 ("[T]he government's ability to grant immunity does not make a witness who invokes the Fifth Amendment privilege peculiarly available to the government[.]"). Given the strong likelihood that Gigi (if he had testified consistently with his statements to the FBI) would have perjured himself, we do not see how his presence would have "elucidated issues in the case."

The district court disallowed the proposed line of inquiry, noting that the details of Brown's prior extortions were collateral matters and that the defense theory was merely speculative. On appeal, Davis argues that the excluded evidence was "vital to the defense theory of its case." We disagree. While the excluded evidence might have bolstered Davis's position, the evidence was not so critical that it was an abuse of discretion to exclude it. The defense asked Brown whether he knew the purpose behind the planned beating of R.J. Serpico:

> DEFENSE COUNSEL: [Y]ou certainly weren't going to collect money from this man, correct?
>
> BROWN: As per my instruction from Paul [Carparelli], no, sir.
>
> DEFENSE COUNSEL: Right. You were just – this was just going to be a beating, correct?
>
> BROWN: That's correct, sir.

Brown's admission that the conspiracy, as he understood it, had nothing to do with debt collection provided *direct* support for the defense theory that the excluded evidence might have supported at best *indirectly*. Under these circumstances, the district judge did not abuse his discretion by limiting the scope of cross-examination.

C. *Government's Rebuttal Argument*

Finally, Davis contends that the government constructively amended the superseding indictment during its rebuttal argument by implying that the loan from Davis to Ideal Motors was an extortionate extension of credit in violation of 18 U.S.C. § 892. We review this question *de novo*. See *United States v. Pigee*, 197 F.3d 879, 885 (7th Cir. 1999).

Davis points to several statements by the government that he interprets as an attack on the loan agreement itself. Early in his rebuttal argument, the prosecutor commented on the "math" associated with the loan deal, observing that Davis anticipated over $430,000 in profit during the three-year loan period. Several minutes later, the prosecutor said, "Who loans a known gambler $300,000 and just steps away? Of course not. He was in this all the way." The prosecutor later said that the "man named Mickey loaned $300,000 to a known gambler" and "expected to . . . double[] his money in three years." Davis contends that these statements amounted to an argument that the "loan agreement was, for all intents and purposes, a 'juice loan.' "

While it is possible for the government to broaden the bases for conviction impermissibly through its closing argument, see *United States v. Cusimano*, 148 F.3d 824, 829, 830 (7th Cir. 1998) (finding no constructive amendment of indictment), that did not happen here. The prosecutor's reference to the lucrative loan terms helped him illustrate why Davis was so angry with R.J.

Serpico and why Davis might have resorted to such extraordinary and extortionate tactics as the planned attack to break Serpico's legs. Context makes this clear. During the initial portion of the closing argument, the government argued that the "evidence establishes beyond a reasonable doubt that the defendant Mickey Davis attempted to extort R.J. Serpico and Ideal Motors" and that Davis "used extortionate means to collect an extension of credit." Later, the government characterized the beating conspiracy as the last in a series of steps by Davis to collect from Serpico:

> In January, he's playing off . . . the fear of future violence. He threatened R.J. Serpico in that conversation. He played off that fear for months. And then when that stopped being productive . . . he decided to follow up on that threat. He decided to escalate it, he decided to get violent but it's just more of the same. It's more about collecting what he's owed.

The prosecutor echoed those remarks at the close of his rebuttal, saying: "We are a country of laws. We are not a country of men who get to choose how they will collect their debts, what means they will use to intimidate, to threaten violence."

Even assuming for the sake of discussion that the prosecutor's rebuttal language could have created some ambiguity, the judge corrected matters at the time. Defense counsel objected to each of the statements Davis now complains about. In response, the judge reminded the jury that attorneys' statements are "not evidence" and that the jury would be "given a copy

of the indictment and a copy of the Court's instructions as to the law." Then, during his final instructions to the jury, the district judge explained that Davis was charged in two counts, and he described the elements of each count. At no point did the judge suggest that the Ideal Motors loan was extortionate from the outset or, as Davis puts it now, a "juice loan." Viewing the government's closing arguments in their totality and in context, we find no indication of a constructive amendment to the indictment.

