No. ___

IN THE

# Supreme Court of the United States

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WALTER A. FORBES,
*Petitioner*,

v.

UNITED STATES,
*Respondent*.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Second Circuit correctly hold, contrary to five others, that written statements that a government witness has received immunity from prosecution, made to the court by government attorneys during two previous trials, are not "admissions by party-opponent" under Federal Rule of Evidence 801(d)(2)?

2. Under the Fifth and Sixth Amendments and this Court's holdings in *Holmes* v. *South Carolina*, 547 U.S. 319 (2006), and *Giglio* v. *United States*, 405 U.S. 150 (1972), may a federal criminal defendant be precluded from informing the jury of repeated written statements by the government, during two prior trials of the same defendant, that a government witness has received immunity from prosecution?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case October 1, 2007, as corrected October 3, 2007.

## OPINIONS BELOW

The oral opinion of the United States District Court for the District of Connecticut excluding evidence of prosecutors' prior statements, and two of its post-trial opinions, are unreported; they are reproduced in the Appendix at A. 11a, 14a and 16a.[1] The summary order of the United States Court of

[1] "A." refers to the appendix to this petition, "C.A.A." to the appendix filed in the Court of Appeals.

Appeals for the Second Circuit is unreported and is reproduced at A. 1a. The order of that Court denying rehearing and rehearing *en banc* is unreported and is reproduced at A. 8a.

## JURISDICTION

The judgment of the Court of Appeals was entered October 1, 2007. A timely petition for rehearing and rehearing *en banc* was denied December 4, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Federal Rule of Evidence 801(d) provides in relevant part:

> "A statement is not hearsay if --
>
> * * *
>
> "(2) Admission by party-opponent. The statement is offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . ."

The complete texts of Fed. R. Evid. 801 and the Fifth and Sixth Amendments to the Constitution of the United States are reproduced in the appendix at A. 18a.

## STATEMENT

Petitioner was tried three times, in 2004, 2005 and 2006. Two juries were unable to reach a verdict, and accordingly two mistrials were declared. The government then brought petitioner to trial for a third time, before a new judge. This time the jury acquitted on one of four counts,[2] but convicted on three.[3] Petitioner was sentenced to twelve years and seven months in prison, and to pay $3.275 billion as restitution.

The central issue in the case, both the government and petitioner agreed, was whether petitioner had known of fraudulent accounting practices in the marketing company he had founded. At each of the three trials, in the government's words, the "question in dispute is this, simply put, whether the defendant knew about the fraud." C.A.A. 10926. There was no documentary evidence to support the government's contention. However, Kevin Kearney, a former employee and cooperating government witness, gave testimony that supported the government's contention that petitioner had had such knowledge.[4]

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[2] Title 15 U.S.C. §§ 78j(b) and 78ff(a) (securities fraud).

[3] Title 18 U.S.C. § 371 (conspiracy) and 15 U.S.C. § 78ff(a) (false statement in a report to the SEC), and 18 U.S.C. § 2 (aiding or abetting).

[4] To support its allegation that petitioner had knowledge, the government relied on testimony of only one person who claimed to have first-hand confirmation, alleged co-conspirator Cosmo Corigliano, the company's former chief financial officer, who was subject to extensive and damaging impeachment in which he acknowledged having lied on multiple occasions. *E.g.*, C.A.A. 7566-68, 9362-67, 9375-9404, 9417, 9426-27, 10985-93. Ultimately the government acknowledged to the jury that "It is true that Mr. Corigliano is a criminal," C.A.A. 11105, but urged

### A. The Government's Acknowledgments of Immunity During Two Trials.

In the first two trials of petitioner, the govern ment had presented Kearney as a witness who had received immunity in return for cooperation. In those trials Kearney acknowledged that beginning in 1998 for the next six years he met with prosecutors "about 15 or 20 times." C.A.A. 5592-93. The government acknowledged that he had received informal immunity from prosecution.[5] The government confirmed that again and again over the course of two years, in what the government itself later described as "a slew of Government briefs and pleadings" C.A.A. 2144, that it filed with the previous district judge. There were no fewer than five such written government submissions to the first district judge:

> (1) In the first trial, the government filed a statement that it "joins in Forbes' request" for an instruction that Kearney had been "promised by the government that, in exchange for [his] testimony, [he] will not be prosecuted." C.A.A. 2128, 2131. Accordingly, at the first trial the following jury instruction was given, C.A.A. 4926-27:
>
> "You have heard the testimony of witnesses Kevin Kearney and Steven Speaks who have

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jurors to ignore "whether he lied before he signed the plea agreement," C.A.A. 11137. Kearney, who did not himself have any personal contact with petitioner, was the only alleged co-conspirator to bolster Corigliano's claim that petitioner knew about the fraud.

[5] "Informal" immunity is described by the Department of Justice as its preferred method of agreement for obtaining cooperation. See U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.630 (2002).

> been promised by the government that in exchange for their testimony they will not be prosecuted for any crimes they may have admitted here in court or in interviews with the government . . . [T]he testimony of a witness who has been promised that he will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness . . . Such a witness . . . has a motive to falsify his testimony."

(2) Early in the second trial, the government itself proposed that the same instruction be used again. C.A.A. 395-96.

(3) Later in the second trial, the government confirmed its request. C.A.A. 2135.

(4) Still later in the second trial, the government stated in writing that it had no objection to adding to the instruction the further elaboration that "This promise was not a formal order of immunity by the Court, but was arranged directly between the witness and the government." C.A.A. 2137. The government observed that this was "substantially similar to the Government's Preliminary Request to Charge" and "the Government has no objection to either version being given." C.A.A. 2139. As in the first trial, the court, this time with the addition, gave the instruction. C.A.A. 5879.

