No. 13-600

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK, ET AL.,

Petitioners,

—v.—

ALEXINA SIMON,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit correctly decide that a state prosecutor is not entitled to absolute immunity for executing a material witness warrant by circumventing its express terms and subjecting respondent to unlawful detention where (1) the state's material witness statute provides that "a police officer" shall be responsible for executing a material witness warrant and that, in executing such warrants, the police shall bring the prospective witness "forthwith" to "the court" for an adversary hearing to determine whether the person shall be adjudged a material witness, (2) the warrant in the case accordingly directed the "police" to bring the prospective witness to the court "forthwith" for a hearing at a specified date and time, and (3) the prosecutor ignored the terms of the warrant and had respondent detained in his office for two days of questioning, without ever bringing her to court for the required hearing?

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JURISDICTION

The petition invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of the New York material witness statute is reprinted in Appendix A to this brief.

STATEMENT OF THE CASE

This case involves an egregious set of facts, a very specific type of state material witness statute, and a narrow immunity decision tied closely to those facts and the state's particular statutory framework. The Second Circuit's decision does not permit a prosecutor to be sued for his actions in court or in judicial pleadings, his questioning of witnesses, or his evaluation of the strength of a case. More particularly, the decision does not in any way address the "difficult" issue reserved by this Court in *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S. Ct. 2074, 2085 (2011): whether a prosecutor has absolute immunity for the illegal *procurement* of a material witness warrant. Rather, the only question decided by the court of appeals is whether a prosecutor is entitled to absolute immunity for the "*execution* of a material witness warrant" under circumstances where the state's material witness statute makes the execution of such warrants "a police function, not a prosecutorial function." Pet. App. 9a (emphasis by court of appeals).

A. New York's Material Witness Statute

New York State's material witness law sets forth a detailed, two-step procedure for adjudicating

whether a person is a material witness. *See* New York Criminal Procedure Law, Article 620. At the initial stage, a prosecutor (or defense counsel) files an *ex parte* application setting forth reasonable cause to believe that the individual possesses material information and will not be responsive to a subpoena to appear in court (or before a grand jury). N.Y. C.P.L. §§ 620.20(1), 620.30(1). If the court is satisfied that the application meets that standard, it may order the prospective witness "to appear at a designated time" for a material witness hearing. N.Y. C.P.L. § 620.30(2)(a). Alternatively, if the court is convinced that the prospective witness would not respond to such an order, it may "issue a warrant addressed to a *police officer*, directing such officer to take such prospective witness into custody . . . and to bring him *before the court forthwith*" for a hearing. N.Y. C.P.L. § 620.30(2)(b) (emphasis added).

The second stage involves an adversary hearing at which the court determines whether the individual "is to be adjudged a material witness." N.Y. C.P.L. § 620.30(2)(b). The prospective witness is entitled to "all the rights" of a felony defendant, including counsel, the right to testify, the right to present witnesses, and the right to release on reasonable bail, either pending a full hearing or after such a hearing. N.Y. C.P.L. §§ 620.40, 620.50. The applicant bears the burden of proof that the individual should be adjudged a material witness and that he will not comply with a subpoena. N.Y. C.P.L. § 620.50.

In short, New York's statute does not permit someone to be adjudged a material witness before there has been a full adversarial hearing.

Prospective witnesses must be brought to court "forthwith" for that adversary hearing, and the task of bringing them to court is expressly delegated to the "police." N.Y. C.P.L. § 620.30(2)(b).

B. Respondent Alexina Simon's Detention

In 2008, a felony complaint was issued in New York City charging Shantell McKinnies with making a fraudulent report concerning her vehicle. Pet. App. 2a. Petitioner Longobardi, a Queens Assistant District Attorney ("ADA"), thereafter obtained a material witness warrant for Alexina Simon, the respondent in this case. Pet. App. 3a. Based on petitioner Longobardi's application, a state court issued a warrant commanding "ANY POLICE OFFICER" in New York State "forthwith to take the above-named ALEXINA SIMON into custody . . . and bring her before this Court in order that a proceeding may be conducted to determine whether she is to be adjudged a material witness." The warrant further specified that the hearing was to take place "at the Queens County Courthouse in the City of New York on August 11, 2008 at 10:00 in the forenoon." (A copy of the warrant is reprinted in Appendix B to this brief.)