The judgment of the district court is AFFIRMED.

**UNITED STATES DISTRICT COURT**
**FOR THE Northern District of Illinois –**
**CM/ECF LIVE, Ver 6,1**
**Eastern Division**

UNITED STATES
OF AMERICA

Plaintiff,

v.

Michael Davis

Defendant.

Case No.: 1:14-cr-00138
Honorable
Samuel Der-Yeghiayan

**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Thursday, June 11, 2015:

MINUTE entry before the Honorable Samuel Der-Yeghiayan as to Michael Davis: As stated on the record, Defendant's motion compel Defense Immunity [107] is denied. Jury Trial held and continued to 06/12/15 at 9:00 a.m. Mailed notice (mw,)

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Government,<br>vs.<br>MICHAEL DAVIS,<br>Defendant. | Docket No. 14 CR 138<br>Chicago, Illinois<br>June 11, 2015<br>9:15 o'clock a.m. |

**VOLUME 9A**
**TRANSCRIPT OF PROCEEDINGS – TRIAL**
BEFORE THE HONORABLE SAMUEL DER-YEGHIAYAN, and a jury

APPEARANCES:

For the Government:
UNITED STATES ATTORNEY'S OFFICE
BY: MR. MICHAEL THOMAS DONOVAN
MS. HEATHER KIRSTEN McSHAIN
219 South Dearborn Street
Suite 500
Chicago, Illinois 60604

For the Defendant:
DURKIN ROBERTS & GROHMAN
BY: MR. THOMAS ANTHONY DURKIN
MR. CHRISTOPHER T. GROHMAN
MS. ROBIN VALENTINA WATERS
2446 North Clark Street
Chicago, Illinois 60614

Also Present:
Mr. Rick Beuke, attorney.

Laura LaCien, CSR, RMR,
CRR Official Court Reporter
219 South Dearborn Street, Suite 1902
Chicago, Illinois 60604
(312) 408-5032

* * *

[1746] (The following proceedings were had in open court outside the presence and hearing of the jury:)

COURTROOM DEPUTY: 14 CR 138, USA versus Michael Davis.

MR. DONOVAN: Good morning, your Honor. Michael Donovan and Heather McShain on behalf of the United States.

THE COURT: Good morning.

MR. DONOVAN: I think Mr. Durkin is in the hallway. If you'd like, I'll get him.

THE COURT: Thank you.

(Brief pause.)

MR. DURKIN: Tom Durkin, Christopher Grohman and Robin Waters on behalf of the defendant who is present, Judge.

THE COURT: Good morning. Good morning, all. Before we bring the jury, there are some motions filed by defense.

MR. DURKIN: Yes, Judge, but I think the first issue – well, we filed a motion – based on what I represented last night, Mr. Beuke and his client Gigi Rovito, Filippo –

MR. DONOVAN: Judge, if I could just interrupt for a second. Can we perhaps have the witness leave the courtroom while we're discussing these matters?

THE COURT: I see Mr. Beuke is in the back so thank [1747] you.

MR. BEUKE: I'll ask him. Do you want me up there, Judge?

THE COURT: Yeah. Mr. Beuke, I've seen you in the courtroom back and forth. Your name has been mentioned. Not in vain but it's been mentioned. Would you identify yourself?

MR. DURKIN: At least on the record.

THE COURT: Would you identify yourself?

MR. BEUKE: Judge, for the record, Rick Beuke. I'm here on behalf of Mr. Rovito.

THE COURT: There's two Mr. Rovitos in this court thus far or maybe even more but –

MR. BEUKE: This would be Filippo Rovito, Judge.

THE COURT: Filippo, also known as Gigi?

MR. BEUKE: Yes, your Honor.

THE COURT: Thank you. Okay. Go ahead, Mr. Durkin.

MR. DURKIN: Judge, as I said last night, we have had a – Mr. Beuke accepted service of the trial subpoena for Gigi Rovito's testimony quite sometime ago. As I mentioned last night before we went home 5:30, 6:00 o'clock that I had received a test message late that – late in the afternoon. I want to say it was roughly –

THE COURT: Well, you told me at the time you [1748] received it a few minutes ago so I know when you got it.