(5) Near the end of the second trial, responding in writing to a motion by petitioner to strike part of the government's closing argument concerning Kearney, the government specifically reiterated to the court that Kearney "*is testifying pursuant to an informal immunity agreement.*"

> C.A.A. 761 (emphasis supplied). It argued that because the court had instructed the jury on his immunity, "no further curative instruction is necessary." *Id.* The government added that, unlike a cooperating witness who pleaded guilty and still awaited a future sentence, Kearney was "*a witness who has already received the benefit of an informal immunity agreement.*" *Id.* (emphasis supplied).

The previous district judge, before giving the instruction, even insisted on confirming with government counsel in open court, "Just so we're clear, it's informal immunity of government witness and it's only about Kevin Kearney." C.A.A. 5856. In the first two trials, neither jury convicted.

### B. The Government's Recantation and Disclaimer of Immunity in the Third Trial.

At the third trial, however, which was transferred to a new judge, the government's position changed. This time, the government denied that there ever had been an immunity promise to Kearney. It told the court that its repeated contrary statements to the prior judge during the previous two trials, spanning two years, had been simply "inadvertent." C.A.A. 1787. When asked by the court to explain what exactly it meant by "inadvertence," the government responded, "[i]n not objecting earlier." C.A.A. 7014. The government announced that it had assumed "that there was an immunity agreement on behalf of Mr. Kearney; but when we got down and looked really hard at it, it turned out that there is not." C.A.A. 7016. "We were wrong to have conceded this point." C.A.A. 11438. At the third trial the government elicited from Kearney a denial that he had

received a promise that he would not be prosecuted. C.A.A. 8355-56.

Petitioner sought to place in evidence at the third trial, pursuant to Fed. R. Evid. 801(d)(2), the government's statements from the prior two trials that had acknowledged that Kearney had received an informal grant of immunity from prosecution. Petitioner argued that these were substantive evidence "as an admission of the government." C.A.A. 10428.

The government opposed, arguing that in the Second Circuit

> "a prior statement or written submission by a prosecutor can be admitted into evidence in order to demonstrate that the government has taken inconsistent positions on a particular factual dispute only if the defendant can establish that the claim of inconsistency 'is a fair [inference] and that an innocent explanation for the inconsistency does not exist.'"

C.A.A. 2149, quoting *United States* v. *McKeon*, 738 F.2d 26, 33 (2d Cir. 1984), and *United States* v. *Salerno*, 937 F.2d 797, 811 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992). *McKeon* had held that Rule 801(d)(2) should not apply to prior inconsistent statements to the jury by a party's attorney as to which it offered "an innocent explanation," 738 F.2d at 33, and *Salerno* applied that exception to the Rule to prior statements by the government. In the present case, the government argued that "the Government has provided an explanation for its change in positions—its inadvertent failure, during the first two trials, to notice that the Kearney instruction was erroneous as a matter of fact." C.A.A. 2150. Nothing

more was required, the government contended, to exclude its prior statements of fact.

> "Accordingly, this Court should exclude any evidence regarding the Government's change of position, since it is 'innocently explained' . . . ."

*Id.*

Petitioner remonstrated that the government's "inadvertence" explanation "goes to weight, not admissibility," C.A.A. 10430, and that "[t]here is plenty of evidence that there is not an oversight or it's not a matter of inadvertence, but that he received an oral informal grant of cooperation in return for no prosecution," C.A.A. 7013; see also C.A.A. 7017. As further support petitioner provided the court with correspondence by Kearney's own attorney with the SEC that referred to "The U.S. Attorney's Office['s] . . . agreement with Kearney," C.A.A. 1749; observed that "Kearney's cooperation with the Government's investigation . . . has been rewarded by the U.S. Attorney's office in its decision not to prosecute," C.A.A. 1748; and stated that Kearney "began his cooperation with the U.S. Attorney's Office in August 1998," at which time "that Office made the decision that Kearney's role in a criminal prosecution would be as a witness," after which time he rendered "valuable cooperation," "important cooperation." C.A.A. 1747-49.[6]

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[6] The government responded that Kearney's counsel's "use of the word 'agreement' . . . was an 'unfortunate' word choice." C.A.A. Supp. 16. The government later asserted that Kearney's counsel several years later had denied to the government that Kearney had received immunity. C.A.A. 2148.

### C. The District Court's Exclusion of the Government's Prior Statements.

The District Court, however, excluded all the government's prior statements. Even though petitioner also requested that "[a]t a minimum, the Court should conduct an evidentiary hearing on the subject of the statements and promises made to Mr. Kearney by the government between 1998 and 2004," C.A.A. 1730, 7067-68, the District Court made its ruling with no hearing, and not even any affidavits or declarations from the government to support the new representations. The court held:

> "Statements and briefs filed by the government during the previous two trials which make reference to the fact that Kevin Kearney was testifying pursuant to an immunity agreement are not admissible as government admissions as the Court has determined that an innocent explanation exists for the statements. See *United States against McKeon* 738 F.2d, 26 at page 33, 2d Cir. 1984."

A. 11a. The court explained that "there is no more innocent explanation than admitting a mistake . . . ." A. 13a.[7] On that basis it not only refused to give the instruction regarding Kearney's credibility that the previous judge had given in the first two trials, but further ordered that petitioner "shall not be allowed to draw any inferences regarding the existence of an

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[7] "[B]ecause there was an innocent explanation for the supposed inconsistency that Forbes sought to take advantage of, the court did not abuse its discretion in ruling that the government submissions were not admissible under Rule 801(D)(2) . . . ."

A. 14a-15a.

immunity agreement." *Id.* Thus excluded were not just "inferences," but the government's flat statement in writing that Kearney "is testifying pursuant to an informal immunity agreement." C.A.A. 761; p. 6, *supra*. As the District Court later elaborated:

> "The government's written submission at the first trial in which it mistakenly agreed with the defendant's proposed jury instruction that a cooperating witness had benefited from an informal immunity agreement was not an admission under Rule 801(d)(2). The witness did not, as a matter of undisputed fact,[8] receive any form of immunity, and thus there was an innocent explanation for the supposed inconsistency and the defendant was correctly precluded from improperly taking advantage of the government's innocent mistake. See *United States* v. *McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (noting that before a prior statement may be admitted under Rule 801(d)(2) the court must, *inter alia*, determine by a preponderance of the evidence that the inferences sought to be drawn from the inconsistency are fair and that innocent explanations do not exist)."

