No. 18-9261

IN THE SUPREME COURT OF THE UNITED STATES

CALMER COTTIER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SANGITA RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed plain error when it admitted into evidence the factual basis of a co-conspirator's plea agreement, including its joint stipulation that the facts contained therein were truthful, where, among other things, petitioner did not object to the admission of the factual basis into evidence, petitioner employed it as part of his defense strategy, and other evidence, including co-conspirator testimony and petitioner's own admissions, established his guilt.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.S.D.):

United States v. Cottier, No. 15-cr-50151 (Nov. 22, 2017)

United States Court of Appeals (8th Cir.):

United States v. Cottier, No. 17-3690 (Nov. 16, 2018), petition for reh’g denied, Feb. 12, 2019

IN THE SUPREME COURT OF THE UNITED STATES

____

No. 18-9261

CALMER COTTIER, PETITIONER

v.

UNITED STATES OF AMERICA

____

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

____

BRIEF FOR THE UNITED STATES IN OPPOSITION

____

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 908 F.3d 1141.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2018. A petition for rehearing was denied on February 12, 2019. Pet. App. 1c. The petition for a writ of certiorari was filed on May 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Dakota, petitioner was convicted of second-degree murder by an Indian in Indian country, in violation of 18 U.S.C. 1111(a), 2, and 18 U.S.C. 1153 (2012 & Supp. II 2014); and conspiring to commit assault with a dangerous weapon and assault resulting in serious bodily injury by an Indian in Indian country, in violation of 18 U.S.C. 113(a)(3) (Supp. II 2014), 18 U.S.C. 113(a)(6), 371, and 1153 (2012 & Supp. II 2014). Pet. App. 1b. Petitioner was sentenced to 210 months of imprisonment, to be followed by five years of supervised release. Id. at 2b; Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-13a.

1. On July 12, 2015, petitioner participated in the "vicious group beating" and murder of Ferris Brings Plenty. Pet. App. 1a; see Gov't C.A. Br. 13-14 & n.3. Petitioner "is an enrolled member of the Ogalala Sioux Tribe," and the murder occurred on the Pine Ridge Reservation in South Dakota. Tr. 265.

Early that morning and the night before, petitioner was in the company of Steven Steele, Terry Goings III, and Billy Bob Bluebird in Bluebird's backyard in Pine Ridge. Pet. App. 2a. "Some of the men were gang members," and they exchanged "gang-related slurs" with Aaron Little Bear and Fred Quiver, "members of a competing gang" who "were drinking in the adjacent Quiver backyard." Ibid. Petitioner and his group left and met up with petitioner's brothers, Jerome Warrior and Albert Cottier. "Angry

that he got 'punked out'" by Little Bear, petitioner (or possibly one of the others) "suggested that the group go back to the Quiver residence to fight Little Bear." Ibid.; see id. at 2a n.2. The group headed back; the men "discussed weapons, Goings gave his machete to Steele," and Goings armed himself with a stick or rake handle. Id. at 2a-3a.

The group split into two to ambush the Quivers. Pet. App. 3a. At the Quiver residence, however, the men did not encounter Little Bear, but instead encountered Brings Plenty, who was "sleeping in a tent in the backyard." Ibid. "When Brings Plenty emerged from the tent and tried running away, [petitioner] threw a cinder block at his head, which struck him in the face and caused him to stumble." Ibid. The group then "vicious[ly]" beat Brings Plenty. Ibid. Warrior and petitioner, and possibly others, "kicked Brings Plenty several times while Goings hit him repeatedly with the stick and Steele struck him multiple times in the back of the head with the machete." Ibid. Brings Plenty died from "numerous blunt force trauma injuries." Ibid. Photos of the crime scene showed a cinder block lying near his body. Id. at 3a n.3.

