No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

GEORGE LESLIE MANLOVE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

WAS PETITIONER DENIED HIS CONSTITUTIONAL RIGHTS, INCLUDING HIS RIGHT TO A FAIR TRIAL, BECAUSE THE PROSECUTOR'S CALCULATED, SUSTAINED, AND IMPROPER USE OF LEADING QUESTIONS DURING THE DIRECT TESTIMONY OF THE GOVERNMENT'S STAR WITNESS USURPED BOTH THE JURY'S ROLE AS FACT FINDER AND THE JURY'S DUTY TO DETERMINE CREDIBILITY AND PRESENTED A CONFUSED AND DISTORTED PICTURE OF THE EVIDENCE TO THE JURY?

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The Petitioner, Mr. George Leslie Manlove, (referred to herein as Petitioner), respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The memorandum decision of the Court of Appeals (App. A) is unpublished, *George Leslie Manlove*, No. 17-30109 (9th Cir. November 14, 2018).

JURISDICTION

The judgment of the Ninth Circuit was entered on November 14, 2018. This Court's

jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's argument necessarily implicates his constitutional rights under the Sixth Amendment (Fair Trial; Confrontation and Cross-Examination). Therefore, the relevant provisions of the Sixth Amendment are reproduced at App. B.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. Introduction

This is an appeal from a criminal conviction entered in United States District Court in Missoula, Montana. Following a three-week jury trial, a jury found Petitioner guilty of 170 counts of wire fraud, money-laundering, bank fraud, false statements to federally insured lending institutions, bankruptcy fraud, and conspiracy to defraud the company for which he was CEO, Vann's, Inc., and others. (Doc. 309).

Contrary to one of the most fundamental maxims of the Federal Rules of Evidence, the District Court erroneously allowed the prosecutor to use leading questions during the direct and re-direct testimony of the Government's star witness. The jury therefore heard the prosecutor's testimony instead of the testimony of the star witness.

Defense counsel had no real fighting chance to challenge this leading question testimony on the cross-examination of the star witness. The credibility of the accused, Petitioner, was no match for the credibility of the prosecutor. As a result, Petitioner was denied his right to a fair trial

2. Course of the Proceedings

On December 21 2015, Petitioner was charged, individually, by Indictment filed in the United States District Court for the District of Montana, Missoula Division, in Cause No. CR 15-040-M-DLC, with over 200 fraud-type felony offenses relating to Petitioner's conduct as chief executive officer (CEO) of Vann's Inc., a Montana corporation that owned and operated retail electronics and appliance stores in Montana. (ER 209). These offenses are alleged to have occurred between 2006 and 2013 in the State and District of Montana and elsewhere. (*Id*.).

Subsequently, the Government added a co-defendant, Paul Lynn Nisbet (hereinafter the star witness), who had been the chief financial officer (CFO) at Vann's, Inc. (ER 210). Later, a second superseding indictment, which added tax fraud allegations against Petitioner, was filed. (ER 13-49). After the arraignments on February 9, 2016, there was a period of over 10 months during which the parties exchanged discovery and filed notices. (ER 211-227). Petitioner's trial counsel filed several pretrial motions, including motions to dismiss, motions

The star witness pleaded guilty to the conspiracy count. (ER 74, 213, 214). Pursuant to his plea agreement, he provided information against Petitioner pre-trial and agreed to testify against Petitioner at trial in order to receive benefits including a shorter sentence. (ER 74-75). On September 8, 2016, the star witness gave the Government a statement under oath. (ER 75).

The star witness was sentenced on October 27, 2017. (ER 216). The advisory Guidelines range was determined to be 30 to 37 months. (Doc. 192 at 8). The star witness'

lawyer requested a sentence of probation or supervised release, having emphasized that Mr. Nisbet has "been cooperating with the government...[and]...will continue to work for the government, potentially testify if Petitioner proceeds to trial." (Doc. 68 at 1; Doc. 192 at 14). The Government filed a motion (filed under seal) to reward its star witness and requested a sentence below the advisory Guidelines range. The District Court sentenced the star witness to serve 14 months in prison. (ER 217). As part of his plea agreement and sentence, he made a commitment to continue to cooperate with the Government. (Doc. 45 at 9). The District Court ruled on the pretrial motions prior to trial, denying most of them. (ER 226-227). The final pretrial conference was held on January 13, 2017. (ER 228).