MR. DURKIN: Right.

THE COURT: So let's move on with the issue.

MR. DURKIN: I want to say 4:45, Judge, somewhere close to 5:00 o'clock that Mr. Beuke told me that because of the immunity conferred upon Filippo –

THE COURT: John Rovito.

MR. DURKIN: John Rovito, that his client was demanding the same now. I believe Mr. Beuke will confirm my representation that up until that time yesterday late 5:00 o'clock, Mr. Beuke had assured me that not only would he be available to come to court but he was not going to assert his Fifth Amendment privilege.

I believe there were conversations that Mr. Beuke had with Mr. Donovan on that topic as well and that it was the conferring of immunity on Johnny Rovito that

apparently caused his client to change his mind. Is that correct, Mr. Beuke?

MR. BEUKE: Judge, it's in essence correct. Your Honor, I believe we received or I accepted service of the subpoena on behalf of Gigi Rovito on June 1st. And at that time I think I informed Mr. Durkin that I'll accept service of the subpoena on behalf of Mr. Rovito. However – and I'll make him available to come to court when he's notified to be here. However, I wasn't – based on his representations to [1749] me, he didn't want to be interviewed or debriefed by anybody.

I think there was some communication between Mr. Durkin and the government earlier – I don't know when but before the trial – that they believed that my client was going to assert his Fifth Amendment privilege and I called Mr. Durkin and I told him I don't think that we have made that decision. At this time, he will be available to testify.

THE COURT: Okay. Let me ask you outright, if Mr. Durkin decides to call Mr. Filippo Rovito to testify, has he made his decision to assert his Fifth Amendment privilege?

MR. BEUKE: He has, your Honor.

THE COURT: Okay. And, government, you indicated that there's a request to give immunity and you have decided on behalf of the government not to?

MR. DONOVAN: That's correct, your Honor.

THE COURT: Okay. The cases that deal with this, the government is the one that decides whether to give immunity or not. The Court can't, I can't give immunity. And Mr. Durkin has argued that there is one instance where – or a limited right of a defendant to say that defense can file a motion for immunity. But once again, just because defense files a motion for immunity doesn't mean that the government has to give immunity. Am I correct on that, government?

[1750] MR. DONOVAN: Yes, your Honor.

THE COURT: Okay. Defense has to show substantial due process violations basically relating to this request. And if the government has kind of – for the term they used, a defendant's due process right might be violated when the prosecution abuses its authority to immunize a witness with the intention of distorting the fact-finding process. And it's an evidentiary issue and, Mr. Durkin, the ball is in your court. Tell me why.

MR. DURKIN: Well, Judge – first, we filed the written motion. We gave you the authority.

THE COURT: I have the written motion.

MR. DURKIN: That's Docket 107. We acknowledge in there that the case law is fairly clear there are some limited exceptions. We think this is one of those limited exceptions.

THE COURT: And why?

MR. DURKIN: Because of the unique nature of this case. This is a case that is primarily as we've argued – and I don't want to get into it again but as we've argued until I'm blue in the face, this is a case that's hearsay upon hearsay based on the – and I'm not complaining. I'm just – I'm not –

THE COURT: Okay. Mr. Durkin, I'm going to stop you here. I've heard that argument maybe 20 to 30 times already. [1751] We're on a limited issue. I know you want to expand. Everything you said is part of the record, I give you that, but here on this issue whether due process rights have been violated when the prosecution abuses its authority to immunize Mr. Beuke's client with the intention on the prosecutor's part with distorting the fact-finding process, tell me why with this witness not immunizing that's happening? That's evidentiary.

MR. DURKIN: I'm sorry but that's what I thought I was trying to tell you, so.

THE COURT: Well, you were bringing all this, that's why, this is unique case.

MR. DURKIN: Because –

THE COURT: Tell me facts.

MR. DURKIN: Well, that's what I was trying to do.

THE COURT: Okay.

MR. DURKIN: It's unique because this is a unique case. It is factually unique because they have

only had one live witness, so to speak, who has been somewhat consistent with their theory. The only other live witness of any merit on the issues we're debating – that is, who is the identity of the person who is the real employer of Carparelli and Brown which is the heart of our case – they have very little evidence would be my position.