Notwithstanding the explicit terms of the arrest warrant, respondent was not brought to court for the hearing. In fact, she never received the material witness hearing mandated by the warrant and New York's statute. Instead, on the morning of the scheduled hearing, petitioners Lee and Alegre (police officers assigned to the District Attorney's office) took respondent to ADA Longobardi's office. There, petitioners, including Longobardi, interrogated her until 8:00 p.m. Petitioners then

allowed her to go home, but told her that she "had to be back the next day to answer some more questions." Pet. App. 4a (brackets omitted). The next day, petitioners Lee and Alegre arrived at her home at 9:00 a.m. and brought her back for further custodial interrogation, which lasted until approximately 5:00 p.m., when they finally released her.

Remarkably, although petitioners interrogated respondent for two full days, it apparently was not until sometime after August 12 that petitioners realized that they actually had named the wrong person in their material witness application. As petitioners now concede (Pet. 2-3), the person whom they meant to name in the warrant application was not respondent *Alexina* Simon, but rather *Alexandra* Simon. Petitioners contend that the confusion arose because Alexandra was Alexina's daughter and the two shared the same residence. But regardless of why the confusion occurred, the mistake easily could have been minimized had respondent been brought to court for her hearing, where she would have had the benefit of pointed questioning by a judge and all the procedural protections guaranteed by New York's material witness statute. As the Second Circuit noted, respondent "had no way of contesting her detention" because petitioners "did not comply with the terms of the material witness order and warrant and never presented Simon before the court." Pet. App. 11a.

C. Proceedings Below

Respondent brought this damages action under 42 U.S.C. § 1983 for her unlawful two-day detention in the District Attorney's office. The district court held, in relevant part, that petitioners

have absolute immunity because the detention occurred in connection with a material witness warrant. Pet. App. 44a-45a. The Second Circuit reversed in a unanimous opinion. Pet. App. 1a-14a.[1]

The Second Circuit began its analysis by emphasizing the narrow claim at issue on appeal. Respondent's claim was not that petitioners had unlawfully *sought* a material witness warrant. Nor did respondent's claim turn on any misstatements in the warrant application or the fact that the warrant had mistakenly named Alexina Simon rather than Alexandra Simon. Pet. App. 9a (noting that such claims would have failed under prior Second Circuit precedent holding that a prosecutor acts in the role of an "advocate" when he "seeks a material witness warrant" and is therefore immune from suit for any "misstatements" in the warrant application).

Rather, as the court of appeals explained, the only question before it was whether the prosecutor and the police officers working under him were entitled to absolute immunity for unlawfully *executing* the material witness warrant by subjecting respondent to two days of detention, instead of bringing her to court as required by the warrant and statute. Pet. App. 9a. In concluding that petitioners were not entitled to absolute immunity when acting in that role, the court explained that "[t]he *execution* of a material witness warrant is a police function, not a prosecutorial function, as New York's material

1 The City of New York is also a petitioner here, but it is unclear why the City is seeking review in this Court. The district court rejected the *Monell* claim against the City, and the court of appeals dismissed respondent's appeal of that claim as untimely. Pet. App. 6a n.4.

witness statute, and the warrant issued in this case, explicitly state." Pet. App. 9a-10a (emphasis in original).

The court of appeals rejected petitioners' contention that they were entitled to absolute immunity because they had been engaged in actions closely tied to the criminal process:

> Far from taking actions "intimately associated with the judicial phase of the criminal process," *Imbler* [*v. Pachtman*], 424 U.S. [409] at 430 [(1976)], defendants were actively *avoiding* the court-ordered material witness hearing. New York procedure requires that an arrested material witness be brought "before the court forthwith," N.Y. Crim. Proc. Law § 620.30(2)(b), and the warrant here directed the executing officers to arrest Simon and bring her *before the court* at 10:00 a.m. on August 11 for a hearing on whether she could properly be considered a material witness.