The jury trial commenced on January 17, 2017. (ER 66-67). The star witness testified against Petitioner. (ER 74-171, 172-189). Petitioner, in part to respond to the star witness's testimony, testified on his own behalf. (ER 237). On February 3, 2017, the thirteenth day of trial, the jury reached a verdict finding Petitioner guilty of conspiracy (Count 1), wire fraud (Counts 2-6, 8, 14-15, 17-18, 20-26, 30-35, 38-39, 41, 44-49, 64, 68, 78-81, 85, 86-121), bank fraud (Count 122), false statements to a federally insured bank (Counts 125-126), and money laundering (Counts 132-218). (ER 241; Doc. 302).

The jury found Petitioner not guilty of several counts of wire fraud (Counts 7, 9. 10-13, 16, 19, 27-29, 36-37, 40, 42-43, 50-53, 55-63, 65-67, 69-77, one count of bank fraud (Count 123), two counts of false statements to a federally insured bank (Counts 124 & 127), and three counts of tax fraud (Counts 219, 220 & 221). (*Id.*). The jury returned its forfeiture verdict in the amount of $2,467,574.56 on the fourteenth day of trial. (ER 242 (Doc. 309)).

Petitioner's Rule 29 motions were renewed and denied post-trial. (ER 242 (Docs.

315 & 322). Prior to Petitioner's sentencing, the District Court reduced Mr. Nisbet's 14 month prison sentence to essentially a time-served sentence of "approximately 85 days." (Doc. 382 Transcript of Sentencing at 127).

A presentence investigation report was filed with the District Court. (ER 245). Both parties filed sentencing memoranda. (ER 243; Docs. 327, 330, 332, & 334). The Government requested "a sentence of 120 months imprisonment." (Doc 327). Defense Counsel requested that Petitioner be sentenced "to one year and one day in federal custody." (Doc. 330).

The District Court held the Sentencing Hearing on May 19, 2017. (ER 244; Doc. 382 Transcript of Sentencing). After calculating the advisory Guidelines range at 87 to 108 months, the District Court sentenced Petitioner to 60 months on Counts 1 and 128-131, and 63 months on Counts 2-6, 8, 14-15, 17-18, 20-26, 30-35, 38-39, 41, 44-49, 64, 68, 78-81, 85-121, 122, 125-126, 132-167, and 168-218, all to run concurrently for a total of 63 months. (ER 191; Doc. 382 Transcript of Sentencing at 168-169). A variance was warranted due to Petitioner's age, lack of criminal history, and contribution to the community. (Doc. 382 Transcript of Sentencing at 167). The District Court also ordered forfeiture in the sum of $2,467,574.56. (ER 192).

A Notice of Appeal was filed on May 26, 2017. (ER 200-201).

The District Court referred the case to the Magistrate Judge for a hearing on restitution. The Magistrate Judge held the restitution hearing on June 19, 2017. (ER 245-246). On August 22, 2017, the Magistrate Judge entered his Findings and Recommendations in which he found that the Government failed to meet its burden of proof for the imposition

of restitution, and recommended that no restitution be imposed against Petitioner. (ER 252; Doc. 384). Subsequently, the District Court adopted in full the Magistrate Judge's Findings and Recommendations and ordered that the Government's request for restitution in the amount of $838,891.00 be denied. (ER 252; Doc. 385).

3. Ninth Circuit Panel's Memorandum Decision

On December 08, 2017, a panel of the Ninth Circuit (Judges Fernandez, N.R. Smith, and Christen) affirmed the judgment of the District Court. The memorandum decision of the Court of Appeals, *George Leslie Manlove*, No. 17-30109 (9th Cir. November 14, 2018) is unpublished and is replicated in Appendix A.