They have – there is no question from the [1752] fingerprint testimony that Johnny Rovito was involved in this. I don't believe they got it sufficiently out of Johnny Rovito yesterday in terms of his recollection or testimony but particularly since you can't use any impeachment for the truth of the matter so there's a real question in this case as to who the employer is and there is a witness that the government has interviewed twice who has flatout – and this is Gigi Rovito, the witness we're talking about – flatout said I did not do this, it is not Mr. Davis, I did not get an envelope from Mr. Davis. That's the most critical question in the case.

Now they chose to immunize the person that they believe who was telling the truth and yet there's another person who says just the opposite and it's his own brother. I think that's pretty unique, I think it's pretty compelling and I think it's incredibly exculpatory based on the evidence of where we're at today. And, you know, I don't know what goes through the minds of the government. I don't have any idea. And, you know, I don't know what other evidence you could put on for intentional. It's certainly tactical. No nobody is saying that, you know, they're evil people and they're, you

know, rotten no good. I'm simply saying if you look at the facts here, they are using their executive authority or the failure to act in a way that has the impact of distorting the fact-finding process. This jury should be [1753] entitled to that evidence.

THE COURT: Okay. You're saying that if Gigi Rovito testifies, he will testify that he never gave any money or any envelope –

MR. DURKIN: That's right. It is my understanding –

THE COURT: – and that there was nothing between him and Davis about this case?

MR. DURKIN: That's right. That it's my understanding he will testify if immunized consistent with what's in those 302s. Is that correct, Mr. Beuke?

MR. BEUKE: Well, I don't feel comfortable going into what my client would testify to, Judge.

MR. DURKIN: Well –

THE COURT: 302s – and you've attached a copy. I don't believe that John Rovito testified anything about Davis or anything about money. He just testified nothing about money. He basically said an envelope was given to him and then government kind of tried to get out of him. I don't think he tied Davis in my opinion. I don't think he tied Davis other than with the circumstantial evidence. He didn't say Davis but government has sufficient facts there with his audio that warrants the case to go before the jury.

The question is would Gigi Rovito be the type of witness that the government is abusing its authority not to [1754] immunize and the government refusal, declination, is with the intention of distorting the fact-finding process.

Government, you have the court.

MR. DONOVAN: Your Honor, the reason that John Rovito is a more truthful witness than Gigi Rovito is in part because his account of events can be tied – not all of which he testified to on the stand but that's not the issue here – can be tied to other evidence in the case.

THE COURT: That's what I just said.

MR. DONOVAN: Including the cell site data. Gigi Rovito made clear lies in his statements to the agents on things that we can prove, on things that even the defendant in his statement to the agents admitted happened. He lied about it and he's lying about his involvement in this offense. And the things that point to Gigi Rovito include George Brown who says when Carparelli introduces the idea that the other friend in Burr Ridge is a reference to Gigi Rovito. It starts there from the very inception of the tapes. Gigi Rovito is at the other end of this contract for this beating and the tapes bear that out.

And even in the examination of John Rovito, he said that he was passing information to Gigi Rovito about this beating. That's who he was giving the information to. And Gigi Rovito, according to his report of

interview, has no idea what any of this is about. The tapes point to Gigi [1755] Rovito. George Brown points to Gigi Rovito. And Johnny Rovito points to Gigi Rovito as the source of this favor which is the beating. Gigi Rovito, were he to be given immunity and testify here, would himself distort the fact-finding and truth-finding process. He is the distortion here because he has lied about this from the outset and he has lied in ways that can be proven about events that he was asked about in those interviews.

So, your Honor, for those reasons in the context of this case where there is a great deal of other evidence of these crimes, including evidence relating to the July contract for the beating, the government believes that there's absolutely no due process violation in refusing to give immunity to Gigi Rovito.

THE COURT: Okay. Mr. Durkin, before I make my decision, anything more on this issue?

MR. DURKIN: Well, I think the government just proved my point but that's beside the point.

The other thing I wanted to point out to you is that we did ask for alternate forms of relief one of which – the second, the alternative form of relief is to put the 302s of Gigi Rovito in and at a bare minimum give us the missing witness instruction.

