

No. 09-__

IN THE
Supreme Court of the United States

JAMES BANNISTER,
Petitioner,

v.

ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari
to the Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the prosecution's presentation of testimony at trial subject to a consistency provision in a plea agreement – that is, a provision binding the witness to testify consistently with prior statements made to the police or prosecutors while not under oath – contravenes the Due Process Clause.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Bannister respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court.

OPINIONS BELOW

The opinion of the Illinois Supreme Court, Pet. App. 1a–31a, is reported at 923 N.E.2d 244 (Ill. 2009). The opinion of the Illinois Appellate Court, Pet. App. 32a–66a, is reported at 880 N.E.2d 607 (Ill. App. Ct. 2007). The relevant trial court proceedings and order are unpublished.

JURISDICTION

The Illinois Supreme Court denied rehearing for this case on January 25, 2010. Pet. App. 67a. Justice Stevens subsequently extended the time to file this petition to and including June 24, 2010. No. 09A951. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in relevant part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”

STATEMENT OF THE CASE

In a typical plea agreement in which an individual agrees to provide testimony in exchange for prosecutorial leniency, the agreement requires the individual to give truthful testimony at trial. This case presents an important and recurring issue concerning testimony offered pursuant to a different type of plea agreement: one that not only requires

that the accomplice shall give truthful testimony, but also requires that such testimony “shall be consistent” with certain prior unsworn statements to the police. Pet. App. 68a. A bare majority of the Illinois Supreme Court held that the Due Process Clause permits the prosecution to present such testimony.

1. On an evening in 1989, in a housing project in Chicago, several men shot at Dan Williams, killing him and a bystander, Thomas Kaufman. Police quickly surmised that the shooting was gang related and concentrated their investigation on suspected members of a local street gang.

A few weeks after the shooting, Cook County police officers interviewed Deanda Wilson, a twelve-year-old member of a rival gang. According to Wilson, the police began the interview by showing him pictures of seven men, including petitioner, whom they suspected of being involved in the shooting. Wilson then told police that he had seen those seven men shooting at the victims.

Another of the individuals depicted in the police photographs was Michael Johnson. The police arrested Johnson and showed him the same seven photographs that they had showed to Wilson. Johnson initially denied any involvement in the incident or any knowledge of who was involved. Pet. App. 7a. After twenty-four hours at the police station, Johnson changed his story. He said that he and the six other men in the photographs had all shot and killed Williams and Kaufman. The police recorded and transcribed Johnson’s statement, which is reproduced at Pet. App. 72a–83a.

The State charged Johnson, petitioner, and the five other individuals in the photographs with two counts of first-degree murder. Because Johnson was the only defendant to have implicated himself, the trial court severed his trial from the others.

During Johnson's pretrial proceedings, he executed an affidavit saying that he had mistakenly implicated one of the other codefendants, Eric Smith, as one of the seven individuals involved in the shootings. Later, Johnson testified under oath that he had no recollection of confessing or implicating others. Pet. App. 7a. Johnson was nevertheless convicted of both counts and sentenced to life without parole.

Johnson refused to testify at the trial of petitioner and his five codefendants, thereby precluding the State from introducing any of his statements. The State introduced a variety of other evidence implicating several of the defendants in the shooting, but "the only direct evidence against [petitioner] was the testimony of Deanda Wilson." Pet. App. 2a. Petitioner called four witnesses, each of whom testified that he was at home at the time of the shootings. The jury convicted all six defendants of both counts, and the court sentenced each to life in prison without parole.

2. Petitioner continued to maintain his innocence on appeal and eventually filed a petition for postconviction relief, based on the fact that Wilson had recanted his trial testimony. Pet. App. 3a. The trial judge responded that "this is a difficult situation for me because it's one of the few times in 20 years I ever disagreed with a jury's verdict on a particular defendant. . . .]H]ad it been a bench trial I would

have found Mr. Bannister not guilty, given the identification and his alibi.” Pet. App. 47a. Nonetheless, he dismissed the petition without an evidentiary hearing.

The Illinois Appellate Court reversed and ordered the trial court to hold an evidentiary hearing. At the conclusion of that hearing, the trial court determined that Wilson’s testimony “was not accurate and truthful” because he did not actually witness the shooting. Pet. App. 3a; *see also* Pet. App. 37a–38a. Because the State had not offered any other evidence at petitioner’s trial implicating him in the murders, the court concluded that “the outcome of [petitioner’s] trial likely would have been different without Wilson’s perjured testimony” and vacated his convictions. Pet. App. 3a.

3. The State elected to retry petitioner. To that end, Cook County prosecutors approached Johnson, who was then in the midst of serving his natural-life sentence. He was housed in a super maximum security prison under twenty-three-hour lockdown.