At trial, Petitioner twice objected to the Government's use of leading questions during the direct testimony of its star witness. Contrary to Fed.R.Evid. 103(b), the panel ruled that Petitioner forfeited his leading-question argument because he did not continue to object to the prosecutor's leading questions. App A at A1. The panel also ruled that Petitioner also forfeited his objection to the district court's adverse witness finding. (*Id*.). In summary, the panel found that Petitioner "hasn't shown that it was error to grant the government's unopposed request for such a finding, or that the district court's decision to do so satisfies any of the other elements of the plain error test." (*Id*.). Although agreeing that the error was not plain because there was "ample evidence of guilt," a concurring judge noted that "[e]xtensive leading questions risk undermining the public's sense of integrity and fairness of judicial proceedings, potentially satisfying the final prong of our plain error test." App A at A4.

B. STATEMENT OF THE FACTS [1]

Petitioner was the Chief Executive Officer of Vann's, Inc., an electronics retailer in Montana. Nisbet, the witness in question (hereinafter the "star witness"), was Vann's Chief Financial Officer. After Vann's board of directors hired Petitioner as CEO in 2006, the star witness worked closely with him up until Petitioner was indicted in 2016. The star witness admitted to playing an instrumental role in the financial transactions that bankrupted the company and destroyed the value of Vann's employee stock option retirement program. Originally indicted as Petitoner's co-defendant, the star witness entered a guilty plea and agreed to testify at Petitioner's trial.

The Government characterized the star witness as an "adverse" witness in the pre-trial phase of Petitioner's case, but by the time Petitioner's trial began, the star witness was the beneficiary of a plea agreement that required his on-going cooperation. The star wintess was sentenced to a below-Guides range term of 14 months. He was also eligible for a further sentence reduction if his trial testimony substantially assisted the government. In short, the star witness had every incentive to cooperate with the Government and even a cursory review of his trial testimony vividly illustrates that he did. In fact, after the trial, he was rewarded with a time-served sentence of only 85 days.

The star witness's direct examination lasted approximately three hours and forty-five minutes. In that time, the Government asked him more than five hundred questions and, by

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[1] This summary of the facts relating directly to the question raised herein was derived from one of the concurring opinions in *United States v. George Leslie Manlove*, No. 17-30109 (9th Cir. November 14, 2018). App A at A2-A4.

rough count, 494 were "yes/no" questions or questions that suggested their own answer. Page after page of the transcript shows that the United States Attorney asked questions by making declarative statements followed by "correct?" or "fair to say?" or "right?" The star witness's answers were usually monosyllabic.

Leading questions were not necessary, in any way, to develop the star witness's testimony. None of the well-established exceptions to the use of leading questions on direct examination applied to the star witness's direct examination. He was an adult witness who spoke perfect English and who did not demonstrate any timidity, confusion, or hostility. The Government's assertions that it was "streamlining its case in chief" and "shortening trial" do not justify entirely jettisoning the general prohibition on leading witnesses. The extensive use of leading questions is particularly problematic where, as here, a witness is led through a virtually uninterrupted series of substantive questions going to essential elements of the core charge, i.e., conspiracy between Petitioner and the star witness. Indeed, the star witness's account was the "glue that bound together the Government's wide-ranging criminal conspiracy theory."

The transcript of the direct examination shows that it was the United States Attorney who was testifying, not the star witness,

REASON TO GRANT PETITION

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS, INCLUDING HIS RIGHT TO A FAIR TRIAL, BECAUSE THE PROSECUTOR'S CALCULATED, SUSTAINED, AND IMPROPER USE OF LEADING QUESTIONS DURING THE DIRECT TESTIMONY OF THE GOVERNMENT'S STAR WITNESS USURPED BOTH THE JURY'S ROLE AS FACT FINDER AND THE JURY'S DUTY TO DETERMINE CREDIBILITY AND PRESENTED A CONFUSED AND DISTORTED PICTURE OF THE EVIDENCE TO THE JURY.

The Government's star witness was "indisputably" Paul Lyn Nisbet. *United States v. Price*, 566 F.3d 900, 913-914 (9th Cir. 2009). The star witness was, at the same time, the only co-defendant, the only co-conspirator, the only accomplice, and the only cooperating witness in this case. His testimony was "the glue that held the prosecution's case together." *Horton v. Mayle*, 408 F.3d 570, 579 (9th Cir. 2005). Like moving the lips of a puppet or flapping the jaw of a ventriloquist's dummy, the prosecutor was allowed to prove the Government's case by throwing his words, via leading questions, through the mouth of his star witness.