THE COURT: You're asking the 302 go into as evidence?

[1756] MR. DURKIN: Yes.

THE COURT: You've been attacking the government's 302s all week long and now you want a 302 to go in as evidence? Should we put all the 302s in? I mean –

MR. DURKIN: Doesn't the goose get the gander or whatever that saying is?

THE COURT: I don't know. I was driving on Highway 94 and there was a sign Gander Company. I don't know if the goose got the gander or the gander got the goose.

But, government, he wants the 302 to be admitted into evidence.

MR. DONOVAN: Your Honor, we oppose that for all sorts of reasons, the first of which is the Rules of Evidence don't permit it so I think that's probably enough.

THE COURT: Okay.

MR. DURKIN: Well, there's the otherwise – there's the catch-all hearsay residual exception and, you know, the government can't claim he didn't say this, I don't think, unless – maybe we can get a stipulation then and put it in that the 302s aren't accurate but, you know, this is a 302 that they took. I mean, you know –

THE COURT: You cannot tell the government how to prosecute its case. They –

MR. DURKIN: Well, for sure.

THE COURT: – take statements. They decide what to [1757] present to meet their burden of proof beyond reasonable doubt –

MR. DURKIN: I get it.

THE COURT: – and government has chosen not to put a liar on the stand, so.

MR. DURKIN: The third request is for the missing witness instruction.

THE COURT: I saw that. On the missing witness instruction, I note you're kind of like going with some circuits that discuss it. Do you want to make some argument about that? I know you filed it. Your motion is there.

MR. DURKIN: I think that the cases make it clear that the Court is not powerless in this situation. There are certain – you can make – you can try to apply some fairness or –

THE COURT: No. I'm saying you cited a Ninth Circuit decision –

MR. DURKIN: Right.

THE COURT: – and another Ninth Circuit decision, another Ninth Circuit decision and there are some Seventh Circuit decisions, aren't they, on point?

MR. DURKIN: I don't know. We filed this at 2:30 in the morning so –

THE COURT: Okay. I think Mr. Grohman might know about it.

[1758] MR. DURKIN: Mr. Grohman, he's –

THE COURT: On the issue of –

MR. DURKIN: That's why I brought him in from Harvard. I need all the help I can get.

THE COURT: Okay. On the issue of the motion relating to immunity for Gigi Rovito, you did cite *United States versus Burke*, 425 F.3d 400, 2005, Seventh Circuit.

As I indicated, defendant's due process rights are violated when prosecutor – prosecution abuses its authority to immunize witness with intention of distorting the fact-finding process. I find that defendant failed to offer substantial evidentiary showing that is required to succeed on this claim. Prosecution has significant discretion to decline and they've properly declined to grant immunity. Defendant has failed to show that his due process rights have been violated to such degree. That would be my ruling.

On the issue of the 302s going in, the 302 – specific 302 going in, government has opposed it. I agree with the government that it will not be admitted.

As for the missing witness instruction, the Seventh Circuit in *U.S. versus Foster*, 701 F.3d 1142 in 2012 citing *United States versus Disantis*, D-i-s-a-n-t-i-s, 565 F.3d 354, Seventh Circuit 2009, has stated the

missing witness instruction is disfavored by this circuit but a district court has discretion to give it in unusual circumstances. [1759] And to establish entitlement to a witness missing instruction, a defendant must prove two things: First, that the absent witness was peculiarly within the government's power to produce and, second, that the testimony would have elucidated issues in the case and would not merely have been cumulative. I give the government an opportunity based on this case law to make your argument and defense based on this case law to make your arguments.

MS. McSHAIN: Your Honor, we found the same case law that you just cited, too. And with respect to the first prong of that analysis, I mean, circuit courts have held that a witness's decision to invoke the Fifth Amendment does not place that witness in the control of the government and there are Seventh Circuit case law. We found U.S. versus Flomenhoft, F-l-o-m-e-n-h-o-f-t, which is a 1983 Seventh Circuit case –

THE COURT: 714 F.2d 708.

MS. McSHAIN: Thanks, your Honor.