A. 16a-17a.

Armed with those rulings, and with the jury not aware of immunity received by Kearney, at the third trial the government presented Kearney as an essentially unbiased person performing a civic duty

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[8] The "undisputed fact" was hotly disputed by the defense, based on numerous prior contrary statements by the government which the court excluded, as well as the correspondence of Kearney's own lawyer. See C.A.A. 395-96, 761, 1747-49, 2128, 2131, 2135-39, 4926-27, 5856, 5879; p. 8, *supra*.

in response to compulsory process. C.A.A. 8356. In its closing, the government repeatedly cited Kearney's testimony to the jury:

> "you heard Kevin Kearney testify . . . Kevin Kearney told you . . . . What else did Kevin Kearney tell you . . . . Did Kevin Kearney make up that . . . . Now remember . . . Kevin Kearney told you . . . ."

C.A.A. 10927, 10928, 10933. This time, after two previous juries had failed to do so, the jury convicted.

### D. The Court of Appeals' Affirmance.

On appeal, petitioner argued that the exclusion of the government's prior statements violated Rule 801(d)(2) and the Fifth and Sixth Amendments. The government responded that the Second Circuit's *McKeon* decision controlled, and that the District Court had properly excluded and forbidden any reference to "mistaken statements by Government lawyers." Government's Brief, Ct. Apps., at 67. The Court of Appeals for the Second Circuit (Cabranes, Cir. J., Miner, Sr. Cir. J., and Crotty, U.S.D.J.) treated the issue as controlled by settled Second Circuit law, and affirmed. In a brief summary order, A. 1a, the Court of Appeals held that by claiming "mistake," "the Government offered a sufficient explanation":

> "Forbes argues that the District Court erroneously blocked his attempts to introduce two prior inconsistent prosecutorial statements—(i) that one of its witnesses had received informal immunity . . .—in violation of FRE 801(d)(2) and the Due Process Clause. Forbes also asserts that the District Court erred in refusing to provide an

> informal immunity instruction given to the jury at the two prior trials but which the Government had since learned was mistaken. Because the Government offered a sufficient explanation for the mistaken jury instruction with regard to one witness' informal immunity . . . the District Court did not abuse its discretion."

A. 5a-6a.

Petitioner sought rehearing and rehearing *en banc*, urging that the exclusion violated Rule 801(d)(2) and the Fifth and Sixth Amendments, and was in conflict with decisions of other circuits and of this Court. Rehearing was denied without opinion. A. 8a.

## REASONS FOR GRANTING THE WRIT

This petition sharply presents the often-noted, but never resolved, question whether Federal Rule of Evidence 801(d)(2)—which without limitation excludes admissions of a party-opponent from the definition of inadmissible hearsay—nevertheless does not apply (or in some circuits applies only with limitations), to statements made in court by the government's attorneys in criminal prosecutions. It is an issue as to which one state court observed last year the federal circuits are "significantly fractured." *State* v. *Pearce*, ___ P.3d ___ (Ida. App. 2007). All circuits, insofar as can be determined, unhesitatingly apply the Rule to admit in evidence prior statements of the government in civil cases.[9] With respect to criminal cases, however, the circuits are split three ways as to the meaning of the identical language of the same Rule of Evidence. The issue is raised especially acutely in this case, in which the prior

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[9] See pp. 26-27, *infra*.

statements by the government were made repeatedly *to the court* in prior trials of the *same defendant* relating to the *same witness*—and when the statements concern matters of fact, not argument, and when the government's latest factual position flatly contradicts its earlier ones.

1. In criminal trials, on the precise and focused issue of applying Rule 801(d)(2) to statements to the court by government attorneys—the case presented here—the circuits have chosen among three positions. The First and D.C. Circuits hold such statements admissible always; the Fifth and Seventh, never; and the Fourth and Eleventh, along with the Second Circuit here, exclude them unless a series of judicially-created extra-Rule criteria of the Second Circuit's invention—such as absence of a loosely-conceived "innocent explanation"—are satisfied. Several state supreme courts that construe an identical rule of evidence are similarly divided three ways.

2. On the more comprehensive issue of whether Rule 801(d)(2) can be invoked in criminal cases for statements by government agents generally, not just government attorneys, the three-way split engages ten circuits and is even more profound. At this level, five circuits reject the holding of the Second Circuit here, and hold instead that Rule 801(d)(2) applies as it is written, without any judge-created exclusion. Three, the Seventh and Fifth, and the Second as well for agents other than attorneys, adhere to their pre-Federal-Rules view that in criminal trials such statements of government agents are not admissible. Two others add restrictions on admissibility that are nowhere to be found in the text or history of the Rule.

3. If Rule 801(d)(2) does not apply, then this petition further presents the question whether, under

the Fifth and Sixth Amendments, a federal criminal defendant may be precluded from informing the jury of previous statements by the government that it granted informal immunity from prosecution to a government witness. The Second Circuit here has rejected a defendant's right to offer in his defense credible evidence that a government witness has received immunity. That position is contrary not only to decisions of at least three other circuits but also to holdings of this Court in cases that stretch from *Giglio* v. *United States*, 405 U.S. 150 (1972), to *Holmes* v. *South Carolina*, 547 U.S. 319 (2006), that a defendant may not be precluded from informing the jury of critical evidence with indicia of reliability bearing directly on credibility of a prosecution witness.

Here the government in two prior trials of the same defendant stated to the court, not just once but several times, that a key government witness had received immunity from prosecution. Yet when at the beginning of the third trial the government suddenly disclaimed and denied what for two years it had previously acknowledged, the District Court, applying the Second Circuit's non-textual construction of Rule 801(d)(2), excluded the government's prior factual statements to the court and refused to allow the government's statements to be made known to the jury. The court saw no need even for an evidentiary hearing to determine the basis for the government's "innocent explanation" for two years of chronic "mistakes" and "inadverten[ce]."