The District Court overruled several defense objections and sat silently by as the prosecutor unfairly presented evidence in violation of the rules and constitution. (ER 1-2, 74-171, 172-189). The U.S. Attorney seized control of the courtroom and usurped both the jury's duty to determine credibility and the jury's role as fact finder. As a result, Petitioner was denied his right to a fair trial.

1. Leading Questions are Prohibited on Direct Examination.

The Federal Rules of Evidence permit leading questions on direct examination only when "necessary to develop [the witness's] testimony." Fed.R.Evid. 611(c). This rule

recognizes the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Advisory Committee Note to Fed.R.Evid. 611(c). The "necessity" exception generally only applies where a witness, unlike the star witness here, is very young, timid, ignorant, unresponsive, or infirm. David W. Louisell and Christopher B. Mueller, Federal Evidence, Vol. 3, § 339 at 462-463 (Lawyers Co-operative Pub. Co. 1979).

Under Rule 611(c)(1), leading questions are permitted on cross-examination because "the cross-examiner needs to suggest answers to the witness in order to explore adequately the reliability of the direct examination and the credibility of the witness." Charles W. Ehrhardt and Stephanie J. Young, *Using Leading Questions During Direct Examination*, 23 Fla. St. U. L. Rev. 401, 402 (1995). However, if the wide use of leading questions is permitted on direct examination, "the jury could hear the lawyer's testimony instead of the witness's." *Id*.; *United States v. Bryant*, 461 F.2d 912, 918 (6th Cir. 1972) ("If counsel were allowed routinely to lead a witness on direct examination, the evidence elicited would all too often be that of the lawyer, not of the witness."). In Petitioner's trial, the jury heard the prosecutor's testimony instead of the star witness's testimony.

In total disregard for Rule 611, the District Court erroneously overruled defense counsel's initial objection to a leading question at the beginning of the direct examination of the star witness:

U.S. ATTORNEY:	And you pleaded guilty to conspiracy with George Manlove because you are guilty of entering a conspiracy with Mr. Manlove to defraud Vann's, Inc., correct?
STAR WITNESS:	Correct.
DEFENSE COUNSEL:	Objection. Leading.

THE COURT: Overruled.

(ER 75).

2. The Government's Star Witness was not Hostile or Adverse.

"[M]any important prosecutions – especially in the area of organized and conspiratorial crimes – could never make it to court" without cooperating witnesses. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L. J. 1381, 1390 (1996). A cooperating witness may be many things but one of them is helpful, not hostile, to the prosecution.

The Government did not and could not show that their star witness was hostile or adverse - a status which would have permitted the use of leading questions on direct. Fed.R.Evid. 611(c)(2). The star witness, based on his pretrial cooperation, had already been rewarded with a reduced sentence of 14 months prompted by the Government's U.S.S.G. §5K1.1 motion. (Doc. 382 Transcript of Sentencing at 127). As part of the sentence, he was bound to keep cooperating with the Government. (Doc. 374 Trial Transcript Vol 7 at 1852).

Like a donkey yearning for a carrot on a stick, the star witness was clearly "hoping to 'trigger' a benefit – specifically, the 'reward' of a Rule 35 motion by the government." *United States v. Nickle*, 816 F.3d 1230, 1236 (9th Cir. 2016). Thus, there was absolutely no reason for the star witness to be considered adverse to the Government. He was ready, willing and able to give rubber stamp approval to almost every leading question pitched to him by the United States Attorney.

Although the Government failed to establish that its star witness was either hostile or adverse, the District Court erroneously overruled defense counsel's second objection:

U.S. ATTORNEY:	You were the CFO of Vann's, Inc. at one time, correct?
STAR WITNESS:	Correct.
DEFENSE COUNSEL:	Objection. Leading.
THE COURT:	Well, we're conducting, I assume, as an adverse witness here, and so leading questions are appropriate.

(ER 76). The District Court also mistakenly concluded that the star witness was an adverse witness.

3. The United States Attorney Unfairly Testified through Leading Questions to His Star Witness.

The United States Attorney did not merely set the stage with a few introductory leading questions to its star witness. Instead, after he was given the green light by the District Court, the United States Attorney launched into a long series of leading questions designed, by themselves, to prove the Government's case against Petitioner.