Pet. App. 10a (emphasis in original). The court of appeals also rejected petitioners' argument that absolute immunity was warranted because respondent "might eventually have been called to testify in a judicial proceeding." Pet. App. 12a. Quoting this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76 (1993), the court of appeals explained that a prosecutor is not entitled to absolute immunity simply because the work may later "be retrospectively described as preparation" for a judicial proceeding. Pet. App. 12a-13a (internal

quotation marks omitted). The court of appeals pointedly concluded that petitioners "were not acting in the role of advocate" when they disregarded the material witness process and subjected respondent to extrajudicial detention. Pet. App. 11a.

Petitioners did not seek en banc review. This petition followed.

REASONS FOR DENYING THE WRIT

The Second Circuit's narrow, case-specific ruling does not warrant review. There is no conflict, and no decision of this Court remotely suggests that a prosecutor is entitled to absolute immunity for illegally *executing* a material witness warrant, especially where, as here, the role of executing such warrants was expressly assigned to police officers by the warrant and the state's material witness statute. Nor does this case present an issue of recurring national importance.

I. THERE IS NO CONFLICT.

There is no conflict at issue here. In fact, petitioners do not cite a single decision from another circuit, much less allege a conflict. To the extent petitioners allege any type of conflict, they argue that the decision in this case is inconsistent with prior *Second Circuit* law. Pet. 13. But the panel in this case properly rejected that argument, Pet. App. 9a, 11a n.6, and petitioners declined to seek review from the full court of appeals. In any event, this Court's review would not be warranted for an intra-circuit conflict. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

II. THE SECOND CIRCUIT'S DECISION IS CORRECT AND ENTIRELY CONSISTENT WITH THIS COURT'S ABSOLUTE IMMUNITY DECISIONS.

Petitioner contends that review is warranted because the Second Circuit's decision conflicts with this Court's absolute immunity decisions. Notably, however, petitioners do not, and cannot, argue that the Second Circuit failed to apply the correct legal test given that the court of appeals indisputably employed the "functional approach" mandated by this Court's decisions. Pet. App. 7a. Instead, petitioners can claim only that the Second Circuit misapplied this Court's precedents to the unique facts of this case. That case-specific ruling does not warrant this Court's attention, and in any event, was correct.

1. Absolute immunity is an extraordinary remedy because it shields even gross violations of clearly established constitutional rights. This Court has thus been "'quite sparing'" in affording prosecutors absolute immunity from civil suit, *Burns v. Reed*, 500 U.S. 478, 487 (1991) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)), and has made clear that it is the official who "'bears the burden'" of establishing that complete immunity from suit is warranted, *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Burns*, 500 U.S. at 486). As the Court has stressed, however, the absence of absolute immunity does not leave an official unprotected. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *accord Burns*, 500 U.S. at 486-87 ("The

presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties"). *See* Pet. App. 1a-2a (remanding to district court, noting that the "record is insufficient" to decide at this stage whether petitioners are entitled to qualified immunity).

The "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley*, 509 U.S. at 273; *see also Van de Kamp v. Goldstein*, 555 U.S. 335, 342-43 (2009). Rather, courts must "examine the nature of the *function performed*, not the identity of the actor who performed it." *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (internal quotation marks and citation omitted) (emphasis added).

Applying this functional approach, courts look first to common-law history to determine whether a tradition of immunity exists, and if so, whether affording complete immunity is nonetheless unwarranted in light of considerations of public policy. *See Burns*, 500 U.S. at 497 (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that, under the Court's absolute immunity test, a tradition of immunity is a "*necessary*" but not a "*sufficient* condition" (emphasis in original)).