– that held that requiring a missing witness instruction each time the prosecution does not immunize a witness would constitute a substantial judicial encroachment upon prosecutorial discretion.

And in this instance, we don't have control over Gigi Rovito. And for the reasons that Mr. Donovan just explained to the Court and per the Court's holding,

we've [1760] decided not to immunize him. But in this posture, that doesn't – that doesn't substantiate the need here for a missing witness instruction and it's our position that it would be improper to provide one to the jury on this issue.

THE COURT: Mr. Durkin?

MR. DURKIN: Well, Judge, I heard those two factors. I thought that both of those factors applied. If you could – I don't have a copy of the case but could you just read them again or could I look at –

THE COURT: Yeah. I'll read it again. It says to establish entitlement to a missing witness instruction, defendant must show – prove two things: First, that the absent witness was peculiarly within the government's power to produce and, second, that the testimony would have elucidated issues in the case and would not merely have been cumulative.

He has told today through counsel that he will take the Fifth. He does not have immunity. I already ruled on the immunity issue that the government properly is not giving immunity or there's no due process violation and the government is right, it's not peculiar within the government's.

And on the second prong, I don't know. I mean, would this witness have elucidated issues in the case or confuse the issues more?

[1761] MR. GROHMAN: Your Honor, I mean, the government's position is that John Rovito is telling the truth and that Gigi Rovito is a liar and they

very well may be right and they very well may have good evidence, cell site and whatnot that says that John Rovito's account of events is more truthful than Gigi Rovito's account of events. But who is a liar and who is not a liar is not up to the government or the Court. That's the province of the jury to make credibility findings so –

THE COURT: That's with every case. The question is whether this witness is the type of witness that requires missing witness instruction. That's the issue.

MR. DURKIN: Well, but the only reason he's missing is that they refuse to immunize him.

THE COURT: But that's their right.

MR. DURKIN: They don't have rights. They only have powers and authority.

THE COURT: Okay. That's their authority.

MR. DURKIN: Okay.

THE COURT: Okay. And the only person in the room with rights is my client and he has a right to present credible evidence that's not cumulative, as it says there, to this jury. This wouldn't be cumulative and it's certainly on a major issue in the case. And with that, I'll – I don't need to argue anymore. I mean, I don't want to.

[1762] THE COURT: Anything further?

MS. McSHAIN: No, your Honor.

THE COURT: I've cited the case law, I cited the requirements and requiring a missing witness instruction each time the prosecution decides not to immunize a witness would constitute a substantial judicial encroachment upon prosecutorial discretion. That's the case U.S. versus Flomenhoft, F-l-o-m-e-n-h-o-f-t, 714 F.2d 708.

This is not a case where there's been a showing of clear prosecutorial abuse of discretion violating the due process clause as I found. Therefore, the Court will decline to give the missing witness instruction.

MR. DURKIN: Just for the record then, Judge, in light of the fact that I just learned this at 5:45 last night, I would move to continue the trial until Monday for me to re-plan my defense.

THE COURT: We discussed this yesterday. I said the trial will proceed. You've known about this case for sometime and there's no reason why you cannot figure out what you will do in the next – by 11:00 o'clock. We'll proceed at 11:00 o'clock.

MR. DURKIN: Thank you.

MR. DONOVAN: Thank you, your Honor.

MR. DURKIN: And just for my –

THE COURT: We'll take a recess until 11:00.

[1763] MR. DURKIN: Just for my record – we don't need to argue it – I would also move for a mistrial based on my ability not to have the case continued.

THE COURT: Your motion for mistrial is denied.

MR. DURKIN: Thank you.

MR. DONOVAN: Judge, just one matter and I'm not certain of the answer to this but I don't know if we should perhaps have Mr. Gigi Rovito or Filippo Rovito put on the record that he intends to assert his Fifth Amendment right. Perhaps if counsel said it, that's sufficient. I'm not sure.

MR. DURKIN: I'm willing to accept Mr. Beuke's testimony – not his testimony; his representation.

MR. DONOVAN: Okay. That's –

THE COURT: Are you fine with that?

MR. DONOVAN: I think we're fine with that.

THE COURT: Okay.