Six months later, the parties entered into a plea agreement in which Johnson agreed to testify at petitioner’s retrial. The agreement, in language typical of plea bargains involving purported accomplices, required Johnson to “testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman.” Pet. App. 68a. The agreement, however, further contained a consistency provision, which required that:

Such truthful testimony shall be consistent with Michael Johnson’s post-arrest statements in December 28, and December

29, 1989, to Chicago Police officers and Cook County Assistant State's Attorneys and his statements made to Cook County State's Attorney personnel during his pre-plea agreement interviews on April 29 and May 24, 2004.

Pet. App. 68a. Put another way, this provision prohibited Johnson from testifying in conformity with the affidavit he signed during his prosecution. The agreement also provided that the deal would be "null and void" if, among other things, Johnson's "post-arrest statements and his pre-plea agreement interviews, upon which this agreement was predicated, . . . are found to be false." Pet. App. 70a.

In exchange for Johnson's testimony, the State agreed to vacate one of his murder convictions and to recommend a significant reduction in his sentence for the other. The State also agreed to recommend transferring Johnson to a medium-security facility. Pet. App. 69a–70a.

At petitioner's second trial, the State put Johnson on the stand, and he testified the way he had promised to do in his agreement. Johnson's testimony was the only direct evidence that petitioner was involved in the shooting. The State presented three other eyewitnesses to the shooting, but they all testified that they had seen only *five* people shoot at the victims. None of them recalled seeing petitioner that evening.¹

¹ The State presented one other witness who testified that seven men – one of whom was petitioner – had robbed him

In his defense, petitioner again presented four alibi witnesses. As in 1991, each one testified that petitioner was at his mother's house when the shootings occurred. Pet. App. 2a, 7a, 44a.

But to no avail. Sitting as finder of fact in a bench trial, the same trial judge who oversaw petitioner's first trial convicted petitioner of both counts of first-degree murder and sentenced him to life in prison without parole. The State subsequently made good on its promises to Johnson. Pet. App. 21a. With good-time credits, he is scheduled to be released from prison in ten years.

4. Petitioner appealed his conviction, arguing that the State's presentation of Johnson's testimony subject to the consistency provision in his plea agreement violated his right to due process under the Fourteenth Amendment. Pet. App. 48a. Petitioner contended that the provision subverted the truth-seeking function of trial because it interfered with Johnson's oath to testify truthfully.

The Illinois Appellate Court rejected the argument and affirmed. Pet. App. 48a–52a. It did not dispute that the Due Process Clause prohibits the prosecution from presenting testimony that impedes the truth-seeking function of trial. But it reasoned that the consistency provision “did not violate [petitioner's] rights to due process and a fair trial”

shortly before the shootings. The State, however, never charged petitioner with robbery. And when the prosecution asked the witness to identify the seven men from photographs, the witness wrongly identified a photograph of another one of the original defendants as petitioner.

because the overall plea agreement “neither compelled Johnson to disregard his oath of truthfulness nor bound him to a particular script or result.” Pet. App. 52a.

5. A bare majority of the Illinois Supreme Court affirmed. Relying on *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), and *People v. Jones*, 600 N.W.2d 652 (Mich. Ct. App. 1999), the majority held that Johnson’s testimony pursuant to the consistency provision did not violate due process because other provisions of his plea agreement required Johnson generally to tell the truth and provided that the agreement was void “if any of the representations contained in his prior statements were found to be false.” Pet. App. 17a. In the majority’s view, these provisions rendered the testimony acceptable because they imposed an “overriding requirement . . . that the accomplice . . . testify truthfully.” Pet. App. 17a. Thus, the court concluded, the traditional safeguard of cross-examination was sufficient to allow petitioner to probe Johnson’s credibility. Pet. App. 17a–18a.²

The dissent disputed the majority’s suggestion that the taint of a consistency provision can be erased by a generalized truth-telling obligation in a plea

² The Illinois Supreme Court also held that petitioner lacked standing to challenge the validity of Johnson’s plea agreement itself. Pet. App. 8a–10a. Petitioner does not renew that argument here. Instead, he seeks review only of the Illinois Supreme Court’s rejection of his argument that the admission of “Johnson’s *testimony*” subject to the agreement “denied [him] a fair trial.” Pet. App. 10a (emphasis added).

agreement. Agreeing with petitioner's argument that "the State has no crystal ball to know what the 'truth' is – it only knows what statements are consistent," Pet. App. 28a, the dissent maintained that a provision requiring that a witness's in-court testimony "*shall* be consistent with certain of his prior statements" violates due process, Pet. App. 30a. This was especially true, the dissent contended, in this case, in which "the witness[] had a history of inconsistent statements." Pet. App. 30a.