Under this approach, prosecutors are shielded by absolute immunity only when they are performing *advocacy* functions "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Conversely, this Court has consistently denied prosecutors absolute immunity where they were engaging in *police-type* functions. *See, e.g., Buckley*, 509 U.S. at

262, 273-74 (denying absolute immunity for investigative witness interviews and fabrication of evidence); *Kalina*, 522 U.S. at 129-31 (denying absolute immunity where prosecutor submitted an affidavit attesting to facts); *Burns*, 500 U.S. at 482, 496 (denying absolute immunity where prosecutor advised police that they had probable cause to arrest petitioner).

a. The Second Circuit carefully applied the Court's functional test and correctly concluded that petitioners were not entitled to absolute immunity on the facts of this case. As the court of appeals emphasized, New York's material witness statute, as well as the warrant itself, expressly state that a "police officer" shall execute the material witness warrant. *See* Pet. App. 10a (discussing statute and warrant). Consequently, under this Court's functional approach, petitioners were not entitled to absolute immunity for performing a quintessential police function—executing an arrest and subjecting respondent to detention—in direct contravention of the terms of the warrant.

Indeed, had the Second Circuit granted absolute immunity, the decision would have undermined one of the basic objectives underlying this Court's immunity jurisprudence: to ensure symmetry between actors performing similar *functions*, regardless of their title. *See Buckley*, 509 U.S. at 288 (Kennedy, J., concurring in part and dissenting in part) ("one of the unquestioned goals" of the Court's immunity cases is "ensuring parity in treatment among state actors engaged in identical functions" (citing *Forrester*, 484 U.S. at 229)). There is no question that a police officer would not be

entitled to absolute immunity for unlawfully executing an arrest warrant. A prosecutor who performs the same function is thus also not entitled to absolute immunity. Otherwise, this Court's immunity jurisprudence would be turned upside down and an official's job description would be dispositive. *See Kalina*, 522 U.S. at 127 (courts must "examine the nature of the function performed, not the identity of the actor who performed it") (internal quotation marks and citation omitted).[2]

b. Petitioners are also not entitled to absolute immunity because they failed to carry their burden of showing that there is a historical tradition of immunity for executing a material witness warrant. Section 1983 on its face does not recognize any defense of official immunity. *Buckley*, 509 U.S. at 268. Courts thus have no "license" to establish immunities to Section 1983 actions for reasons of "public policy," but may only recognize existing common-law immunities that Congress, when it enacted the statute in 1871, is deemed to have incorporated. *Id.* (internal quotation marks and citation omitted).

The Second Circuit was able to resolve this case without addressing whether such a tradition exists, but petitioners ultimately cannot prevail

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2 For purposes of this appeal, respondent accepts that if the prosecutor is entitled to absolute immunity, then the police officers assigned to the District Attorney's office and working at the prosecutor's direction would be entitled to absolute immunity as well. Tellingly, though, the petition focuses very little attention on the police officer petitioners, presumably because their involvement makes clear that all three petitioners were engaged in a police function.

without making that showing. *See Buckley*, 509 U.S. at 269 (official claiming immunity must show a "common-law tradition of absolute immunity" for the function in question); *Malley*, 475 U.S. at 339-40 (same); *Burns*, 500 U.S. at 497 (Scalia, J., concurring in the judgment in part and dissenting in part) (stating that tradition of immunity is a "*necessary*" requirement for absolute immunity (emphasis in original)). Yet petitioners made no attempt in the court of appeals to establish that tradition and likewise have made no attempt in their petition before this Court.

Nor could petitioners have established such a tradition had they attempted to do so. There is no common-law history of absolute immunity for the execution of a material witness warrant. Respondent is not aware of any case decided before the enactment of Section 1983 holding that prosecutors are immune for unlawfully executing a material witness warrant. To the contrary, common-law courts routinely held that prosecutorial actors[3] *were* liable for executing various types of warrants when they did so in a manner not authorized by the warrant's terms, or when the warrant itself did not comply with the governing statute's procedures. *See, e.g.*, *Pratt v. Hill*, 16 Barb. 303 (N.Y.S. 1853) (constable who executed arrest warrant was liable for

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3 The office of public prosecutor in its modern form was not common in the 1800s. *See Kalina*, 522 U.S. at 124 n.11. For this reason, when weighing a claim of absolute immunity, the Court considers how other actors—including justices of the peace, private prosecutors, and law enforcement officials—were treated at common law when performing prosecutorial functions. *See, e.g.*, *Imbler*, 424 U.S. at 421-24; *Malley*, 475 U.S. at 340-41 & n.3.

detaining arrestee without first bringing him before the magistrate as the statute required); *Holley v. Mix*, 3 Wend. 350, 355 (N.Y.S. 1829) (constable and complainant were liable when they arrested plaintiff on a warrant and, rather than bringing plaintiff before the magistrate as ordered, detained him and coerced him into paying eleven dollars). Given this history, there is no authority to extend absolute immunity to petitioners' actions in this case.

