No. 99-166

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Filed December 27, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Pages**

CONSTITUTION, STATUTES, AND RULES

Pag

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense La ("NACDL") is a nonprofit corporation with membership of mo 10,000 attorneys and 28,000 affiliate members in all fifty state American Bar Association recognizes the NACDL as an a organization and awards it full representation in its Ho Delegates.

The NACDL was founded in 1958 to promote research field of criminal law, to disseminate and advance knowledge of t in the area of criminal practice, and to encourage the int independence, and expertise of defense lawyers in criminal Among the NACDL's objectives are to ensure the administration of justice and to ensure that criminal statut construed and applied in accordance with the United Constitution. One of its particular concerns is ensuring t individuals, including the criminally accused and suspect ensured of the constitutional rights embodied in the Fifth Amen clause that "No person ....shall be compelled in any criminal be a witness against himself."

SUMMARY OF ARGUMENT

The immunity statutes, 18 U.S.C. §§ 6001-6003, provide use and derivative use immunity for both testimo documents. When a witness is subpoenaed, refuses to p documents pursuant to a proper assertion of the Fifth Amendme thereafter receives immunity pursuant to 18 U.S.C. § 60

---

[1] The parties have consented to the submission of this brief. letters of consent have been filed with the Clerk of the Court. Pursuant Supreme Court Rule 37.6, none of the parties authored this brief in wh in part and no one other than *amicus*, its members, or counsel contribut money or services to the preparation or submission of this brief.

government cannot use that testimonial communication against the witness. Requiring a witness to turn over voluminous "personal and financial"[2] records (in this case "some 13,120 pages of documents and records") and then have those documents used as the basis for instituting a prosecution against the witness violates the unambiguous language of the immunity statute in addition to the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment right against self-incrimination is crucial to preserving our adversarial process. It serves to safeguard against government abuse. The values embodied in the Fifth Amendment are jeopardized when the Government can use documents produced by a witness, pursuant to use/derivative use immunity, as the basis for a prosecution against this same witness. Permitting the Government to commence an investigation by requiring an individual to produce his or her documents improperly shifts the burden of producing evidence of guilt onto the accused.

If the Government has knowledge of the existence of these documents prior to issuing the subpoena and also has a basis, other than through the witness, for introducing them at trial, it should not be permitted to use the witness/defendant to obtain the documents. It is unnecessary to offer the witness immunity when there is another source from which to procure the documents. Alternatively, if the Government has no knowledge of the existence of these documents, then the production of the documents accruing from the witness' testimony represents a derivative use of the grant of immunity. If the Government has no knowledge of the existence of the specific documents then the documents should not be considered a foregone conclusion.

Entity documents and individuals producing documents as the custodian of a collective entity offer different concerns than an *individual* being asked to produce documents that will be used against the *individual*. Further a non-communicative taking by the

[2] *United States v. Hubbell*, 167 F.3d 552, 563 (D.C. Cir. 1999).

Government, as one finds in cases where the government extra individual's blood or requires a handwriting exemplar, doc address the witness being given a grant of statutory immun procure testimony or information that serves as the basis for his indictment.

ARGUMENT

THE FIFTH AMENDMENT RIGHT AGAINST S INCRIMINATION PRECLUDES THE GOVERNMENT F USING DOCUMENTS THAT ARE PROVIDED BY INDIVIDUAL UNDER A GRANT OF IMMUNITY

A. THE CLEAR LANGUAGE OF 18 U.S.C. §§ 6002 AND PRECLUDES COMPELLED INFORMATION FROM B USED AGAINST AN INDIVIDUAL PROVIDED V IMMUNITY PURSUANT TO THESE STATUTES

In determining the scope of immunity, there is no justification to distinguish between that which is written an which is spoken. Clearly the statute includes both. Immunity pr pursuant to 18 U.S.C. § 6002 specifically requires that

> 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.