MR. DONOVAN: Thank you.

MR. BEUKE: Thank you, your Honor.

MR. DURKIN: I mean, as long as the government is –

MR. DONOVAN: Yeah.

THE COURT: At this time what I'm going to do is either call the jury and take a recess or tell the Security Officer to tell the jurors take your time in the morning, we're going to start at 11:00. Which one would you prefer?

MR. DURKIN: Security Officer.

* * *

| | |
|---|---|
| [SEAL] | **OFFICIAL RECORD** Document participants have digitally signed All signatures have been verified by a certified FBI information system |

**FEDERAL BUREAU OF INVESTIGATION**

Date of entry 04/09/2014

FILIPPO "GIGI" ROVITO, Owner of CAPRI RISTORANTE (CAPRI), [redacted] phone number [redacted] Date of Birth (DOB) [redacted] Illinois Driver's License Number [redacted] home address: [redacted] cellular phone number: [redacted] FBI # [redacted] was advised as to the identity of the interviewing agent and the purpose of the interview.

At first, ROVITO stated he did not feel comfortable talking to the interviewing agent without his attorney. When asked who his attorney was, ROVITO explained that his attorney only helped him with his business matters. ROVITO was told it was his choice if he wanted to have his attorney present. ROVITO then agreed with continuing the interview and provided the following information voluntarily:

ROVITO started in the restaurant business with his mother and brothers more than ten years ago. They used their mother's recipes. There are currently four restaurants affiliated with the CAPRI chain. ROVITO

manages the CAPRI RESTAURANTE in Burr Ridge. JOHNNY ROVITO runs the CAPRI EXPRESS which is located in the same strip mall as the CAPRI RESTAURANTE. ROVITO's sister owns the CAPRI in Palos Hills and ROBERT ROVITO manages the CAPRI in Plainfield.

GIGI ROVITO hired JOHNNY ROVITO to be a cook at the CAPRI RISTORANTE in Burr Ridge after JOHNNY ROVITO's Oak Brook restaurant closed. JOHNNY ROVITO is GIGI ROVITO's older brother. GIGI ROVITO's attorney advised him to kick JOHNNY ROVITO out of the CAPRI RISTORANTE after news articles came out about the arrest of JOHNNY ROVITO's friend, PAUL CARPARELLI. GIGI ROVITO claimed he had not spoken with JOHNNY ROVITO for approximately a year and a half.

GIGI ROVITO noticed that JOHNNY ROVITO had changed when he (GIGI ROVITO) got out of prison. JOHNNY ROVITO had tatoos and talked like a tough guy. GIGI ROVITO stated he did not like the "tough Tony" stuff. GIGI was not aware of JOHNNY ROVITO being a member of or associating with any motorcycle gang. GIGI met a few bikers when he attended a motorcycle show with JOHNNY ROVITO. GIGI ROVITO denied ever having met Outlaw Motorcycle Club member, Big Pete.

JOHNNY ROVITO is the son-in-law of Chicago Outfit member, MIKE SPANO, who is currently incarcerated.

JOHNNY ROVITO and CARPARELLI grew up together. CARPARELLI had a reputation of being a gang member.

JOHNNY ROVITO lives in Woodridge, Illinois, just off the by-pass.

ROVITO has known MICKEY DAVIS for approximately four years. DAVIS was a regular customer of the CAPRI. ROVITO considered DAVIS to be a friend. DAVIS came to the restaurant every couple of weeks. He always came with his girlfriend, CARMELLA LAST NAME UNKNOWN (LNU). CARMELLA sometimes came to the restaurant first and later met DAVIS. DAVIS liked to order special foods from the restaurant. ROVITO stated he only saw DAVIS at his restaurant. ROVITO stated he had not seen DAVIS or CARMELLA LNU in his restaurant for more than a year and a half.

ROVITO had met DAVIS' friend, E.F. HEIL. HEIL came to the restaurant with some friends on occasion.

ROVITO attended the wake of DAVIS' nephew last week. DAVIS' nephew died from an overdose. ROVITO talked with DAVIS briefly but the subject of the news articles about CARPARELLI was never discussed. ROVITO also saw DAVIS' son, MICHAEL DAVIS, at the funeral. MICHAEL DAVIS had eaten at the CAPRI RISTORANTE in Burr Ridge a few times.