Two previous juries, made aware of Kearney's immunity, had not found the evidence sufficient to convict. In the third trial—with all evidence of the government's statements acknowledging a grant of

immunity excluded, and with any reference to them prohibited—the third jury reached a different verdict.

## I. THE SECOND CIRCUIT'S CONSTRUCTION OF FEDERAL RULE OF EVIDENCE 801(d)(2) IS CONTRARY TO DECISIONS OF THIS COURT AND OF FIVE OTHER CIRCUITS.

### A. The Circuits Are Deeply Divided as to Whether Rule 801(d)(2), Which Provides That Statements of a Party-Opponent Are Not Hearsay, Does Not Apply in Criminal Trials to Statements of Government Attorneys and Agents.

#### 1. *The First, Sixth, Eighth, Ninth and District of Columbia Circuits Hold That Rule 801(d)(2) Applies Without Qualification to Statements by the Government.*

The Second Circuit's construction of Rule 801(d)(2) has been rejected by the courts of appeals of five circuits, which hold that Fed. R. Evid. 801(d)(2) makes statements of government agents, including in-court statements of fact by attorneys, an exception to the hearsay rule in criminal prosecutions no less than in any other.

The First Circuit in the leading case *United States* v. *Kattar*, 840 F.2d 118 (1st Cir. 1988), applied Rule 801(d)(2) to statements by government attorneys in a brief and a sentencing memorandum. The First Circuit explicitly agreed with an earlier D.C. Circuit holding that

> "the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases."

840 F.2d at 130, quoting *United States* v. *Morgan*, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978). Explicitly rejecting contrary Seventh Circuit decisions, the First Circuit held that "Whether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases . . . the Justice Department certainly should be considered such." *Kattar*, 840 F.2d 130. The First Circuit further reasoned:

> "We agree with Justice (then Judge) Stevens that the assertions made by the government in a formal prosecution (and, by analogy, a formal civil defense) 'established the position of the United States and not merely the views of its agents who participate therein.' . . . *The government cannot indicate to one federal court that certain statements are trustworthy and accurate, and then argue to a jury in another federal court that those same assertions are hearsay.*"

*Kattar*, 840 F.2d at 131 (emphasis supplied), quoting *United States* v. *Powers*, 467 F.2d 1089, 1097 n.1 (7th Cir. 1972) (Stevens, J., dissenting), *cert. denied*, 410 U.S. 983 (1973).

The D.C. Circuit in *Morgan*, as the First Circuit noted, had emphatically stated that

> "Notwithstanding the plain language of the Rule, the government urges us to hold it inapplicable to the prosecution in criminal cases . . . . [T]here is nothing in the history of the Rules generally or in Rule 801(d)(2)(B) particularly to suggest that

> it does not apply to the prosecution in criminal cases."

581 F.2d at 937-38. In *United States* v. *Warren*, 42 F.3d 647, 655 (D.C. Cir. 1994), the D.C. Circuit reiterated its holding in *Morgan* and the First Circuit's in *Kattar*, applying the Rule to a statement of facts attached by the government to a criminal complaint.

The Ninth Circuit has applied the Rule broadly to hold admissible statements of government attorneys and agents. See *United States* v. *Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989) (government manual); *Hoptowit* v. *Ray*, 682 F.2d 1237, 1262 (9th Cir. 1982) (investigative report of attorney general's office admissible under Rule 801(d)(2)). More recently the Ninth Circuit's construction was thoroughly explained by one of its district courts in *United States* v. *Bakshinian*, 65 F. Supp. 2d 1104, 1108 (C.D. Cal. 1999) ("*McKeon*'s reasoning breaks down when applied to a government prosecutor").

The Sixth Circuit also agrees with the established First Circuit and District of Columbia Circuit construction of Rule 801(d)(2). See *United States* v. *Branham*, 97 F.3d 835, 851 (6th Cir. 1996) (citing *Morgan* with approval); *United States* v. *Reed*, 167 F.3d 984, 989 (6th Cir. 1999). The Eighth Circuit at least in dictum has recognized that statements of a government official may be admissible under Rule 801(d)(2) (though not for the truth of hearsay they report). *United States* v. *Santisteban*, 501 F.3d 873, 879 (8th Cir. 2007).

### 2. *The Seventh and Fifth Circuits Hold That in Criminal Cases Rule 801(d)(2) Does Not Apply to Government Statements.*

At the other end of the spectrum, the Seventh Circuit wholly denies the applicability of Rule 801(d)(2) in criminal cases to prior statements by the government. In *Powers*, noted *supra*, which was decided before adoption of the Federal Rules of Evidence, the Seventh Circuit held that a criminal defendant was not entitled to introduce transcripts from a previous trial to show that the government had previously taken the position that a different person had committed the offense. However, then Judge Stevens in dissent had concluded:

> "I believe . . . that a more basic issue is raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens.
>
> "The inconsistency may be justified or explained by newly discovered evidence or by more accurate analysis of facts which were always available. But in my opinion *the fact of the inconsistency may properly be brought to the attention of the jury and the government put to the burden of explaining* . . . ."

*Id.* at 1097 (footnote omitted; emphasis supplied). That dissenting opinion, although not accepted in the Seventh Circuit, subsequently has been cited, quoted with approval, and adopted by the First and District of Columbia Circuits and by other courts as well.[10]

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[10] See *Harris* v. *United States*, 834 A.2d 106, 118, 120 (D.C. 2003) ("We agreed with the views of the First Circuit, the D.C.