Id. (emphasis added) By requesting that a court grant a v immunity, federal prosecutors receive the benefit of a con communication in return for the guarantee that they will not u information directly or indirectly in a later prosecution

individual providing the information.

"Courts in applying criminal law generally must follow the plain and unambiguous meaning of the statutory language." *United States v. Albertini*, 472 U.S. 675, 680 (1985). The clear language of 18 U.S.C. § 6002 includes the protection of "testimony *or* other information." The use of the disjunctive "or" emphasizes the clear congressional purpose to provide immunity for both testimony and information. (*See McNally v. United States*, 483 U.S. 350, 365 (1987)) (Stevens, J., joined by O'Connor, J., dissenting) (use of disjunctive "or" in mail fraud statute provides clear language). "Other information," as defined in 18 U.S.C. § 6001 "includes any book, paper, *document*, record, recording, or other material." (emphasis added). Immunity is not limited to oral testimony.

The present immunity statute was included as Part II of the Organized Crime Control Act of 1970. Its passage offered a unitary approach to immunity from what had been "a hodgepodge of existing immunity provisions tied to particular substantive statutes..."[3] Immunity affords prosecutors a bargaining tool to procure information necessary for prosecution that normally would be inaccessible because of the Fifth Amendment. "It is simply a fixed price that the Government must pay to obtain certain kinds of information..."[4]

Many of the self-incrimination cases, such as *Fisher v. United*

[3] Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 91st Cong., 1st Sess., H.R. 11157 and H.R. 12041, at p. 40 (Statement of Will Wilson, Assistant Attorney General, Criminal Division, Department of Justice). The provisions of Part II are similar to H.R. 11157. See Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives, S. 30, 91st Cong. 2nd Sess., at p. 160, May 21, 1970 (Comments of Department of Justice on S.30 Organized Crime Control Act of 1969).

[4] Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 91st Cong., 1st Sess., H.R. 11157 and H.R. 12041, at p. 69 (Testimony of Professor Dixon).

States, 425 U.S. 391 (1976) and *United States v. Doe (Doe I* U.S. 605 (1984), considered testimonial compulsion absent a g immunity.[5] In contrast, in *Kastigar v. United States*, 406 U.S 453 (1972), where immunity was provided, this Court recogni importance of a grant of immunity, stating that it "prohib prosecutorial authorities from using the compelled testimony *respect*, and it therefore insures that the testimony cannot lead infliction of criminal penalties on the witness." (emphasis add

There is no fear of this statute providing "immunity t such as an all-encompassing immunity to a witness for crim known to prosecutors. The statute does not offer transa immunity and is limited to what is requested by the prosecutor. if a prosecutor desired documents that he or she intends to use a the witness producing them, he or she should secure the doc from another source.[6] The Government's inability to obt documents from someone other than the witness may implic Fifth Amendment's privilege against self-incrimination. As n this Court in *Doe I*, 465 U.S. at 616, "[t]he decision to se immunity necessarily involves a balancing of the Govern interest in obtaining information against the risk that immuni frustrate the Government's attempts to prosecute the subject investigation."

Although some Court decisions may be seen to have away from providing full Fifth Amendment protection to doc produced via subpoena, the statute authorizing a court to com production of documents (18 U.S.C. § 6003) and to grant im

[5] The District Court's order states in part: "2. That Webster L Hubbell is granted immunity to the extent allowed by law. *See United S v. Doe*, 465 U.S. 605 (1984) and *United States v. J.W.O.*, 940 F.2d 116 Cir. 1991)." (Jt. App., at 61).

[6] The prosecutor also has the option of obtaining these docum through an authorized search.

(18 U.S.C. § 6002) have remained intact.[7] When the Government elects to secure documents directly from a witness and to request that the court issue a grant of immunity, the clear language of the statute provides that the documents and any information derived therefrom cannot be used against the party provided with immunity. Since the documents do not arrive in the grand jury room "like manna from heaven,"[8] it is appropriate to provide the immunized individual presenting them to the grand jury with the full protection afforded by the immunity statute.