6. The Illinois Supreme Court denied rehearing without comment. Pet. App. 67a.

REASONS FOR GRANTING THE WRIT

The Illinois Supreme Court's decision widens an acknowledged division among state courts of last resort and a federal court of appeals over whether the prosecution's presentation of testimony pursuant to a consistency provision in a plea agreement violates the Due Process Clause. This Court should resolve this conflict. The criminal justice system relies heavily upon the use of accomplice-turned-informant testimony, and the use of consistency provisions to contractually bind such witnesses to give particular testimony at trial raises important questions about the integrity of criminal trials.

Furthermore, the Illinois Supreme Court's decision holding that the Constitution allows testimony pursuant to consistency provisions is incorrect. The Due Process Clause prohibits the prosecution from interfering with the truth-seeking function of trial. When the prosecution presents testimony subject to a consistency provision, the prosecution requires the witness to recite a specific

version of events that it has predefined as the “truth.” This interferes both with the witness’s ability to discharge his oath – the centuries-old mechanism for securing truthful testimony – and the jury’s role as ultimate finder of fact.

I. The Decision Below Widens An Irreconcilable Conflict Among State And Federal Courts.

Courts are intractably divided over whether the prosecution violates the Due Process Clause when it presents testimony at trial under a plea agreement requiring that the witness’s testimony be consistent with prior statements he made to law enforcement. Courts take three different approaches to the issue: four always allow such testimony; three never allow such testimony; and one takes a fact-intensive approach, but would not have allowed the testimony at issue here.

1. The Illinois Supreme Court’s decision allowing the prosecution to introduce accomplice testimony pursuant to consistency provisions comports with decisions of two other state supreme courts and one intermediate appellate state court.

In *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), the prosecution presented testimony from an accomplice whose plea agreement required him to testify “truthfully . . . and as he stated in his statement to [law enforcement] on 3/21/94 at 6:05 p.m.” *Id.* at 589. The Tennessee Supreme Court held that testimony pursuant to such a consistency provision does not violate due process. *Id.* at 593. The court reasoned that such “testimony [i]s not tainted” because a general truth-telling obligation

alongside a consistency provision makes “the agreement hinge[] upon truthful testimony.” *Id.* at 592. Thus, the jury may consider a consistency provision in assessing a witness’s credibility, but such a provision does not affect the permissibility of the witness’s testimony. *Id.* at 592–93.

The Wisconsin Supreme Court has similarly held that an agreement requiring a purported accomplice “to testify to the state’s version of the ‘truth,’ . . . [is] no different from any other . . . negotiated plea agreement[] with accomplices in exchange for their testimony.” *State v. Nerison*, 401 N.W.2d 1, 8 (Wis. 1987). Accordingly, in a case in which the Wisconsin Court of Appeals had held that the prosecution violated due process by presenting testimony from a witness whose plea agreement required him to testify “consistent with his testimony at [an earlier] [h]earing,” *State v. Nerison*, 387 N.W.2d 128, 133 (Wis. Ct. App. 1986), the Wisconsin Supreme Court reinstated the defendant’s conviction. The court concluded that the normal procedural safeguards used to protect a defendant’s right to a fair trial in a case involving a plea agreement – cross-examination, disclosure of the agreement, and jury instructions on accomplice credibility – are always enough to guarantee due process. *Nerison*, 401 N.W.2d at 8.

Lastly, the Michigan Court of Appeals has held that due process allows the prosecution to present testimony subject both to a general truthfulness provision and a consistency provision. *People v. Jones*, 600 N.W.2d 652, 656–57 (Mich. Ct. App. 1999). The court reasoned that although such a consistency

provision provides “some incentive” for a witness “to conform [his] trial testimony to [his] prior accounts,” it does not “render[] the witnesses’ testimony so tainted as to be inadmissible.” *Id.* at 657.³

2. One federal court of appeals and two state high courts have adopted precisely the opposite position. The U.S. Court of Appeals for the Armed Forces (formerly the U.S. Court of Military Appeals) has held that due process prohibits the prosecution from presenting an accomplice’s testimony subject to a provision that requires the witness to testify consistently with a pretrial statement to law enforcement. *United States v. Stoltz*, 14 C.M.A. 461, 464 (1964). Declaring that a consistency provision “obviously detract[s] from the quest for truth,” the