Adhering to its 1972 *Powers* decision, which antedated Rule 801(d)(2), the Seventh Circuit continues to hold that in spite of the Rule, statements by government attorneys cannot be introduced against the government in a criminal proceeding, "[b]ased on the common law principle that no individual should be able to bind the sovereign." *United States* v. *Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir.), *cert. denied sub nom. United States* v. *Marcello*, 522 U.S. 988 (1997). *Accord, e.g., United States* v. *Arroyo*, 406 F.3d 881, 888 (7th Cir. 2005) ("This court has held that government agents are not party-opponents for purposes of Rule 801(d)(2)."); *United States* v. *Prevatte*, 16 F.3d 767, 779 n.9 (7th Cir. 1994) (same) ("We see no reason to disturb this longstanding rule;" noting conflict with D.C. Circuit in *Morgan* and First Circuit in *Kattar*); *United States* v. *Kampiles*, 609 F.2d 1233, 1246 n.16 (7th Cir. 1979) (noting conflict), *cert. denied*, 446 U.S. 954 (1980).

The Fifth Circuit specifically adopted the Seventh Circuit's construction of the Rule in *United States* v. *Garza*, 448 F.3d 294, 298 (5th Cir. 2006). See also *Lippay* v. *Christos*, 996 F.2d 1490, 1497-98 (3d Cir. 1993) (dictum) (citing Seventh and Second Circuit cases with apparent approval).

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Circuit, and then-Judge (now Justice) Stevens that the United States is 'bound by the position taken in a formal prosecution . . . .'") ("We reaffirm and adhere to our holding . . . that the prior statements of an Assistant United States Attorney can be treated as party admissions."); *Freeland* v. *United States*, 631 A.2d 1186, 1192 (D.C. 1993) (quoting *Powers* dissent). See also *Jacobs* v. *Scott*, 513 U.S. 1067, 1070 (1995) (Stevens, J., joined by Ginsburg, J., dissenting from denial of certiorari) (quoting *Powers* dissent).

### 3. *The Second, Fourth and Eleventh Circuits Hold That in Spite of Rule 801(d)(2), in Criminal Cases Admissibility of Government Statements Is Severely Restricted.*

In affirming exclusion from a criminal case of government attorneys' prior statements to the court, the Second Circuit approved application of a doctrine limiting Federal Rule of Evidence 801(d)(2) that it announced in *United States* v. *McKeon*, 738 F.2d 26 (2d Cir. 1984), and has invoked on multiple occasions in the two decades following.[11] According to *McKeon* (which concerned statements to the jury by a defendant's attorney), such statements by a party's attorney may be introduced in evidence provided every one of three conditions is met: (1) the prior statements must be statements of fact; (2) their inconsistency with the party's present position must be clear; and (3) the inference for which they are offered must be "a fair one and . . . an innocent explanation for the inconsistency does not exist." 738 F.2d at 33; see also *United States* v. *Salerno*, 937 F.2d 797, 811 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992). One court has described the Second Circuit's *McKeon* doctrine as "a rather elaborate

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[11] *E.g.*, *United States* v. *Ford*, 435 F.3d 204, 215 (2d Cir. 2006). *McKeon* was also followed in *United States* v. *GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991), which the District Court in the present case explained as permitting prior statements of government counsel to be admitted if the government's change was "wholly without explanation." P. 12a, *infra*. In criminal cases concerning extrajudicial statements by government agents, the Second Circuit has followed its pre-Federal-Rules exclusionary rule. See *United States* v. *Yildiz*, 355 F.3d 80, 80-81 (2d Cir. 2004) (noting split among circuits), *reaffirming United States* v. *Santos*, 372 F.2d 177, 180-81 (2d Cir. 1967).

series of rules to test admission of the evidence." *People* v. *Cruz*, 643 N.E.2d 636, 665 (Ill. 1994). The Second Circuit here held, affirming the District Court's application of *McKeon*, that because the government now represented that it had been "mistaken" in its prior repeated statements to the court throughout two trials, therefore "an innocent explanation" had been sufficiently demonstrated—and that ended the matter.

Two federal circuits have followed the Second Circuit's *McKeon* gloss on Rule 801(d)(2). In *United States* v. *DeLoach*, 34 F.3d 1001, 1005-06 (11th Cir. 1994), the Eleventh Circuit explicitly adopted *McKeon*, holding that prior statements by a prosecutor were properly excluded in a criminal case in spite of Rule 801(d)(2). The Fourth Circuit has held the same. *United States* v. *Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) (adopting *McKeon*, holding prior statements of government attorneys inadmissible).[12]

### B. The Second Circuit's Departure From the Plain Language of Rule 801(d)(2) Is Contrary to Decisions of This Court.

#### 1. *This Court Repeatedly Has Held That the Federal Rules of Evidence Are To Be Construed According to Their Plain Language.*

This Court often has held that the Federal Rules of Evidence are to be construed according to their plain language. Indeed, it has applied that principle to Rule 801 itself. See *United States* v. *Owens*, 484 U.S.

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[12] *But cf. United States* v. *Barile*, 286 F.3d 749, 758 (4th Cir. 2002) (dictum that Rule 801(d)(2) would apply to statements by government official).

554, 561 (1988) (adopting "the more natural reading" of Fed. R. Evid. 801(d)(1)(C)); see also *United States* v. *Zolin*, 491 U.S. 554, 566 (1989) (rejecting construction "inconsistent with the . . . plain language" of Fed. R. Evid. 104(a)); *Huddleston* v. *United States*, 485 U.S. 681, 687 (1988) (declining to read unstated limitations into Rule; "[w]e reject petitioner's position, for it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(d)"); *Bourjaily* v. *United States*, 483 U.S. 171, 178 (1987) ("It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104") (emphasis in original).