With leading questions, the United States Attorney testified through the star witness for almost the entire time the star witness was on the stand. This happened from one day of trial to the next and constitutes more than 100 pages of the trial transcript. (ER 74-171; 172-189). No critically important testimony from the star witness was elicited through "proper non-leading questions" *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 515 (9th Cir. 1989).

The star witness was reduced to simply a "sounding board" for the Government. *Straub v. Reading Company*, 220 F.2d 177, 179-180 (3rd Cir. 1955). He did nothing more than repeatedly respond "correct" or "true" depending on which word was used by the prosecutor to conclude that leading question. *Compare Miller*, 885 F.2d at 514 ("During this portion of his testimony, [the witness] did little more than repeatedly respond 'right.'").

Many of the leading questions were even directed to the ultimate issues in the case:

U.S. ATTORNEY:	You pled guilty because you are, in fact, guilty of conspiracy, correct?
STAR WITNESS:	That's correct.
U.S. ATTORNEY:	There was an agreement between you and George Manlove to defraud Vann's, Inc. and others, correct?
STAR WITNESS:	Correct.
U.S. ATTORNEY:	You entered into that agreement knowing of its objectives and intending to accomplish several of those objectives, true?
STAR WITNESS:	True.
U.S. ATTORNEY:	One of those objectives was to defraud Vann's, true?
STAR WITNESS:	True.
U.S. ATTORNEY:	You performed several acts in furtherance of that agreement with Petitioner to defraud Vann's, true?
STAR WITNESS:	True.
U.S. ATTORNEY:	And you're here in front of this jury to testify to those acts in furtherance of the conspiracy that you entered into with Petitioner to defraud Vann's, true?
STAR WITNESS:	True.
U.S. ATTORNEY:	**You and Mr. Manlove knowingly combined, conspired, confederated, and agreed to knowingly defraud Vann's and others of Vann's assets for personal gain?**

(ER 85-86). (Emphasis added). Defense Counsel objected to the last question as a legal conclusion. (ER 86). As with the leading question objections, the District Court overruled this objection and allowed virtually the same "question" to be repeated by the prosecutor and then to be re-"answered" by the star witness:

STAR WITNESS:	Sorry. Can you say it again? I lost you there.
U.S. ATTORNEY:	**Sure. You and Mr. Manlove knowingly combined, conspired, confederated, and agreed among yourselves to knowingly defraud Vann's and others of Vann's assets for personal gain and Mr. Manlove's, true?**
STAR WITNESS:	**True.**

(ER 86-87). (Emphasis added).

4. The U.S. Attorney Proved His Case Through Inadmissible Leading Questions to the Star Witness.

Although the star witness pleaded guilty to the conspiracy count which permeated every other count in the second superseding indictment, Petitioner never admitted to committing conspiracy or any other crime. *Compare United States v. Castro-Romero*, 964 F.2d 942, 944 (9th Cir. 1992) ("[E]ven if the leading questions had been improper, they would not have resulted in denial of a fair trial because of the evidence that [the defendant] admitted to the crime.").

Many of the leading questions presented the U.S. Attorney's version of the facts and supported the Government's theory of the case:

U.S. ATTORNEY:	It was the purpose of the conspiracy to conceal and then misrepresent the ongoing schemes to defraud Vann's in order to avoid detection and enrich both you and Mr. Manlove, correct?
STAR WITNESS:	Correct.
U.S. ATTORNEY:	It was a part of the conspiracy to conceal the full extent of your knowledge and Mr. Manlove's knowledge of the financial condition of Vann's; is that true?
STAR WITNESS:	Yeah, that's true.
U.S. ATTORNEY:	It was part of the conspiracy to conceal the full extent and withhold information regarding the full extent of Vann's financial condition from shareholders, employees, ESOP participants, Vann's creditors, lenders, First Interstate Bank, Treasure State Bank, and Vann's board of directors, correct?
STAR WITNESS:	**That's a mouthful. Can you say that again? I'm sorry.**
U.S. ATTORNEY:	Yes. It was part of the conspiracy to conceal the full extent of the coconspirators -- of the conspirators' knowledge of the financial condition of Vann's and withhold information regarding the full extent of Vann's financial condition from shareholders, employees, ESOP participants, Vann's creditors, lenders, First Interstate Bank, Treasure State Bank, and Vann's board of directors, correct?
STAR WITNESS:	**I would agree with that. Correct.**
U.S. ATTORNEY:	It was part of this conspiracy between you and Petitioner that