2. Petitioners nonetheless contend that they are entitled to absolute immunity and make three principal arguments.

First, petitioners contend that they are entitled to absolute immunity because they were engaged in advocacy that was undertaken "in connection with a pending criminal proceeding" in which a felony complaint had been issued against the defendant. Pet. 22-23; *see generally* Pet. 16-23. More specifically, petitioners argue that interviewing witnesses and evaluating the strength of an ongoing case are core prosecutorial functions entitled to complete immunity, and that once probable cause had been established, the court of appeals should not have pulled "apart the natural flow of the prosecutor's work into discrete sections." Pet. 14; *see generally* Pet. 14-19 (citing *Imbler* and *Buckley*).

Petitioners' arguments are incorrect. This Court's cases focus on the specific function at issue, and do not simply lump together all of the prosecutor's actions because some may be entitled to absolute immunity. *Buckley*, 509 U.S. at 274-79 (separately analyzing each specific action of the prosecutor); *Kalina*, 522 U.S. at 129 (granting absolute immunity as to some but not other

prosecutorial actions, even though they were all undertaken with respect to the same warrant application). Relatedly, the Court has emphasized that a prosecutor's actions are not entitled to absolute immunity merely because they are in some way connected to a pending criminal proceeding. As this Court has pointedly observed, "[a]lmost any action by a prosecutor . . . could be said to be in some way related to the ultimate decision whether to prosecute." *Burns*, 500 U.S. at 495; *see also* Pet. App. 13a (quoting *Burns*).

The Court has further made clear that prosecutorial actions are not entitled to absolute immunity simply because they occur after a determination of probable cause. *Buckley*, 509 U.S. at 274 n.5 ("Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards.").

Most fundamentally, petitioners are simply arguing a different case. Respondent's claim is not that the prosecutor acted unlawfully in seeking a material witness order in the first place, or that the nature of the questioning at the District Attorney's office was unlawful. Rather, respondent's claim is that she was injured by her two-day detention in the District Attorney's office due to the unlawful execution of the warrant. Accordingly, given the limited nature of her claim on appeal, the court of appeals held only that prosecutors are not entitled to absolute immunity for engaging in the classic police function of executing a warrant, particularly where that function has been expressly assigned to the police by statute and court order. *See* Pet. App. 9a-

10a. The Second Circuit did not remotely hold that a prosecutor should receive less than absolute immunity for evaluating evidence, interviewing witnesses or engaging in any other core prosecutorial activity.

Second, petitioners cite *Goldstein*, 555 U.S. at 344, for the proposition that absolute immunity is necessary to protect a prosecutor's independent legal judgment and discretionary decision-making from the inevitable second-guessing that results from civil lawsuits. Pet. 19-20, 25. But those concerns have no place here. The execution of a material witness warrant in New York does not call for legal judgments. Nor did petitioners have to exercise professional prosecutorial discretion in this case. To the contrary, the warrant could not have been more specific and unequivocal, directing the police to bring respondent to the court at a specified time and date. Petitioners simply ignored the express terms of the warrant.