Rule 801(d)(2) does not contain in its text, nor does its structure call for, the exception that the Second Circuit has created. Nor does the text support the even broader exclusion applied in the Fifth and Seventh Circuits. "Nothing on the face or in the history of Fed. R. Evid. 801(d)(2) suggests the admissions doctrine does not reach statements by government agents." 4 C. MUELLER & L. KIRKPATRICK, FEDERAL EVIDENCE 458-59 (3d ed. 2007). "[I]t is very hard to find any support in [Rule 801(d)(2)'s] language or structure for a blanket exclusion of statements by government agents." 2 K. BROUN, MCCORMICK ON EVIDENCE 205-06 (6th ed. 2006). "[T]here is nothing in the plain language of Rule 801(d) to suggest that it does not apply to the prosecution in a criminal case . . . ." *State* v. *Villeda*, 599 S.E.2d 62, 66 (N.C. App. 2004) (state rule identical to federal rule). See also *United States* v. *American Tel. & Tel. Co.*, 498 F. Supp. 353, 358 (D.D.C. 1980) ("[t]he unambiguous language of Rule 801(d)(2)"). Three years after the Federal Rules of Evidence were enacted in 1975, the District of Columbia Circuit pointed out that "the Federal Rules

clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases." *Morgan*, 581 F.2d at 937 n.10.

When the Federal Rules of Evidence were being considered, it was explained to Congress that Rule 801(d)(2) was intended in various respects to alter the common law.[13] The Advisory Committee Note accompanying the Federal Rules anticipated as to Rule 801(d)(2) that there would be "generous treatment of this avenue of admissibility." Committee on Rules of Practice and Procedure, *Revised Draft of Proposed Rules of Evidence*, 51 F.R.D. 315, 417 (1971). Congressional consideration reflected nothing to the contrary.

In construing the Federal Rules, this Court has not readily implied unstated conditions or exceptions. For example, in examining Fed. R. Evid. 804 this Court explained that "Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not . . . . [W]e must enforce the words that it enacted." *United States* v. *Salerno*, 505 U.S. 317, 322 (1992).

> "This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases."

*Id.* "We . . . fail to see how we may create an exception to Rule 804(b)(1)." *Id.* at 324. *Cf.* also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 586-87 (1993) (holding that Federal Rule of

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[13] *E.g.*, statement of Assistant Attorney General Rakestraw that Rule 801(d)(2)(D) "is straightforward in overturning the traditional rule" requiring proof an of agent's authority to make statement. Hearings on Federal Rules of Evidence Before Senate Committee on Judiciary, 93d Cong., 2d Sess. 161 (1973).

Evidence 702 superseded the common-law test for expert testimony).

The Second Circuit and the Seventh Circuit, and those circuits aligned with one or the other of them, have scarcely mentioned the Rule itself, much less its text, in their decisions. Instead, they have treated admissibility of statements by government attorneys and agents as if this were simply an issue of common law. But this Court several times has recognized that the Federal Rules of Evidence modified common-law rules in many respects. *E.g., Bourjaily* v. *United States*, 483 U.S. at 177.

### 2. *To Exempt the Government From Rule 801(d)(2) Is Contrary to Text, History and the Fifth Amendment.*

This Court recognized more than a century ago that "[i]n the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon . . . . Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." *Oscanyon* v. *Arms Co.*, 103 U.S. 261, 263 (1880). And certainly in a federal criminal prosecution, it is the government that is the defendant's party-opponent. Indeed, "[t]he party admission rule is 'particularly' applicable to statements by government attorneys, who have the power to bind the government." *Harris* v. *United States*, 834 A.2d 106, 119 (D.C. 2003), quoting WEINSTEIN'S FEDERAL EVIDENCE § 801.33[3] (2d ed. 1997), and citing 2 MCCORMICK ON EVIDENCE § 257 at 142 n.8 (5th ed. 1999) and *Giglio* v. *United States*, 405 U.S. 150, 154 (1972).

Even more troubling, the Seventh Circuit, although it excludes prior statements of government agents, without hesitation has applied Rule 801(d)(2) to allow in evidence prior statements of *defense* counsel, to be used against the criminal defendant. *United States* v. *Brandon*, 50 F.3d 464, 468-69 (7th Cir. 1995) (defense counsel's response to grand jury subpoena); *United States* v. *Harris*, 914 F.2d 927, 931-32 (7th Cir. 1990) (prior defense counsel's statements at trial). See also *State* v. *Worthen*, 765 P.2d 839, 848 (Utah 1988) ("Clearly, that rationale [excluding admissions of government agents in criminal cases] finds no basis in fact when the government agents are involved in law enforcement work. The rationale is even more lacking in the case of statements made by the prosecutor in a criminal case.").

"Rule 801(d)(2), the modern rule defining party admissions, was written broadly and contains no special rule for the government, either explicit or implicit." Poulin, *Party Admissions in Criminal Cases*, 87 MINN. L. REV. 401, 479 (2002). For a Federal Rule of Evidence to command unequal treatment of the parties in a criminal proceeding would call into question its validity under the Fifth and Sixth Amendments. Thus in *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989), this Court declined to construe Fed. R. Evid. 609(a) as treating civil plaintiffs and defendants differently, concluding that "the plain text does not resolve these issues," 490 U.S. at 511, and that a literal reading "produces an absurd, and perhaps unconstitutional, result," *id.* at 527 (Scalia, J., concurring).

### C. The Second Circuit's Construction of Rule 801(d)(2) for Criminal Cases Is Contrary to the Construction of the Same Rule in Civil Cases.