It is the prosecution and not the accused that has the burden of proving a defendant's guilt in a criminal case. The Government's burden of proof includes "[t]he burden of producing evidence." Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law 2nd* § 1.8, at p. 48 (1986). Having the accused give the very evidence that will be presented at trial improperly shifts the burden onto the defense. Limiting the immunity statute to only provide the Government with a benefit, an order compelling the production of the documents, with no corresponding benefit to the person providing the documents, permits the Government to use the accused to produce the very evidence that will serve as the basis of the Government's case against that individual.

To permit the Government to use the witness's *documents* would render meaningless the explicit word used in § 6001. The effect of such a reading would give prosecutors the option of commencing their cases by securing all documentation directly from the accused. With technological advancements this could result in the government securing massive amounts of information from a potential defendant's computer files and hard drives. Unlike a search, there would be no requirement of probable cause and no protection for the

[7] *See United States v. Kastigar*, 406 U.S. 441, 462 (1972) ("The immunity therefore is coextensive with the privilege and suffices to supplant it.").

[8] *United States v. Hubbell*, 167 F.3d 552, 585, 602 (1999).

individual targeted by a prosecutor. In white collar cases th predominantly documentary, immunity will be a nullity.

B. INFORMATION THAT IS DERIVATIVE OF IMMUNIZED ACT OF PRODUCTION CANNOT BE U TO INCRIMINATE THE INDIVIDUAL PROVIDING INFORMATION

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.

Hoffman v. United States, 341 U.S. 479, 486 (1950). Althou immunized witness can still be prosecuted, the prosecution cann the immunized testimony directly or indirectly. Immunity p prosecution only with "untainted evidence."[9] As the Governme long acknowledged, "[t]he practical difficulty of establishin intended evidence is independently derived and not the fr compelled testimony will occasionally deter legally permi presentations."[10]

The burden rests with the government to prove that evidence is not tainted by establishing that they had an indepe

[9] National Commission on Reform of Federal Criminal Law, at 1405, Nov. 18, 1968 (Testimony of Professor Dixon). The proposed imm reforms of the National Commission on Reform of Federal Criminal Law served as the draft for the S. 30, Title II, Organized Crime Control Act of 1970.

[10] *See* Hearings Before Subcommittee No. 5 of the Committee the Judiciary House of Representatives, S. 30, 91st Cong. 2nd Sess., at p. 1 May 21, 1970 (Comments of Department of Justice on S.30 Organized Cr Control Act of 1969: Statement of Attorney General).

legitimate source for the disputed evidence." *Kastigar*, 406 U.S. at 460. Absent a hearing to determine the Government's independent knowledge, the Government's burden is not met. This is especially true when the finder of fact specifically determines that the evidence that would be used at trial was directly or indirectly derived from the documents produced by the witness/defendant pursuant to a grant of immunity.[11]

The Fifth Amendment right against self-incrimination clearly applies "when the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher*, 425 U.S. at 408. Three communicative acts are involved in Mr. Hubbell's production of his documents. These are revealing the existence of the documents, establishing the witness's possession and control, and authentication of the documents.[12] In a case where immunity is granted, it is an improper derivative use for the prosecution "[a]rmed with that information and the documents produced," to use this information to "locate persons who either observed the individual preparing the documents or prepared them themselves under this supervision and are

[11] *See* App. to Pet. for a Writ of Cert., at p. 130a. ("The independent counsel has indicted that a *Kastigar* hearing is unnecessary because he 'will make no bones about the fact that [he] did use the information provided by Mr. Hubbell pursuant to the production immunity.' Tr. Of Status Conf., June 2, 1998, at 8. He argues that the instant motion 'will rise and fall on the law.' *Id.*").