Petitioner made incriminating admissions about his participation in the attack on Brings Plenty in four interviews with an agent from the Federal Bureau of Investigation as well as at trial. Gov't C.A. Br. 8-10. In his first interview, petitioner denied being at the scene. Id. at 8. In his second interview, he admitted to being present but denied participating in the beating.

Id. at 8-9. In his third interview, petitioner admitted that he "hit Brings Plenty once in the face," but claimed that he did so because Brings Plenty "rushed wildly at him." Id. at 9. Petitioner also admitted that the group's purpose in going to the Quiver residence was to engage in a fight. Ibid. In his fourth interview, petitioner admitted to hitting Brings Plenty twice, but claimed that he used only his fist, while others used hard objects including a machete. Ibid. Petitioner admitted that "he wasn't trying to be no referee because honestly in my heart I was all for the fucking fight." Ibid. (citation and internal quotation marks omitted).

A federal grand jury sitting in the District of South Dakota returned a superseding indictment charging petitioner and others with one count of second-degree murder by an Indian in Indian country, in violation of 18 U.S.C. 1111(a), 2, and 18 U.S.C. 1153 (2012 & Supp. II 2014); one count of conspiring to commit assault with a dangerous weapon and assault resulting in serious bodily injury by an Indian in Indian country, in violation of 18 U.S.C. 113(a)(3) (Supp. II 2014), 18 U.S.C. 113(a)(6), 371, and 1153 (2012 & Supp. II 2014); and one count of solicitation to commit a crime of violence, in violation of 18 U.S.C. 373, 1111(a), and 18 U.S.C. 1153 (2012 & Supp. II 2014). Superseding Indictment 1-4. Several of petitioner's co-conspirators pleaded guilty, including Goings, Bluebird, and Steele. See, e.g., Tr. 72, 147, 176-177, 266-267, 270, 340. Petitioner pleaded not guilty and proceeded to trial,

although he stipulated to his status as an Indian and the attack's location within Indian country. Tr. 7, 18.

2. At trial, petitioner admitted to lying in his first two interviews, Tr. 590-592, 596, and stated that the assault on Brings Plenty "wasn't a fair fight," Tr. 596. He also admitted that he hit Brings Plenty three times during the assault and that his last punch staggered Brings Plenty, who fell into Warrior, allowing Warrior to take him to the ground. Tr. 596-598; see Gov't C.A. Br. 10.

Goings and Bluebird testified for the government. Goings testified that petitioner hit Brings Plenty with some kind of brick as Brings Plenty was trying to run away and began kicking him in the face as he lay on the ground, while Steele hit him with a machete and others hit or kicked him as well. Tr. 112; see Tr. 116 ("It was like a thick -- a thick brick," "[l]ike a piece of cement"). Bluebird testified that petitioner was part of the group that attacked Brings Plenty, Tr. 188, 190, and that he saw petitioner kick the victim, Tr. 199, 204.

During Goings's direct examination, the district court admitted into evidence Goings's plea packet, including the written statement supporting the factual basis for his guilty plea. Tr. 71-72. "The factual basis statements are official court documents, signed by an Assistant United States Attorney and the respective co-defendant, that stated that '[t]he undersigned parties stipulate that the following facts are true.'" Pet. App. 8a

(brackets in original). Petitioner "affirmatively consented to the admission of Goings's factual basis statement." Ibid. The court instructed the jury that the government "still had to prove every element beyond a reasonable doubt" and that the factual basis was "not admitted for the truth of the matter asserted but instead to show the arrangements Goings had with the government." Ibid.; see Tr. 72. The prosecutor "did not read the factual basis statement to the jury or draw much attention to it," but the defense "attacked the factual basis statement repeatedly on cross-examination" and had the defense investigator "actually read it to the jury." Pet. App. 8a; see Tr. 147-154, 364-366.