³ The Illinois Supreme Court also suggested that its holding is consistent with the Arizona Supreme Court’s decision in *State v. Rivera*, 109 P.3d 83 (Ariz. 2005). But *Rivera* did not involve a consistency provision. *Id.* at 87. Instead, the witness’s plea agreement simply recited an avowal from the witness that her prior statements were truthful. *Id.* at 84. The Arizona Supreme Court made clear that such an avowal “is not the same as requiring [a witness] to testify consistently with [a] specific version of the facts.” *Id.* at 86. What is more, the Arizona Supreme Court expressly *rejected* the holdings of Tennessee and Wisconsin supreme courts that a witness’s “obligation to testify truthfully over[comes] any pressure” a consistency provision imposes “to testify consistently with a prior statement.” *Id.* at 87; *see also State v. Fisher*, 859 P.2d 179, 184 (Ariz. 1993) (holding that consistency provisions are unenforceable because they “undermine the reliability and fairness of the trial . . . and taint the truth-seeking function of the courts by placing undue pressure on [a] witness[] to stick with one version of the facts regardless of [the truth]”).

court “utterly condemn[s]” testimony pursuant to such a provision “as a pollution of the stream of justice.” *Id.* at 464–65; *see also United States v. Gilliam*, 23 C.M.A. 4, 8 (1974) (testimony subject to agreement that “required [a witness] to testify in a particular manner” improperly bound the witness “without regard for the sanctity of his oath”). The court allows accomplice testimony subject to a plea agreement only when there is a “complete understanding . . . that [the witness is] to testify *only* truthfully” – a requirement that cannot be met when a plea agreement contains a consistency provision. *Gilliam*, 23 C.M.A. at 8 (emphasis added). In the years following these holdings, there does not seem to be any record of any federal prosecutor – inside or outside of the military – presenting testimony subject to a consistency provision.

The Supreme Court of California has reached the same conclusion, reasoning that when the prosecution provides a purported accomplice with a benefit “subject to the condition that his testimony substantially conform to an earlier statement given to police,” then “the accomplice’s testimony is ‘tainted beyond redemption’ and its admission denies the defendant a fair trial.” *People v. Allen*, 729 P.2d 115, 130–31 (Cal. 1986) (quotation and citation omitted) (citing *People v. Medina*, 116 Cal. Rptr. 133, 141 (Ct. App. 1974)). In other words, when a bargain is “expressly contingent on the witness sticking to a particular version” of his story, *People v. Garrison*, 765 P.2d 419, 430 (Cal. 1989), “[t]he error involved in the use of such tainted testimony is a denial of the fundamental right to a fair trial in violation of federal

constitutional principles.” *Id.* at 428 (alteration in original) (quoting *Medina*, 116 Cal. Rptr. at 146).⁴

The Kansas Supreme Court likewise has held that the prosecution may not present testimony pursuant to a consistency provision. In *State v. Dixon*, 112 P.3d 883 (Kan. 2005), a witness agreed in a probation agreement to “testify . . . in a consistent and truthful manner as set forth in his [sworn] inquisition.” *Id.* at 914. Noting the “split in authority as to whether a consistency agreement affects a defendant’s right to a fair trial,” the Kansas Supreme Court specifically rejected the Michigan Court of Appeals’ holding in *Jones*. *Id.* at 915–17. Instead, it ruled that the prosecution may not require anything more of accomplices in plea agreements than they “testify[] completely and truthfully,” even when the prior statements at issue were given under oath. *Id.* at 917. Otherwise, the accomplice will feel too much pressure to adhere to his prior statements. *See id.* at 915.

⁴ The Illinois Supreme Court’s suggestion that the California Supreme Court has since backed away from these decisions, *see* Pet. App. 12a, is incorrect. While the California Supreme Court has *declined to extend* the “*Medina* rule,” it has never cut back on the rule itself. *See People v. Boyer*, 133 P.3d 581, 612–13 (Cal. 2006) (distinguishing plea agreements in which witness represents that prior statements are truthful from those that require consistency and reaffirming impermissibility of testimony subject to the latter); *People v. Jenkins*, 997 P.2d 1044, 1119–20 (Cal. 2000) (allowing accomplice testimony while charges are pending against the accomplice because pending charges are not the same as a consistency provision).

Petitioner would also likely prevail in three additional states whose courts have not directly confronted the issue but nonetheless have strongly suggested that the admission of testimony pursuant to a consistency provision violates due process. *See State v. DeWitt*, 286 N.W.2d 379, 384 (Iowa 1979) (agreeing that plea agreement requiring conformity with specific statements violates due process, but concluding that the plea agreement at issue did not so require), *cert. denied*, 449 U.S. 844 (1980); *State v. Burchett*, 399 N.W.2d 258, 266 (Neb. 1986) (same, reasoning that “it is only where the prosecution has bargained for false *or specific testimony* . . . that an accomplice’s testimony is so tainted as to require its preclusion” (emphasis added) (citing *DeWitt*, 286 N.W.2d at 384)); *State v. Clark*, 743 P.2d 822, 828 (Wash. Ct. App. 1987) (citing the California Court of Appeal’s decision in *Medina* for the rule that consistency provisions violate due process but finding no such provision in the case before it).