ROVITO stated he has never seen CARPARELLI and DAVIS meeting together.

DAVIS never talked about being involved with a car dealership called IDEAL MOTORS. ROVITO stated he never met R.J. SERPICO. ROVITO added that he had never heard of R.J. or JOSEPH SERPICO.

ROVITO admitted He enjoyed sports gambling.

ROVITO first said he had never dealt with TONY J (JARZEMBOWSKI). ROVITO later stated that JOHNNY ROVITO introduced him to TONY J. ROVITO stated that he gambled with TONY J more than seven years ago. ROVITO denied that DAVIS told TONY J to leave GIGI alone regarding the amount of money GIGI owed TONY J through gambling.

RUDY FRATTO used to come to the CAPRI RISTORANTE with his wife. FRATTO's wife was a very loud person.

ROVITO stated that the CAPRI RISTORANTE had been broken into on two separate occasions. The incidents were reported to the Burr Ridge Police Department. The burglars never got any money. On one occasion the burglars came through the restaurant's sky light. In a separate instance, the intruders tore a hole in the roof and fell through the office's drop ceiling. ROVITO advised that there was a safe in the CAPRI EXPRESS.

Investigation on 03/26/2014 at Burr Ridge, Illinois, United States (In Person)

File# 281A-CG-133568 Date drafted 04/08/2014

by SA Andrew T. Hickey

| | |
|---|---|
| [SEAL] | **OFFICIAL RECORD**<br>Document participants have digitally signed<br>All signatures have been verified by a certified FBI information system |

**FEDERAL BUREAU OF INVESTIGATION**

Date of entry 05/07/2014

FILIPPO ROVITO, manager of the CAPRI RISTORANTE (CAPRI), [redacted] was interviewed at his place of business. ROVITO was advised as to the identity of the interviewing agent and the purpose of the interview. ROVITO provided the following information:

ROVITO told his parents that federal authorities had evidence that JOHNNY ROVITO was at one time planning to rob the safe in the CAPRI EXPRESS. A short time later, approximately three weeks ago, PAUL CARPARELLI called FILIPPO ROVITO and told him not to listen to what "them people" said about JOHNNY ROVITO.

CARPARELLI has been calling FILIPPO ROVITO the last few days. CARPARELLI asked if FILIPPO ROVITO had any employees that could work for him at the CAPRI DELI in Bloomingdale, Illinois.

FILIPPO ROVITO denied having any knowledge that MICKEY DAVIS was interested in having R.J. SERPICO beaten.

The interviewing agent showed FILIPPO ROVITO a copy of e-mail image CARPARELLI sent the CHS on July 12, 2014. (The image was of a fanned out, bundle of $100.00 bills) FILIPPO ROVITO stated he knew nothing about DAVIS passing an envelope with $5,000.00 in it as payment to others to have SERPICO beaten. When advised that there were two fingerprints yet to be identified, one on the envelope and another on one of the $100.00 bills, FILIPPO ROVITO stated the interviewing agent could take his restaurant and arrest him if they found any of his fingerprints on said envelope or bill.

FILIPPO ROVITO was shown phone records revealing that he and DAVIS contacted each other on 07/11/2013, at approximately 9:00 P.M. ROVITO advised that DAVIS probably called him to ask for some type of special meal. FILIPPO ROVITO was told that phone data showed that he called JOHNNY ROVITO immediately after DAVIS contacted him. FILIPPO ROVITO had no response as to why he called JOHNNY ROVITO the evening of 07/11/2014.

FILIPPO ROVITO was told that there was reason to believe that DAVIS handed he or JOHNNY ROVITO the envelope of money at the CAPRI RESTAURANTE the evening of 07/11/2014. FILIPPO ROVITO denied having any knowledge of the incident but did not rule out that others might have used his restaurant to carry out the hand to hand exchange.

Investigation on 05/06/2014 at Burr Ridge, Illinois, United States (In Person)

File# 281A-CG-133568 Date drafted 05/07/2014

by SA Andrew T. Hickey