Ironically, many of the same circuits that hold statements by government attorneys not within Rule 801(d)(2) in criminal cases have no difficulty holding that the same language, of the same Rule, applies to such statements in civil cases in which the government is a party. See *United States* v. *D.K.G. Appaloosas, Inc.*, 630 F. Supp. 1540, 1564 (E.D. Tex. 1986) ("Government attorneys in criminal cases are exempt from this rule [801(d)(2)(D)] . . . . In civil cases, however, . . . statements by government attorneys are admissible."), *aff'd*, 829 F.2d 532 (5th Cir. 1987), *cert. denied sub nom. One 1984 Lincoln Mark VII Two-Door* v. *United States*, 485 U.S. 976 (1988); *Murrey* v. *United States*, 73 F.3d 1448, 1456 (7th Cir. 1996) (reversing because of exclusion of statements of government officials that should have been admitted under Rule 801(d)(2)).[14]

There is no logical or textual basis to construe the words of Rule 801(d)(2) as applying to government statements in civil cases but not criminal. As this Court pointed out in *Green* v. *Bock Laundry Machine Co.*, 490 U.S. at 526, Rule 1101(b) of the Federal Rules of Evidence specifically provides that "These

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[14] The Rule is applied routinely by other circuits to such statements in civil cases. See generally, *e.g.*, *Wright-Simmons* v. *City of Oklahoma City*, 155 F.3d 1264, 1268 (10th Cir. 1998) (written notes of city official); *Skaw* v. *United States*, 740 F.2d 932, 937 (Fed. Cir. 1984) (statements of government agents); *Czekalski* v. *Peters*, 475 F.3d 360, 366 n.2 (D.C. Cir. 2007) (statements reported by federal investigators "admissible as admissions by a party opponent under Rule 801(d)(2)").

rules apply generally to civil actions and proceedings . . . [and] to criminal cases and proceedings . . . ." Even at common law, "In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act . . . . Nor is there any authority for confining the rule to civil cases." *United States* v. *Gooding*, 12 Wheat. 460, 469 (1827) (Story, J.). "Nothing in the language of Rule 801(d)(2)(D) makes any distinction between civil and criminal actions." Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 778 (1990).

### D. The Conflict Among the Circuits Has Been Acknowledged by the Courts, by Commentators, and by the Government Itself.

Five United States Courts of Appeals have explicitly acknowledged that they are divided on how to apply Rule 801(d)(2) to statements of government attorneys and agents in criminal cases. The Seventh Circuit, explaining its own contrary position, observed that "a number of courts have rejected that approach when dealing with statements made by government attorneys," citing the holdings of the First Circuit in *Kattar* and the D.C. Circuit in *Morgan*. *Zizzo*, 120 F.3d at 1351 n.4. See also *Garza*, 448 F.3d at 298 ("other circuits have declined to extend Rule 801(d)(2)(D) to statements made by government agents, especially in criminal trials"); *Kattar*, 840 F.2d at 131 (specifically rejecting holding of Seventh Circuit in *Powers*, adopting that of D.C. Circuit in *Morgan*); *Prevatte*, 16 F.3d at 779 n.9 (noting that Second and Seventh Circuits disagree with D.C. Circuit); *United States* v. *Yildiz*, 355 F.3d

80, 81 (2d Cir. 2004) (noting circuit split as to Rule 801(d)(2)(D)). See also *United States* v. *Bakshinian*, 65 F. Supp. 2d at 1108 (analyzing and explaining rejection of *McKeon* and *DeLoach*).

State courts—42 of which[15] must interpret state evidence rules that are modeled on the Federal Rules of Evidence—have pointed out the division among the federal circuits, and have divided among themselves. *E.g., Allen* v. *State*, 787 N.E.2d 473, 478 (Ind. App. 2003) ("this issue has been addressed by numerous federal jurisdictions with varying results"); *State* v. *Pearce*, ___ P.3d ___, 2007 WL 1544152 at *11 (Ida. App. 2007) ("It is an area of law that has been significantly fractured;" calling *McKeon* a "seminal case" and the "most prominent approach"); *Harris* v. *United States*, 834 A.2d 106, 118-19 (D.C. 2003) (noting split among federal circuits, adopting First Circuit position); *State* v. *Therriault*, 485 A.2d 986, 992 & n.9 (Me. 1984) (noting split, adopting Seventh Circuit position); *People* v. *Cruz*, 643 N.E.2d 636, 664-65 (Ill. 1994) (adopting *McKeon* position); *State* v. *Ogden*, 640 A.2d 6, 11n. (Vt. 1993) ("Courts have split on this issue."); *State* v. *Asbridge*, 555 N.W.2d 571, 576 (N.D. 1996) (noting that "there appears to be some disagreement among the courts," adopting Seventh Circuit view); *State* v. *Brown*, 784 A.2d 1244, 1254-55 (N.J. 2001) (pointing out split).

Commentators likewise have recognized the circuit split. *E.g.*, ABA SECTION ON LITIGATION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 244-45 (3d ed. 1998) ("A third issue, and one that divides the courts, concerns whether the statement of

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[15] See 6 J. MCLAUGHLIN, ED., WEINSTEIN'S FEDERAL EVIDENCE T-1 to T-8 and T-107 to T-112 (2d ed. 2007).

a government agent is admissible against the government under Rule 801(d)(2(C) or (D)."); 4 C. MUELLER & L. KIRKPATRICK, FEDERAL EVIDENCE 459-60 (3d ed. 2007) (detailing split among circuits).

The government itself has acknowledged the disagreement in the circuits. In a brief filed four months ago the Justice Department's Criminal Division, in "urg[ing] the court to follow the Second, Seventh, and Eleventh Circuits," wrote:

> "The government recognizes that other courts have come out differently, holding that statements by prosecutors can bind the government. See *United States* v. *Kattar*, 840 F.2d 118, 130-31 (1st Cir. 1988); *United States* v. *Morgan*, 581 F.2d 933, 937-38 & n.10 (D.C. Cir. 1978); *United States* v. *Bakshinian*, 65 F. Supp. 2d 1104, 1105-09 (C.D. Cal. 1999)."[16]

In fact, the government's own position with respect to Rule 801(d)(2) has sometimes been in conflict with itself. See *United States* v. *Branham*, 97 F.3d 835, 851 (6th Cir. 1996), in which the Sixth Circuit observed that "The government concedes that Rule 801(d)(2)(D) contemplates that the federal government is a party opponent of the defendant in a criminal case."[17]

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[16]Government's Opposition to Defendant Smith's Motion in Limine To Introduce Government Admissions, *United States* v. *Convertino*, No. 2:06-CR-20173, E.D. Mich., at 7 (Oct. 2, 2007), 2007 WL 3168832.