3. The Nevada Supreme Court takes a context-specific approach to testimony subject to consistency provisions, under which petitioner would also prevail: the prosecution may not present testimony subject to consistency provisions, at least when credible evidence does not corroborate the testimony. In *Franklin v. State*, 577 P.2d 860 (Nev. 1978), the Nevada Supreme Court held that “testimony becomes ‘tainted beyond redemption’ where the accomplice is placed under compulsion to testify in a particular fashion in order to receive the benefits of his plea bargain.” *Id.* at 862. Such testimony “violates the defendant’s due process rights,” the court held, because it “call[s] upon an alleged ‘accomplice’ to

disregard his or her oath,” thereby undercutting the witness’s obligation to “render a full, fair, and accurate account of the facts.” *Id.* at 862 & n.3.⁵

The Supreme Court of Nevada later suggested that the prosecution might be allowed to introduce testimony subject to a consistency provision when there is “[c]redible evidence” corroborating the testimony. *Leslie v. State*, 952 P.2d 966, 972–73 (Nev. 1998). Even under such a rule, however, the Nevada Supreme Court still would have condemned the testimony subject to the consistency provision in this case because Johnson’s testimony was not corroborated. To the contrary, Johnson provided the only direct evidence implicating petitioner in the shooting.

⁵ Apart from concluding that presenting testimony subject to an express consistency provision violates due process, the Nevada Supreme Court also held in *Franklin* that the prosecution could not present *any* testimony subject to a plea agreement that would “reasonably cause the alleged accomplice to believe he must testify in a particular fashion,” even if the agreement was not “expressly conditioned on specific testimony.” 577 P.2d at 862. The Nevada Supreme Court has overruled the latter holding, making clear in *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (Nev. 1991), that the prosecution may, consistent with due process, “bargain in good faith for testimony represented [during plea negotiations] to be factually accurate.” *Id.* at 200 & n.4. But contrary to the Illinois Supreme Court’s misleading reference to *Acuna*, *see* Pet. App. 16a, the Nevada Supreme Court reaffirmed in that case that the prosecution may not present testimony “where the bargain [itself] compels the witness to provide particularized testimony.” 819 P.2d at 201.

II. The Question Presented Significantly Impacts The Administration Of Criminal Justice.

This Court should resolve the constitutionality of presenting testimony subject to consistency provisions now for at least two reasons.

1. The question presented implicates the reliability and public integrity of criminal trials. There is no doubt that using accomplice testimony procured through plea bargaining is a necessary and accepted component of our criminal justice system. *See Hoffa v. United States*, 385 U.S. 293, 311 (1966). Accordingly, the prosecution may offer a benefit to an accomplice in exchange for the accomplice's agreement to testify fully and truthfully at another's trial.

At the same time, this Court repeatedly has stressed that a purported accomplice's testimony that shifts or spreads blame carries "presumptive unreliability," *Lilly v. Virginia*, 527 U.S. 116, 137 (1999), in part because accomplices have a great "interest in lying in favor of the prosecution" in order to secure more lenient treatment. *Washington v. Texas*, 388 U.S. 14, 22–23 (1967). Accomplice testimony pursuant to plea agreements that do not simply require accomplices to testify truthfully, but also that contractually require them to testify in a specific way, exacerbates these concerns. Such testimony also raises suspicions insofar as it suggests that a general truth-telling requirement will not alone produce the testimony the prosecution desires.

2. Indeed, it appears that prosecutors reserve consistency provisions for cases in which an

accomplice's blame-spreading testimony is particularly suspect. Petitioner's understanding is that neither federal prosecutors nor prosecutors' offices in some states ever insert such provisions in plea agreements; these offices simply require accomplices to give truthful testimony at trial. Nor do prosecutors' offices in the remaining states insert consistency provisions in the mine run of cases. But that does not mean that the legality of presenting testimony subject to such provisions is an inconsequential matter. To the contrary, prosecutors seem to reserve such provisions for cases in which accomplices have told prior inconsistent stories and there is no direct corroboration for the story that the prosecution wants the witness to recite:

- Here, the accomplice made several contradictory statements – only some of which implicated petitioner – before entering into his plea agreement. Indeed, he testified twice under oath in ways that conflicted with the unsworn statements to the police that his plea agreement required him to repeat at petitioner's trial. *See supra* at 3. Had Johnson not presented the most prosecution-friendly version of his story at petitioner's trial, the prosecution would have been unable to convict petitioner, as he was the only witness to directly implicate petitioner in the shooting. Pet. App. 3a–7a.