[12] Mr. Hubbell's production of documents was accompanied by an act of production. The act in this case involved testimony. Specific questions were asked of Mr. Hubbell at the time he produced these documents. Jt. Appendix p. 62-70. Some of the questions specifically asked of Mr. Hubbell were if he brought the requested documents (p. 62, 64), if he provided all the documents (p. 65, 66, 67, 68, 68), whether he understood everything that was being asked for (p. 69), whether he understood constructive possession (p. 67), whether he understood that he was required to produce documents within his constructive possession (p. 67), whether he withheld any documents premised on a privilege other then the attorney work product privilege (p. 70), and whether he had searched or "caused a thorough search to be made in response to this Subpoena." (p. 69). The receipt of the documents was derivative of this testimony.

thus able to authenticate them." Robert P. Mosteller, *Simp. Subpoena Law:Taking the Fifth Amendment Seriously*, 73 Rev. 1 (1987). Although prosecutors can avoid derivative use by showing an independent basis for their evidence, it is incu that the Government meet this burden. "[T]he requirement tl prosecution introduce independent proof to eliminate the possib improper use seems a modest price to pay for the protectio witness' fifth amendment rights." *Id.* at 42.

The foregone conclusion test is often used by cou determine whether there is compelled testimony. If the items pr "add[] little or nothing to the sum total of the Governi information" the question has been held to be one of surrender a testimony. *Fisher*, 425 U.S. at 411. Recent lower court r generally require "that the foregone conclusion standard be met government 'demonstrat[ing] with reasonable particularity knows of the existence and location of subpoenaed docum Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, 3 *Cr Procedure 2nd* § 8.13, at 262-63 (1999) (*quoting In re Gran Subpoena Duces Tecum, Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2 1993). One cannot use the existence of mere categories of docu as a basis for contending the documents are a foregone conclu the Government does not know of the existence of the sp documents prior to the accused producing them.[13]

If the existence, possession, and authentication c documents are a foregone conclusion, there is no implication Fifth Amendment and thus no necessity to provide immunity witness. *See Mosteller, supra*, at 48. If the government can est the existence and location of the documents other then by usi defendant's testimonial act of production, there would be no n use the defendant to produce them before the grand jury. Here the Fifth Amendment would not be violated and there would need to grant immunity to the witness. It degrades the very esse

[13] *See United States v. Hubbell* 167 F.3d 552, 581n. 36 (D.C. C 1999).

this constitutional privilege to claim that it is more efficient to procure items from an accused through a grant of immunity than to obtain the items from other available sources.

If the Government does not know of the existence and location of these documents and only acquires that information from the witness who received immunity, then clearly the documents are derivative of the testimony provided by the witness. This violates both the Fifth Amendment and 18 U.S.C. § 6002.

C. THE FIFTH AMENDMENT PROTECTS AN INDIVIDUAL'S PRODUCTION OF DOCUMENTS FROM BEING USED AGAINST HIM OR HER

The Fifth Amendment provides that "No person ....shall be compelled in any criminal case to be a witness against himself." In *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964), this Court stated that "[t]he privilege against self-incrimination 'registers an important advance in the development of our liberty –'one of the greatest landmarks in man's struggle to make himself civilized." In *Murphy*, Justice Goldberg discussed the "fundamental values" that are advanced by the Fifth Amendment Privilege. These policies are not exclusive to oral testimony. Rather, they serve an equally important function in the context of compelled production of documents.

An individual producing papers can be subjected "to the cruel trilemma of self-accusation, perjury or contempt." *Id.* A compelled production of an individual's documents moves us further from "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Id.* Without Fifth Amendment protection, one forced to produce documents may be compelled to provide incriminating communication "elicited by inhumane treatment and abuses."*Id.* Forcing a witness, to produce documents that will be used against him or her, is in direct opposition to "our sense of fair play which dictates 'a fair state-individual balance requiring the government to leave the

individual alone until good cause is shown for disturbing him requiring the government in its contest with the individual to sl the entire load." *Id.* Requiring an individual to produce "some pages" of his or her documents and records does not advance : of "respect for the inviolablity of the human personality."*Id.* I it must also be remembered that while the privilege is "someti shelter to the guilty' [it] is often 'a protection to the innocent.'