[17]In its appellate brief in *Branham*, the government, citing *Morgan*, acknowledged that "Undoubtedly, the federal rules contemplate that the federal government is a party-opponent of the defendant in a criminal case." Brief of Cross-Appellant United States, *United States* v. *Branham*, Nos. 95-5357, -5213, -5241, -5490, U.S.C.A., 6th Cir., at 22 (Oct. 19, 1995).

## II. TO PRECLUDE A FEDERAL CRIMINAL DEFENDANT FROM INFORMING THE JURY THAT THE GOVERNMENT ACKNOWLEDGED IMMUNIZING ONE OF ITS WITNESSES VIOLATES THE FIFTH AND SIXTH AMENDMENTS.

If Rule 801(d)(2) had been applied in this case as written—which at least five other circuits would have done—no constitutional issue would arise. But because petitioner was prevented from informing the jury of the government's prior statements, the third trial of petitioner did not comply with the Fifth and Sixth Amendments. When evidence was offered that "was highly relevant" and "substantial reasons existed to assume its reliability," then "'the hearsay rule may not be used mechanistically to defeat the ends of justice.'" *Green* v. *Georgia*, 442 U.S. 95, 97 (1979), quoting *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973).

In *Holmes* v. *South Carolina*, 547 U.S. 319, 330-31 (2006), this Court held that a trial court may not exclude exculpatory evidence bearing indicia of reliability just because the court credits the government's argument that that evidence should not be believed. That is because both the Fifth and Sixth Amendments guarantee criminal defendants "a meaningful opportunity to present a complete defense." *Id.* at 331, quoting *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986), and *California* v. *Trombetta*, 467 U.S. 479, 485 (1984). In *Giglio* v. *United States*, 405 U.S. 150 (1972), this Court unanimously held that due process requires that a jury, so it may assess credibility, must be allowed to know of the promise of immunity to a witness—even when (as in *Giglio* itself) prosecutors have made contradictory

statements as to whether such immunity had been conferred.

> "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

*Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). Here the jury's "estimate of [Kearney's] truthfulness and reliability" was crucial, for two prior juries, having been informed of his immunity, had declined to convict.

This Court also recognized in *Washington* v. *Texas*, 388 U.S. 14, 19 (1967), that the Fifth and Sixth Amendments protect the defendant's "right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Yet the District Court here weighed and credited the government's "inadvertence" excuse on its own; the court did not even conduct an evidentiary hearing before it excluded the evidence, relying simply on the unsworn representation of government attorneys. The third jury never knew that the government had completely contradicted its own prior version of the facts as to Kearney's status. *Cf. United States* v. *Powers*, 467 F.2d at 1097-98 (Stevens, J., dissenting):

> "in my opinion the fact of the inconsistency may properly be brought to the attention of the jury and the government put to the burden of explaining how it could argue . . . two mutually exclusive propositions."

See also *DeMarco* v. *United States*, 928 F.2d 1074, 1076-77 (11th Cir. 1991) (government's suppression

of immunity agreement was not harmless error); *Haber* v. *Wainwright*, 756 F.2d 1520, 1523-24 (11th Cir. 1985) (ordering hearing on whether witness had received undisclosed immunity).[18]

Decisions of the First, Fourth and Fifth Circuits hold that the Fifth and Sixth Amendments guarantee a criminal defendant the right both to inform the jury of credible evidence that a government witness has been granted immunity, and to argue to the jury that they should give that evidence weight in assessing such a witness's credibility.

> "It has been settled for some time that *due process requires a defendant be given the opportunity to present evidence* concerning *any promises, understandings or agreements* between the government and a key prosecution witness relating to the witness' testimony."

*United States* v. *Mitchell*, 886 F.2d 667, 670 (4th Cir. 1989) (emphasis supplied). See also *Ouimette* v. *Moran*, 942 F.2d 1, 11 (1st Cir. 1991) ("[T]he jury did not know and should have known the full extent of promises and deals made by the prosecutor in return for [the witness's] testimony."); *United States* v. *Barham*, 595 F.2d 231, 243 (5th Cir. 1979) ("Barham was entitled to a jury that, before deciding which story to credit, was truthfully apprised of any

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[18] The same principle is applied in civil cases. *E.g.*, *Huey* v. *Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) ("Despite the fact that Honeywell later amended its answers to deny this allegation, Honeywell's admissions are still admissible evidence, though not conclusive . . . ."); *Williams* v. *Union Carbide Corp.*, 790 F.2d 552, 556 (6th Cir. 1986) ("The plaintiff's arguments that the statements were made merely to preserve legal rights may be quite persuasive, but should have been made to the jury.").

possible interest of any Government witness in testifying falsely."), *cert. denied*, 450 U.S. 1002 (1981). The District of Columbia Court of Appeals also has held that to keep from the jury a government attorney's contrary statements in an earlier memorandum to the court was a critical denial of basic defense guarantees that "went to the heart of [the] defense." *Freeland* v. *United States*, 631 A.2d 1186, 1192, 1195 (D.C. 1993) (citing *Giglio*, *Kattar*, *Morgan*, and dissent of then Judge Stevens in *Powers*).

## III. THE ISSUES ARE FAR-REACHING, IMPORTANT AND OVERDUE FOR RESOLUTION.

This is a federal prosecution. Government grants of immunity, including informal immunity, to key witnesses happen every day, throughout the country. Informal grants, such as the government described the one to Kearney here, C.A.A. 761, are frequent and more common than statutory grants. 2 S. BEALE, ET AL., GRAND JURY LAW & PRACTICE § 7.11 at 7-37 (2d ed. 2005); 3 CRIMINAL PRACTICE MANUAL § 89:3 (Thomson-West 2007).

If a defendant in a federal criminal prosecution cannot inform the jury of such a grant of immunity—and if the government can so admit, but in a later trial erase its admission, leaving the jury none the wiser—then the entire dynamic of federal criminal justice will have changed.

## CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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