- In *Bolden*, the Tennessee case on this issue, the accomplice initially entered into a traditional plea agreement to testify against the defendant. 979 S.W. 2d at 589. Once on the stand, however, he failed to inculcate the defendant. *Id.* During a recess in the trial, the prosecution negotiated a new plea bargain

in which the accomplice agreed, in exchange for a further reduction in his sentence, to testify not only truthfully but also “as he stated in his statement to [law enforcement] on 3/21/94 at 6:05 p.m.” *Id.* The prosecution then recalled the witness to the stand, where he testified as the prosecution wished. *Id.*

- In *Nerison*, the Wisconsin case on this issue, one individual involved in a theft repeatedly told law enforcement, and later testified under oath, that the defendant was not involved in the crime; another repeatedly said that he did not know whether the defendant was involved. 387 N.W.2d at 129–33. After the two alleged accomplices were convicted, however, they claimed for the first time, in exchange for newly offered promises of leniency, that the defendant *had* been involved. *Id.* at 130. The prosecution then charged the defendant and introduced this testimony at his trial, subject to the accomplices’ promises to testify consistently with their new accusations and inconsistently with their prior sworn testimony. *Id.* at 132–33. The accomplices’ blame-spreading testimony constituted “the only testimony specifically implicating [defendant] in the ‘conspiracy.’” *Id.* at 130.

Until this Court resolves the conflict over the constitutionality of presenting testimony subject to consistency provisions, the due process rights of criminal defendants will vary based on geographic happenstance. And in those states that permit consistency provisions, prosecutors will continue to use them in precisely the kinds of cases in which it is paramount that witnesses appreciate their obligation to tell the whole truth and nothing but the truth.

III. The Illinois Supreme Court's Decision Contravenes This Court's Due Process Jurisprudence.

The Due Process Clause guarantees a fundamentally fair trial, and “the *sine qua non* of a fair trial” is “[c]ourt proceedings [that] are held for the solemn purpose of endeavoring to ascertain the truth.” *Estes v. Texas*, 381 U.S. 532, 540 (1965); *see also Portuondo v. Agard*, 529 U.S. 61, 73 (2000) (The “central function of the trial . . . is to discover the truth.”). Accordingly, the Due Process Clause imposes various bedrock requirements concerning witness testimony that are necessary to prevent the “corruption of the truth-seeking function of the trial process.” *United States v. Agurs*, 427 U.S. 97, 104 (1976); *see also Perry v. Leeke*, 488 U.S. 272, 282 (1989) (due process rules that apply to witnesses are “rules that serve the truth-seeking function of the trial.”).

These truth-seeking requirements manifest themselves in two overlapping strands of jurisprudence that preclude the prosecution from deviating from the ordinary practice of requiring witnesses solely to testify truthfully and instead introducing their testimony subject to consistency provisions. First, the prosecution may not interfere with a witness's ability at trial to take an oath to tell “the whole truth.” Second, the prosecution may not act as an arbiter of truth, impeding or distorting the jury's ability to determine the truth for itself according to all relevant and admissible evidence. The prosecution's presentation of testimony pursuant to consistency provisions runs afoul of both of these prohibitions.

1. In the common law tradition, “[t]he oath administered to the witness is not only that what he deposes shall be true, but that he shall depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not.” 3 William Blackstone, *Commentaries on the Laws of England* 372 (1768) (emphasis in original). This requirement dates back at least to 1702, when an English act declared that before giving any evidence all “witnesses . . . shall first take an Oath to depose the Truth, the whole Truth, and nothing but the Truth.” 3 John Cay, *The Statutes at Large, from Magna Charta, to the Thirtieth Year of King George the Second, Inclusive* 405 (1758). Congress enshrined the whole truth oath in the Judiciary Act of 1789, requiring that witnesses “shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth.” An Act to Establish the Judicial Courts of the United States § 30, 1 Stat. 73, 89 (1789).⁶

A witness’s oath or affirmation is intended to “awaken the witness’ conscience and [to] impress the witness’ mind with the duty to [testify truthfully].”

⁶ The requirement that witnesses tell the “whole truth” also has deep roots in the particular context of accomplice testimony. In the crown witness system – the historical analogue to plea bargaining for accomplice testimony that existed at the founding – an accomplice turned state witness had to “disclose[] the whole truth” to “save himself from punishment and secure a pardon [I]f he act[ed] in bad faith or fail[ed] to testify fully and fairly, he [could] still be prosecuted as if he had never been admitted as a witness.” *United States v. Ford (The Whiskey Cases)*, 99 U.S. 594, 600 (1878).