Third, petitioners contend that there are other ways to deter prosecutors from engaging in constitutional violations. Pet. 25-26. Witnesses, however, have far less protection than do criminal defendants under the judicial system. In granting prosecutors absolute immunity for certain advocacy functions, the Court has stressed that, among other things, criminal defendants will still have "appellate review, and state and federal post-conviction collateral remedies," to protect their rights. *Imbler*, 424 U.S. at 427. In fact, in every one of this Court's cases in which absolute immunity was afforded to a prosecutor—from *Imbler* to *Goldstein*—the plaintiff was an individual who had been criminally charged

and/or prosecuted. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 513-14 (1985) (denying absolute immunity to the Attorney General in case where the plaintiff was affected by a wiretap aimed at a third party, but the plaintiff "had never been the actual target" and the recordings had not been "used against [him] in any way"). The arrest of witnesses, however, takes place largely out of the public eye. That is particularly so where, as here, the criminal case was dropped and the witness was never brought before a judicial forum. Pet. 4 n.1 (noting that the case against the accused was dismissed and that respondent was not brought before a Grand Jury); s*ee also* Pet. App. 12a n.8 (noting a factual dispute about whether a grand jury had even been empaneled).

III. THIS CASE DOES NOT RAISE AN ISSUE OF RECURRING NATIONAL IMPORTANCE.

Finally, petitioners argue that this case presents a recurring issue and therefore warrants the Court's attention. Specifically, petitioners contend that "applying absolute immunity in this case will increase the ability of prosecutors to exercise their independent judgment not only generally, but also specifically in cases involving reluctant witnesses, a not unusual subcategory." Pet. 24.

Petitioners are presumably not arguing that a witness must agree to talk with a prosecutor outside of court or that prosecutors have the right to engage in the "extrajudicial" detention of witnesses. Pet. App. 11a. As the Second Circuit explained:

> Under New York law, as under federal

> law, a prosecutor has no power to subpoena a witness to appear outside of judicial proceedings to answer questions from the prosecution or the police. A material witness warrant serves the purpose of securing a witness's presence at a trial or grand jury proceeding. It does not authorize a person's arrest and prolonged detention for purposes of investigative interrogation by the police or a prosecutor.

Pet. App. 12a. Insofar as petitioners are arguing that prosecutors frequently encounter reluctant witnesses, and therefore will often need to procure material witness warrants, the court of appeals could not have been clearer that this case does not involve a prosecutor's decision to *seek* a material witness warrant. Pet. App. 9a. *Compare al-Kidd*, 131 S. Ct. at 2085 (reserving question whether a prosecutor is entitled to absolute immunity for the illegal procurement of a material witness warrant). The sole question decided by the Second Circuit was whether a prosecutor is entitled to absolute immunity for the unlawful "*execution*" of a material witness warrant. Pet. App. 9a (emphasis in original). Petitioners have not remotely shown that the question actually decided by the Second Circuit is a recurring issue of national significance warranting this Court's attention.

* * *

The court of appeals correctly concluded that petitioners were not entitled to the extraordinary protection of absolute immunity for the unlawful

execution of a material witness warrant where that function was expressly delegated to the police by state statute and court order. That narrow case-specific conclusion does not warrant this Court's review, especially given the lack of even an alleged conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Dated: March 20, 2014

APPENDIX

APPENDIX A

§ 620.10 **Material witness order; defined.**

A material witness order is a court order (a) adjudging a person a material witness in a pending criminal action and (b) fixing bail to secure his future attendance thereat.

§ 620.20 **Material witness order; when authorized; by what courts issuable; duration thereof.**

1. A material witness order may be issued upon the ground that there is reasonable cause to believe that a person whom the people or the defendant desire to call as a witness in a pending criminal action:
   - (a) Possesses information material to the determination of such action; and
   - (b) Will not be amenable or responsive to a subpoena at a time when his attendance will be sought.
2. A material witness order may be issued only when:
   - (a) An indictment has been filed in a superior court and is currently pending therein; or
   - (b) A grand jury proceeding has been commenced and is currently pending; or
   - (c) A felony complaint has been filed with a local criminal court and is currently pending therein.

3. The following courts may issue material witness orders under the indicated circumstances:

   (a) When an indictment has been filed, or a grand jury proceeding has been commenced, or a defendant has been held by a local criminal court for the action of a grand jury, a material witness order may be issued only by the superior court in which such indictment is pending or by which such grand jury has been or is to be impaneled;

   (b) When a felony complaint is currently pending in a district court or in the New York City criminal court or before a superior court judge sitting as a local criminal court, a material witness order may be issued either by such court or by the superior court which would have jurisdiction of the case upon a holding of the defendant for the action of the grand jury;

   (c) When a felony complaint is currently pending in a city court or a town court or a village court, a material witness order may be issued only by the superior court which would have jurisdiction of the case upon a holding of the defendant for the action of the grand jury.