These values inherent in the Fifth Amendment right : self-incrimination are not implicated when the documents inv entity, or an individual acting in a representative capacity to the It is therefore warranted to differentiate between entiti individuals. *See* Peter J. Henning, *Finding What Was Lost: S the Custodian's Privilege Against Self-Incrimination fro Compelled Production of Records*, 77 Neb. L. Rev. 34, 35 (In *Braswell v. United States*, 487 U.S. 99, 117 (1988), this noted that requiring a grant of immunity to produce corporate r could have "serious consequences" should the government de prosecute the custodian.

Individuals and sole proprietors, however, clearly have Amendment right when they are subpoenaed to produce records 104-05. Absent a statutory grant of immunity, individuals car compelled to produce business or personal records. *Doe I*, 465 : The policy considerations inherent in the Fifth Amendment s this distinction.

The Fifth Amendment right against self-incrimination p that which is *given* by an individual as opposed to that which is by the government. *See* Richard A. Nagareda, *Compulsion ' A Witness" And The Resurrection Of Boyd*, (to be publishec N.Y.U. L. Rev. 1575, 1621 (1999)). Professor Nagareda provi extensive review of the historical context of the Fifth Amen phrase "to be a witness," from state constitutions existing at th of its ratification, a lone discussion when the First Congress d the proposed Bill of Rights, and definitions of terminology used this period. All provide strong evidence that this phrase "sp

terms of a right against compulsion either 'to give evidence' or, equivalently, 'to furnish evidence.'" *Id.* at 1605-09. "[T]he compelled giving of evidence (forbidden by the Fifth Amendment)" differs from "the taking thereof (regulated by the Fourth)." *Id.* at 1621. Thus, the Fifth Amendment privilege is inapplicable when the government takes evidence such as blood samples, *Schmerber v. California*, 384 U.S. 757 (1966).

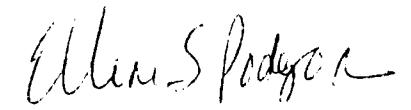
It is also apparent that while a compelled production may be present in cases such as *Schmerber* and *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplars), there is no accompanying testimonial communication that is incriminating. *Fisher*, 425 U.S. at 408. Thus, there is no need to provide immunity. Requiring an individual to provide his or her private documents to the government that are later used as the basis for an indictment against that individual, renders the giving of the papers a testimonial communication that is incriminating. In *Schmerber*, this Court stated that "[i]t is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." 384 U.S. at 763-64.

The Fifth Amendment right against self-incrimination is an important right to maintaining liberty. Finding the Fifth Amendment essentially inapplicable when an individual produces documents pursuant to a grant of use immunity will provide an exorbitant power to prosecutors. Permitting prosecutors authority under 18 U.S.C. §§ 6001-6003 to provide immunity and then use immunized testimony against a witness by claiming the documents are "manna from heaven," takes the act of production and makes that communication irrelevant. This contradicts this Court's holdings in *Fisher* and *Doe I.* It provides the Government with an incentive to immunize all witnesses, including targets. Prosecutors could shortcut investigations by simply making a witness produce the evidence that will serve as that person's indictment.

CONCLUSION

For the foregoing reasons, NACDL urges this Court to the judgment of the Court of Appeals.

Respectfully Submitted,



ELLEN S. PODGOR*
Georgia State University
College of Law
140 Decatur Street
Atlanta, Georgia 30303
(404) 651-2087

LISA KEMLER
Of Counsel
National Association of Criminal Def
Lawyers
108 North Alfred Street
Alexandria, VA. 22314
(703) 684-8000

Counsel for *Amicus Curiae*
National Association of Criminal
Defense Lawyers

*Counsel of Record

December 1999