Fed. R. Evid. 603; *see also Maryland v. Craig*, 497 U.S. 836, 845–46 (1990) (the oath “impress[es the witness] with the seriousness of the matter”) (quoting *California v. Green*, 399 U.S. 149, 159 (1970)). It also “guard[s] against the lie by the possibility of a penalty for perjury.” *Green*, 399 U.S. at 158; *see also The Pizarro*, 15 U.S. (2 Wheat.) 227, 240 (1817) (Story, J.) (when witnesses “are bound to declare the whole truth” they cannot “fraudulently suppress any material facts”).

Given the longstanding centrality of the oath to the truth-seeking process of trial, the Due Process Clause prohibits the prosecution from presenting testimony from a witness who is unwilling, or compromised in his ability, to testify to the whole truth. The prosecution, for example, may not knowingly present false testimony at trial. *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935) (per curiam). Nor may it allow one of its witness’s testimony that it knows to be false or incomplete to stand uncorrected. *See Napue v. Illinois*, 360 U.S. 264, 269–70 (1959); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam).

Presenting accomplice testimony subject to a consistency provision interferes with the sanctity and function of the oath in much the same way. Consistency provisions require witnesses to adhere to prior, *unsworn* statements on the stand. Pet. App. 68a. What is more, such provisions make it a breach of contract for witnesses to give testimony that deviates from the prosecution’s theory of the case. Presenting accomplice testimony subject to consistency provisions, therefore, “taint[s] the truth-seeking function of the courts by placing undue pressure on witnesses to stick with one version of the

fact regardless of its truthfulness.” *Fisher*, 859 P.2d at 184 (Ariz. 1993). It also effectively removes the threat of perjury, for accomplices under consistency provisions know that it is highly improbable that the state will later charge that the story the prosecution itself foreordained as the “truth” was actually a lie.

Presenting testimony subject to consistency provisions also subverts the truth-seeking process in a more subtle way. It is commonplace for a witness to “modify his testimony in the light of a refreshed recollection.” *Mattox v. United States*, 156 U.S. 237, 252 (1895) (Shiras, J. dissenting). Witnesses also sometimes realize simply through rigorous cross-examination that certain details in prior statements were incorrect. A witness under an unfettered obligation to tell the “whole truth” can clarify or revise his testimony in such situations without fear that the prosecution will rescind his plea bargain. A witness subject to a consistency provision, however, faces a powerful disincentive to clarify or revise inadvertently incorrect prior statements – especially if he believes that the details at issue might call into question the prosecution’s theory of the case. The Due Process Clause does not allow the prosecution to interfere in this manner with the oath to tell the whole truth.

2. The prosecution’s presentation of testimony subject to a consistency provision contravenes due process for another, related reason: It arrogates to the prosecution the factfinder’s duty to determine the ultimate truth of the prosecution’s charges.

Under the Anglo American system of trial by jury, the prosecution and the defense present their dueling versions of the truth, and the jury decides

whether the prosecution has proven the defendant's guilt beyond a reasonable doubt. The Due Process Clause, in other words, "preserve[s] the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitley*, 514 U.S. 419, 440 (1995). The prosecution thus may not withhold material exculpatory evidence from the jury's purview. *Id.* at 432; *see also Brady v. Maryland*, 373 U.S. 83 (1963). Nor may a prosecutor "vouch" for a witness's testimony, suggesting that she has personal knowledge beyond the evidence presented to the jury of what the truth is. *Young v. United States*, 470 U.S. 1, 18–19 (1985); *see also, e.g., Hall v. United States*, 419 F.2d 582, 585–87 (5th Cir. 1969). Nor may the prosecution introduce witness identification testimony that it has unduly influenced before putting the witness on the stand. *Foster v. California*, 394 U.S. 440, 443 (1969); *see also Manson v. Brathwaite*, 432 U.S. 98, 116 (1977). If the state "[i]n effect, . . . repeatedly [says] to the witness, 'This is the man,'" the witness's testimony becomes tainted beyond repair. *Foster*, 394 U.S. at 443.

Presenting accomplice testimony pursuant to a consistency provision similarly gives primacy to the prosecutor's "private deliberations" over the jury's role as finder of fact. When the prosecution contractually requires an accomplice's trial testimony to be consistent with particular prior statements, the prosecution predetermines the veracity of its own charges just as surely as when the prosecution presents testimony from a witness whom it subjected to an unduly suggestive line-up. In both situations, the prosecution "define[s] the truth in its own terms,"

Nerison, 387 N.W.2d at 325, effectively telling the witness, “this is what the truth is, and this is what you should (or, in the case of a consistency provision – must) tell the jury.” Such actions interfere with the jury’s ability to hear untainted testimony and to decide for itself whether the prosecution’s allegations are true.