4. Unless vacated pursuant to section 620.60, a material witness order remains in effect during the following periods of time under the indicated circumstances:

(a) An order issued by a superior court under the circumstances prescribed in paragraph (a) of subdivision three remains in effect during the pendency of the criminal action in such superior court;

(b) An order issued by a district court or the New York City criminal court or a superior court judge sitting as a local criminal court, under circumstances prescribed in paragraph (b) of subdivision three, remains in effect (i) until the disposition of the felony complaint pending in such court, and (ii) if the defendant is held for the action of a grand jury, during the pendency of the grand jury proceeding, and (iii) if an indictment results, for a period of ten days following the filing of such indictment, and (iv) if within such ten day period such order is indorsed by the superior court in which the indictment is pending, during the pendency of the action in such superior court. Upon such indorsement, the order is deemed to be that of the superior court.

(c) An order issued by a superior court under circumstances prescribed in paragraph (c) of subdivision three remains in effect (i) until the disposition of the felony complaint pending in the city, town or village court, and (ii) if the defendant is held for the action of the

grand jury, during the pendency of the action in the superior court.

§ 620.30 **Material witness order; commencement of proceeding by application; procurement of appearance of prospective witness.**

1. A proceeding to adjudge a person a material witness must be commenced by application to the appropriate court, made in writing and subscribed and sworn to by the applicant, demonstrating reasonable cause to believe the existence of facts, as specified in subdivision one of section 620.20, warranting the adjudication of such person as a material witness.

2. If the court is satisfied that the application is well founded, the prospective witness may be compelled to appear in response thereto as follows:

   (a) The court may issue an order directing him to appear therein at a designated time in order that a determination may be made whether he should be adjudged a material witness, and, upon personal service of such order or a copy thereof within the state, he must so appear.

   (b) If in addition to the allegations specified in subdivision one, the application contains further allegations demonstrating to the satisfaction of the court reasonable cause to believe that (i) the witness would be unlikely to respond to such an order, or (ii) after

previously having been served with such an order, he did not respond thereto, the court may issue a warrant addressed to a police officer, directing such officer to take such prospective witness into custody within the state and to bring him before the court forthwith in order that a proceeding may be conducted to determine whether he is to be adjudged a material witness.

§ 620.40 **Material witness order; arraignment.**

1. When the prospective witness appears before the court, the court must inform him of the nature and purpose of the proceeding, and that he is entitled to a prompt hearing upon the issue of whether he should be adjudged a material witness. The prospective witness possesses all the rights, and is entitled to all the court instructions, with respect to right to counsel, opportunity to obtain counsel and assignment of counsel in case of financial inability to retain such, which, pursuant to subdivisions three through five of section 180.10, accrue to a defendant arraigned upon a felony complaint in a local criminal court.

2. If the proceeding is adjourned at the prospective witness' instance, for the purpose of obtaining counsel or otherwise, the court must order him to appear upon the adjourned date. The court may further fix bail to secure his appearance upon such date or until the proceeding is completed and, upon default

thereof, may commit him to the custody of the sheriff for such period.

§ 620.50 Material witness order; hearing, determination and execution of order.

1. The hearing upon the application must be conducted as follows:

   (a) The applicant has the burden of proving by a preponderance of the evidence all facts essential to support a material witness order, and any testimony so adduced must be given under oath;

   (b) The prospective witness may testify under oath or may make an unsworn statement;

   (c) The prospective witness may call witnesses in his behalf, and the court must cause process to be issued for any such witness whom he reasonably wishes to call, and any testimony so adduced must be given under oath;

   (d) Upon the hearing, evidence tending to demonstrate that the prospective witness does or does not possess information material to the criminal action in issue, or that he will or will not be amenable or respond to a subpoena at the time his attendance will be sought, is admissible even though it consists of hearsay.

