

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

DAVID CROSBY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: November 29, 2018

QUESTION PRESENTED

WHETHER THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THE SEVENTH CIRCUIT'S AND THIS COURT'S PRECEDENT AS IT CONCERNs IMPROPER VOUCHING.

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Petitioner, David Crosby, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

1. The Opinion of the Ninth Circuit Court of Appeals is reported as *United States v. Crosby*, ___ Fed.Appx. ___, 2018 WL 4233053 (9th Cir. 2018). A copy of it is attached in the Appendix to this petition at pages 1-2 of the Appendix.
2. A jury convicted Petitioner of failing to register as a sex offender. The Ninth Circuit affirmed Petitioner's conviction.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's Opinion was filed on September 6, 2018 (Appendix at pages 1-2). Petitioner did not file a petition for rehearing. Petitioner's current petition is timely because it was placed in the United States mail, first class postage pre-paid, on November 29, 2018, within the 90 days for filing under the Rule of this Court (*see* Rule 13, ¶1).

FEDERAL PROVISION INVOLVED

This case involves a Petitioner's due process right to a fair trial contained within the following:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE AND FACTS

1. Petitioner is a reliable, hardworking man with a family who was trying to do right by the sexual offender registration conditions under which he lived. He lived in Colorado before deciding to move to New York. While in Colorado, he registered as a sex offender as he was required to do—every 90 days. He was fully compliant.

2. Wanting still to be compliant and knowing he and his family desired to move to New York, in May 2015 Petitioner talked to Stephanie Harman (Harman) who is the coordinator for the Fort Morgan Police Department and who registers all sexual offenders in that area. Petitioner asked Harman what he needed to do if he traveled.

3. Petitioner indicated that Harman advised him to go to the sheriff's department since he would no longer be in her jurisdiction. Petitioner was released from his parole on July 20, 2015, and indicated he went to the sheriff's office in June or July of 2015 and provided them an address in New York where he would be. Petitioner noted Harman never advised him that he would need to contact the local law enforcement where he was located if he was gone longer than 24 hours.

4. Petitioner and his family began their travels but the transfer case of his vehicle unfortunately exploded near Forsyth, Montana, and the family was forced to remain there for several weeks until Petitioner obtained enough money to fix the vehicle. Petitioner never intended to remain in Montana, nor did he understand that he had to register in Montana. That followed because he had already registered in Colorado, and his 90-day quarterly registration was not due. He understood the Colorado requirement to mean that by the time he was in New York, it would be 90 days later and he would register there.

5. Eventually United States Marshal Matthew Brophy contacted a Montana state employee about Petitioner. Since Petitioner had not registered in the three days since his arrived in Montana, he was non-compliant with his registration requirement and he was arrested.

6. During Harman's testimony at trial, she was adamant that she spoke to Petitioner about needing to contact local law enforcement if he was going to be in any jurisdiction longer than 24 hours. She stated that was her understanding of Colorado law and that she told Petitioner's investigating officer (Deputy Brophy) about the advice she gave to Petitioner when that officer later contacted her.

7. Deputy Brophy remembered speaking to Harman sometime between November 15 to November 20, 2015. He did not, however, note Harman's alleged 24-hour advice in his report. Such advice from Harman was something Deputy Brophy testified he could have possibly forgotten to include in his report, but something he would have noted had she actually given it.

8. The government made much of Harman's alleged advice during its closing and rebuttal arguments, as indicated by the following.

But you heard testimony from Stephanie Harman that she told him [Mr. Crosby] exactly what he had to do when he was traveling to New York. That he may have registered an address in New York when he was leaving, but he didn't end up in New York. For whatever reason, he ended up in Montana. And Stephanie told him: "Along your way, you have to update your registration if you spend more than 24 hours in any jurisdiction."

Now, Mr. Crosby denies that she ever told him that. But think about what are their motivations here to testify the way they did. Who's got the dog in the fight in this case, so to speak? Stephanie Harman, an employee with the Fort Morgan Police Department? It doesn't matter to her whether Mr. Crosby registered; whether he didn't. It does not matter to her what he ended up doing.

But he has an extraordinary motivation to shade the truth or to misremember things.

At the end of the day, he is the one who's been indicted for a federal offense to failing to register. And so, it's easy for him to come in and say: "I didn't know. Nobody ever told me." Even though Ms. Harman testified that she did, in fact, tell him.

• • •

Now, with respect to Stephanie Harman, I just want to reiterate, you had an opportunity to listen to her testimony here today. And it is your responsibility to evaluate her credibility.

There is a jury instruction that you have, it's Number 19, and it gives you several things that you can take into account when you're evaluating credibility, like, the witness's memory; the witness's manner while testifying; the interest in the outcome of the case, if any; the witness's bias or prejudice, or whether other evidence contradicted the witness's testimony; the reasonableness of the witness's testimony in light of all the evidence; and any other factors that bear on believability.

• • •

And like I mentioned before, it doesn't matter for Stephanie Harman whether David Crosby did or did not violate the law here. She's not the one who's on trial. She's not on the hook for anything. So imagine what her motivation is.

And also, what her bias or prejudice is. And the reasonableness of her testimony.

Her job – part of her job is to counsel sex offenders on what the requirements are for the Sex Offender Registration and Notification Act. She's the one who would tell folks like Mr. Crosby when they come in, those 42 sex offenders, what the requirements are. It is very reasonable, I submit, to believe that Ms. Crosby – or Ms. Harman did, in fact, tell him that when that's what she testified to, that's what her job is, and that's what her job entails.