3. The Illinois Supreme Court did not dispute that presenting testimony subject to a provision in a plea agreement that subverts the truth-seeking process of trial violates the Due Process Clause. It held, however, that introducing testimony subject to a consistency provision does not have this effect because: (a) the presence of standard plea terms render truthfulness “the overriding requirement” of an agreement even when a consistency provision is present; and (b) cross-examining a witness who is subject to a consistency provision can address any residual concerns regarding its influence on the witness. Pet. App. 17a–18a. Neither of these arguments has merit.

a. Neither a plea agreement’s general requirement that the witness testify truthfully nor a provision voiding the agreement if the witness’s prior statements to law enforcement turn out to be false – both standard provisions in plea agreements and present in the agreement at issue here – prevents a consistency provision from tainting the testimony of a witness who is subject to it. As the dissent below noted, “the State has no crystal ball to know what the ‘truth’ is – it only knows what statements are consistent.” Pet. App. 28a. If an accomplice adheres to the details of his prior, unsworn statement at the expense of telling the whole truth, the accomplice will

retain the benefit of his bargain so long as the prosecution does not independently discover that the factual inaccuracies in the testimony. But if an accomplice tells the truth but testifies inconsistent with his prior unsworn statements, the accomplice will obviously breach his plea agreement and lose the benefit of his bargain. Under these circumstances, an accomplice feels pressure to stick the prosecution's preferred version of events, regardless of its veracity, in a way that exceeds the ordinary dynamics of testifying pursuant to an ordinary plea bargain. A consistency provision, in short, limits the truthfulness of witness testimony and the effect of the witness's oath – not the other way around.

In the end, the proof is in the pudding: If general truthfulness requirements actually trumped the influence of consistency provisions, then prosecutors would never have reason to insert consistency provisions into plea agreements. A standard plea agreement would always suffice. Yet the State insisted here that Johnson testify here subject to a consistency provision, and prosecutors in other cases sometimes likewise deviate from standard practice. *See supra* at 17–18. The only reasonable inference from this reality is that prosecutors themselves believe that consistency provisions have some influence on witnesses that goes above and beyond customary truth-telling obligations.⁷

⁷ At a minimum, presenting testimony subject to a consistency provision violates the Due Process Clause in cases, such as this one, in which there is no reliable, objective way to determine the “truth” (because there is no physical or other

b. Nor does the fact that an accomplice who testifies subject to a consistency provision is, like any other witness, “subject to searching cross-examination,” Pet. App. 17a–18a (quotation omitted), cure the taint that such a provision creates either. When prosecutorial tactics interfere with the truth-seeking process, this Court has never suggested, much less held, that a defendant’s opportunity for cross-examination cures such prosecutorial misconduct. *See Napue*, 360 U.S. at 269–70; *Alcorta*, 355 U.S. at 31.

Furthermore, even if the sole constitutional concern here were, as the Illinois Supreme Court suggested, Pet. App. 18a, one of witness credibility, cross-examination concerning the effect of a consistency provision would not solve the due process problem. Federal courts of appeals have held that prosecutors violate the Due Process Clause when they introduce into evidence a plea agreement with even an ordinary truthfulness provision *and* suggest to the jury – either by other language in the agreement itself or by argumentation – that they have “independently verified the truthfulness of the [accomplice’s] testimony.” *United States v. Harlow*, 444 F.3d 1255, 1263 (10th Cir. 2006); *see also United States v. Binker*, 795 F.2d 1218, 1222 n.2, 1227 (5th

direct evidence corroborating the witness’s story) and the State picks its preferred version of testimony out of a witness’s own numerous conflicting accounts. *See Leslie*, 952 P.2d at 972–73 (suggesting that presenting testimony subject to consistency violates due process at least when no “credible evidence” corroborates the witness’s prior statements).

Cir. 1986). Such action constitutes impermissible vouching; it implies “that the prosecutor knows what the truth is and is assuring its revelation.” *United States v. Brown*, 720 F.2d 1059, 1073 (9th Cir. 1983) (quoting *United States v. Roberts*, 618 F.2d 530, 536 (9th Cir. 1980)).

A consistency provision sends the same message of independent prosecutorial knowledge of the truth; it expresses the prosecution’s belief that the witness’s testimony is truthful insofar as it tells a certain story. Consequently, the prospect of cross-examination on the basis of such a provision presents, at best, a Hobson’s choice: whatever gains a defendant might make by attacking the accomplice’s credibility come at the expense of revealing to the factfinder that the prosecution seemingly “knows what the truth is and is assuring its revelation.” *Id.* Due process does not allow the prosecution to put the defendant in such a bind.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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