2. If the court is satisfied after such hearing that there is reasonable cause to believe that the prospective witness (a) possesses information

material to the pending action or proceeding, and (b) will not be amenable or respond to a subpoena at a time when his attendance will be sought, it may issue a material witness order, adjudging him a material witness and fixing bail to secure his future attendance.

3. A material witness order must be executed as follows:

   (a) If the bail is posted and approved by the court, the witness must, as provided in subdivision three of section 510.40, be released and be permitted to remain at liberty; provided that, where the bail is posted by a person other than the witness himself, he may not be so released except upon his signed written consent thereto;

   (b) If the bail is not posted, or if though posted it is not approved by the court, the witness must, as provided in subdivision three of section 510.40, be committed to the custody of the sheriff.

§ 620.60 **Material witness order; vacation, modification and amendment thereof.**

1. At any time after a material witness order has been issued the court must, upon application of such witness, with notice to the party upon whose application the order was issued, and with opportunity to be heard, make inquiry whether by reason of new or changed facts or circumstances the material witness order is no longer necessary or warranted, or, if it is, whether the original bail currently appears

excessive. Upon making any such determination, the court must vacate the order. If its determination is that the order is no longer necessary or warranted, it must, as the situation requires, either discharge the witness from custody or exonerate the bail. If its determination is that the bail is excessive, it must issue a new order fixing bail in a lesser amount or on less burdensome terms.

2. At any time when a witness is at liberty upon bail pursuant to a material witness order, the court may, upon application of the party upon whose application the order was issued, with notice to the witness if possible and to his attorney if any and opportunity to be heard, make inquiry whether, by reason of new or changed facts or circumstances, the original bail is no longer sufficient to secure the future attendance of the witness at the pending action. Upon making such a determination, the court must vacate the order and issue a new order fixing bail in a greater amount or on terms more likely to secure the future attendance of the witness.

§ 620.70 **Material witness order; compelling attendance of witness who fails to appear.**

If a witness at liberty on bail pursuant to a material witness order cannot be found or notified at the time his appearance as a witness is required, or if after notification he fails to appear in such action or proceeding as required, the court may issue a warrant, addressed to a police officer, directing such officer to take such witness into custody anywhere

within the state and to bring him to the court forthwith.

§ 620.80 **Material witness order; witness fee**.

A witness held in the custody of the sheriff as a result of a material witness order must be paid the sum of three dollars per day for each day of confinement in such custody. Such compensation is a county charge and is payable upon release of such material witness from custody or, in the discretion of the court, at any designated times or intervals during the confinement as the court may deem appropriate.

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS: CRIMINAL TERM:
PART: **K-16**

____ x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ARREST WARRANT FOR MATERIAL WITNESS

Docket #2008QN001693

SHANTELL MCKINNIES

Defendant(s)

____ X

State of New York)

:

County of Queens)

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

TO: ***ANY POLICE OFFICER IN THE STATE OF NEW YORK***

The above-named defendant having been arraigned on a felony complaint charging her with the crimes of Grand Larceny in the 3rd Degree, Insurance Fraud in the 3rd Degree, Falsifying

Business Records in the 1st Degree, and Conspiracy in the 5th Degree, and the People of the State of New York having made an application for an order adjudging one **ALEXINA SIMON** a material witness in the prosecution of said felony complaint, and an order having been granted by the Supreme Court of Queens County on the **8th day of August, 2008** directing said **ALEXINA SIMON** to appear at a hearing at the Queens County Courthouse in the City of New York on August 11, 2008 at 10:00 in the forenoon to determine whether **ALEXINA SIMON** should be adjudged a material witness and bail set to secure her attendance, and it appearing from the allegations of the aforesaid application, that there is reasonable cause to believe that **ALEXINA SIMON** would be unlikely to respond to such order,

YOU ARE, THEREFORE, COMMANDED forthwith to take the above-named **ALEXINA SIMON** into custody within the State of New York and bring her before this Court in order that a proceeding may be conducted to determine whether she is to be adjudged a material witness.

Dated at the County of Queens, City and State of New York, August 8, 2008.

[Signature Omitted]____________________
JUSTICE OF THE SUPREME COURT