And so the fact that Mr. Crosby said: "Well, I don't remember. Nobody told me that." Well, he's the one on trial, and he has an extraordinary motivation to say that he didn't know.

9. Petitioner urged the jury to consider his honest, and not intentional, mistake about misunderstanding the time frame within which he had to register, especially in light of his full compliance in Colorado; his attempt to find out what he needed to do when traveling; and the fact that Harman's testimony about her alleged advice to Petitioner appeared incredulous.

10. The jury ultimately found Petitioner guilty of failing to register as a sexual offender. Petitioner timely appealed and oral argument before a panel of the Ninth Circuit occurred.

11. The Ninth Circuit held that the prosecutor, by stating Harman had no "dog in the fight" and that it was reasonable for the jury to believe Harman testified truthfully, did not vouch for Harman's credibility. *Crosby*, ___ Fed.Appx. ___, 2018 WL 4233053 at *1. Even if vouching occurred, however, the Ninth Circuit held Petitioner failed to demonstrate the result of his trial would have been different. *Id.*

REASONS FOR GRANTING THE WRIT

In general, a prosecutor may not express his belief in the credibility of the government witnesses or his opinion in the defendant's guilt. *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985). Prosecutors also may not denigrate the defense as a sham (*United States v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999)), implicitly vouch for a witness's credibility (*McKoy*, 771 F.2d at 1211), or vouch for his own credibility (*United States v. Smith*, 962 F.2d 923, 933-934 (9th Cir. 1992)). Where the credibility of the witnesses' testimony is crucial, vouching is especially problematic requiring reversal. *See United States v. Roberts*, 618 F.2d 530, 535 (9th Cir. 1980); *United States v. West*, 680 F.2d 652, 657 (9th Cir. 1982); *McKoy*, 771 F.2d at 1213.

A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). A prosecutor's "job isn't to win, but to win fairly, staying well within the rules." *United States v. Maloney*, 755 F.3d 1044, 1046 (9th Cir. 2014) (en banc) (quoting *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993)).

A prosecutor has reasonable latitude in his closing arguments, with freedom to argue reasonable inferences based on the evidence. *See United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989); *United States v. Laurins*, 857 F.2d 529, 539 (9th Cir. 1988). However, a prosecutor's statement during closing argument even regarding an officer's lack of motivation to lie may constitute improper vouching. *United States v. Combs*, 379 F.3d 564, 574-576 (9th Cir. 2004) (a prosecutor's argument about a special agent's disincentive to lie was impermissible vouching).

Improper vouching occurs, typically, in two situations: (1) where the prosecutor places the prestige of the government behind the witness by explaining his personal belief in the veracity of the witness; or (2) where the prosecutor indicates the information not presented to the jury actually supports the witness's testimony. *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998).

In analyzing a prosecutor's vouching, a number of factors are considered, including (1) the form of the vouching; (2) the degree of personal opinion asserted by the prosecutor; (3) how much the vouching implied that the prosecutor had extra knowledge about the witness's truthfulness; and (4) the importance of the testimony in the overall context of the case. *United States v. Williams*, 989 F.2d 1061, 1072 (9th Cir. 1993); *see also United States v. Necoechea*, 986 F.2d 1273, 1279 (9th Cir. 1993) (improper vouching, although not error warranting reversal, where prosecutor stated “[w]hy, ladies and gentlemen, if [the witness is] lying, isn't she doing a better

job of it? I submit to you, ladies and gentlemen, that she's not lying. I submit to you that she's telling the truth"); *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (improper vouching where prosecutor stated "I think he was very candid" and "I think he was honest").

Here, the prosecutor encouraged the jury to consider Harman's motivation to lie versus that of Petitioner's, noting that Harman—an employee with the Fort Morgan Police Department—did not have a "dog in the fight" of whether Petitioner registered. Instead, her job was to register people like Petitioner. Hence, the prosecutor stated it was reasonable for the jury to believe what Harman testified to—namely, that she told Petitioner to register within 24 hours—since that advice was her job to give. The prosecutor reiterated that Harman had no motivation to lie while Petitioner, who faced a criminal indictment, did.

As recently as August 2016, the Seventh Circuit—facing strikingly similar facts and a similar argument regarding the prosecutor's statements as to the witness whose job it was to investigate cases like the defendant's—indicated the prosecutor's statements during closing argument were "textbook" improper vouching. *Jordan v. Hepp*, 831 F.3d 837, 847 (7th Cir. 2016). The Seventh Circuit further noted that "the prosecutor's improper vouching for the credibility of one of the detectives went to the heart of the matter," such that a reasonable probability existed that the result of the trial would have been different. *Id.* at 848.

Here, the prosecutor's statements during closing and rebuttal amounted to improper vouching by indicating Harman, an employee of a police department, must be believed since she did not face a criminal indictment and since her job depended on giving the very advice Petitioner indicated he did not receive from her. *See Combs*, 379 F.3d at 574-576; *Necochea*, 986 F.2d at 1279; *Kerr*, 981 F.2d at 1053.

Petitioner's defense was that he did not knowingly fail to register since he had spoken with Harman before he ventured to New York from Colorado about what he must do when traveling; he was compliant with his registration in Colorado; and he had provided his New York information as directed to do before his vehicle unfortunately broke down thereby delaying his New York travel plans.

By having decided for the jury the believability of Harman, the prosecutor's improper vouching affected Petitioner's due process right to a fair trial warranting reversal, especially where the Ninth Circuit's holding conflict with the Seventh Circuit's and this Court's precedent on the same issue.

CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing and argument.

Respectfully submitted this November 29, 2018.



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