	you used your official positions within the company to obtain loans using Vann's assets as collateral and to spend corporate assets for your own personal benefit, correct?
STAR WITNESS:	Correct.
U.S. ATTORNEY:	It was part of the conspiracy that you and Mr. Manlove falsely described, concealed from, and failed to reveal to shareholders, employees, ESOP plan participants, Vann's creditors, First Interstate Bank, Treasure State Bank, and Vann's board of directors the full extent and true nature of the financial transactions involving the expenditure of Vann's corporate assets, correct?
STAR WITNESS:	Again, that's a lot of parties, but I would say that's correct.
U.S. ATTORNEY:	It was part of the conspiracy between you and Mr. Manlove that the two of you created LLC companies, correct?
STAR WITNESS:	Correct.

(ER 87-88). (Emphasis added). "And so it goes..." on and on. Kurt Vonnegut, Jr., Slaughterhouse Five (Delacorte 1969).

5. The U.S. Attorney Usurped the Jury's Role to Decide Credibility.

The proper role of the jury should have been to decide who to believe, the star witness or Petitioner:

> As in many trials, the jury's task boiled down to deciding which of the two most important witnesses was lying to them. The defendant had an obvious motive to lie, because his direct freedom was at stake, but so did the government's star witness. His motive was more subtle, as it arose from a plea agreement that left open the possibility that he might walk out the door a free man if the government was satisfied that his testimony was the truth.

United States v. Schoneberg, 396 F.3d 1036, 1041 (9th Cir. 2005) (as amended). Here, the star witness actually did "walk out the door a free man" because shortly after the trial, the Government arranged for the remainder of his prison sentence to be reduced to a time-served sentence of 85 days. (Doc. 382 Transcript of Sentencing at 127).

The leading questions prevented the jury from weighing the credibility of the star

witness against the credibility of Petitioner. In a 1909 decision, this Court advised that "evidence of such a [cooperating] witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses." *Crawford v. United States*, 212 U.S. 183, 204 (1909). Justice Jackson echoed these concerns almost fifty years later, warning "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952). Petitioner's credibility was pitted against the U.S. Attorney's credibility not against that of the star witness. Obviously, Petitioner's credibility was no match for the credibility of the U.S. Attorney.

The U.S. Attorney used leading questions to prove to the jury that Petitioner committed other crimes in addition to conspiracy, for example:

U.S. ATTORNEY:	It was part of the conspiracy that you and Mr. Manlove, in the course of obtaining loans for the purchase of The Outlet store, made statements and submitted false information to loan officers at First Interstate Bank and Treasure State Bank that signed lease agreements existed between Vann's and the independent third-party LLCs owned and operated by you and Mr. Manlove, correct?
STAR WITNESS:	Correct. Again, using the definition of "board-approved" that we just established.

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U.S. ATTORNEY:	So you and Mr. Manlove submitted false information to First Interstate Bank and Treasure State Bank, correct?
STAR WITNESS:	Well, the false information at hand is the fact that --whether or not there was a board-approved lease.
U.S. ATTORNEY:	**Correct.**
STAR WITNESS:	**So, correct.**

*****

U.S. ATTORNEY: Okay. So from June of 2007 through March of 2012, JPEG, run by you and Mr. Manlove, received approximately $906,000 in monthly lease payments from Vann's, Inc., correct?
STAR WITNESS: Correct.
U.S. ATTORNEY: This included approximately 12 monthly lease payments totaling about $190,000 even after that JPEG store had closed, correct?
STAR WITNESS: Correct.
U.S. ATTORNEY: By doing so, you and Mr. Manlove defrauded Vann's, Inc. through JPEG, LLC, correct?
STAR WITNESS: Correct.

*****

U.S. ATTORNEY: Based on your personal knowledge, George Man love's conduct related to the Painted Sky leases also defrauded Vann's, Inc., correct?
STAR WITNESS: Correct.

(ER 90, 104, 105-109). (Emphasis added).

The U.S. Attorney improperly used his leading question testimony to destroy the credibility of Petitioner. In the Government's closing arguments, the U.S. Attorney pointed out how his leading question testimony though the star witness "pop[ped] the balloon" of Petitioner's testimony. (Doc. 379 Trial Transcript Vol 12 at 2854). Nothing in a jury trial could be more prejudicial or more unfair to the accused.

6. Defense Counsel was Unable to Confront or Cross-Examine the Leading Question Testimony of the U.S. Attorney.

Cross examination is the primary means by which the believability of a witness and the truth of his testimony are tested. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). It "is the most powerful instrument known to the law in eliciting truth" and one of "the established

safeguards of the Anglo-American legal system." John Henry Wigmore, Wigmore on Evidence, Vol. 5, § 1362 n.1 (Chadbourn rev. 1970); *Hoffa v. United States*, 385 U.S. 293, 311-312 (1966). The U.S. attorney's extensive leading questions here defeated the essential purpose of cross-examination: "[T]o challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.'" *Ohio v. Roberts*, 448 U.S. 56, 71 (1980).

Again, because, through leading questions, the U.S. Attorney testified instead of the star witness, defense counsel was "unable to seriously challenge [the U.S. Attorney's leading questions] on cross examination" and "was in no position to attack [the prosecutor's] credibility." *United States v. Price*, 566 F.3d 900, 913-914 (9th Cir. 2009).

Much of the Government's case focused on allegedly unauthorized corporate expenditures made for the benefit of Petitioner. (Doc. 28 Second Superseding Indictment: ER 15, 16, 18-19, 20, 21, 22, 24, 26-27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41-42, 43-44, 45, 46). These include travel, tuition, home expenses, club memberships, jewelry, a real estate commission, and bonuses. (*Id.*). Petitioner testified that these expenditures had legitimate, business-related justifications. (*See e.g.*, Doc. 377 Trial Transcript Vol 10 at 2473, 2492, 2500, 2502, 2503, 2507-2508, 2521-2522). However, the U.S. Attorney used leading questions to the star witness, as an anticipatory strike, to directly contradict much of Petitioner's later testimony. (*See e.g.*, ER 78-79, 145-146, 150, 158, 164, 165-166).

The U.S. Attorney was permitted to prove, via his leading questions, that "[Petitioner] converted Vann's funds and assets into personal benefits," that "[Petitioner]

also personally benefitted from this lease transaction over the interests of Vann's, Inc.", that "[Petitioner] did not have an arm's length relationship with Vann's, Inc.", that "[Petitioner]...seemed to conduct himself as though he thought he should have owned Vann's himself" and that "[Petitioner] put his personal interests above the interests of the company itself." (*See e.g.*, ER 91, 97, 109, 144, 168). Ultimately, the U.S. Attorney very improperly established, through the star witness and prior to Petitioner's testimony, that Petitioner was not worthy of belief:

U.S. ATTORNEY:	**Did Mr. Man love make a statement to you, "People can't handle the truth, so don't give it to them?"**
STAR WITNESS:	That would be my paraphrasing of the discussions or the mandate that he had, **yes**.

(ER 171). (Emphasis added).

7. The District Court Had No Discretion to Allow Calculated, Sustained, and Improper Leading Questions Which Deprived Petitioner of His Constitutional Rights including His Right to a Fair Trial.

It cannot be approved as discretionary where the District Court lost, ignored, and forfeited control of the star witness to the prosecutor thus producing a "warped version of the issues." *Straub*, 220 F.2d 177 at 182. As a result, the jury "never did have the opportunity to pass upon the whole case and a judgment based on that kind of a twisted trial must be set aside." *Id.*

The "calculated, sustained, and improper" use of leading questions "shows a conscious successful effort on the part of plaintiff's attorney which resulted in a confused distorted picture going to the jury to the grave prejudice of the defense." *Straub,* 220 F.2d at180-182. While the United States Attorney "may strike hard blows, he is not at liberty to

strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

The U.S. Attorney's's brazen misuse of leading questions casts serious constitutional doubt on the correctness of the jury's verdict. Petitioner was deprived of his right to a fair trial. *Straub,* 220 F.2d at 182. He was also denied his Sixth Amendment right to confront and cross-examine the star witness.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED this 19th day of December, 2018.

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