The district court also admitted into evidence Steele's factual basis statement, which was "nearly identical" to Goings's factual basis statement. Pet. App. 8a. Petitioner did not object and instead used the factual basis as part of his defense. See Tr. 138, 262, 266. Before trial, Steele had stated to the defense investigator in a jailhouse interview that "parts of Goings's factual basis statement, particularly the part about the cinder block, was 'bullshit.'" Pet. App. 8a. Steele, however, invoked his Fifth Amendment privilege against self-incrimination to decline to testify at trial, and the court permitted petitioner to introduce Steele's jailhouse interview under Federal Rule of Evidence 804(b)(3) on the ground that Steele was unavailable. Pet. App. 8a-9a. Because the government "expressed concern about jury confusion if [petitioner] was able to present Steele's interview

without the jury knowing what Steele had actually attested to in his own factual basis statement," the court "allowed the government to place the factual basis statement into evidence." Id. at 9a. Petitioner "expressed no concerns about this approach of handling Steele's unavailability." Ibid. Rather, petitioner's defense strategy was to attack Goings's credibility by arguing that Goings and Steele "colluded to come up with the exact same factual basis statement." Tr. 138.[1]

The jury found petitioner guilty of second-degree murder and conspiracy to commit assault, but not guilty of the solicitation charge. Pet. App. 1a. The district court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised release. Id. at 1b-2b; see Judgment 1-3.

3. The court of appeals affirmed. Pet. App. 1a-13a. As relevant here, petitioner contended for the first time on appeal that the factual basis statements of Goings and Steele constituted improper governmental vouching for the credibility of those witnesses, because they included the statement that "[t]he undersigned parties" (including the government) "stipulate that the following facts are true." Id. at 8a (brackets in original); see Pet. C.A. Br. 16-24. Reviewing for plain error, the court affirmed. The court cautioned against admitting factual basis

[1] Bluebird's plea packet, including his factual basis statement, was also admitted into evidence without objection. Tr. 174-176. Petitioner has never challenged the admission of Bluebird's factual basis statement.

statements at trial "without redaction of all but the testimonial portions of the documents and the pleading defendant's signature." Pet. App. 9a. The court determined, however, that no plain error had occurred. Ibid. The court explained that petitioner "affirmatively consented to the admission of Goings's factual basis statement," and that "Steele's factual basis statement was offered without defense objection because it was necessary to explain Steele's comment that the statement was 'bullshit.'" Ibid. The court also observed that the district court "instructed the jury that * * * the contents" of Goings's statement "were not admitted for the truth of the matter asserted but instead to show the arrangements Goings had with the government" and that the government "still had to prove every element beyond a reasonable doubt." Id. at 8a. Finally, the court found that petitioner "also had not demonstrated" prejudice given the "overwhelming evidence of [his] guilt." Id. at 9a.

ARGUMENT

Petitioner renews (Pet. 4-10) his contention that the district court committed plain error by admitting into evidence Steele's factual basis statement, asserting that it served to improperly vouch for Steele's credibility as a witness.[2] The court of appeals correctly rejected that contention. Its fact-bound

---

[2] Petitioner appears no longer to challenge the admission of Goings's factual basis statement, to which he affirmatively consented at trial. See Pet. 10; Pet. App. App. 7a.

decision does not conflict with any decision of any other court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that the admission of Steele's factual basis statement, which included the statement that the government "stipulate[d] that the following facts are true," Pet. App. 8a, was not reversible plain error.

Petitioner asserts (Pet. 4-10) that the document included statements by the government improperly vouching for Steele's credibility as a witness, and thereby deprived petitioner of a fair trial. A prosecutor's statements vouching for the credibility of a government witness can compromise a defendant's right to a fair trial in two ways: they may "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant," and they "may induce the jury" to credit the prosecutor's personal opinion "rather than its own view of the evidence." United States v. Young, 470 U.S. 1, 18-19 (1985). "[I]t is not enough," however, "that the prosecutors' remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citation omitted). Rather, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Ibid. (citation and internal quotation marks omitted). That is evaluated by looking at the statements "within the context of the trial" as a whole. Young, 470 U.S. at 12.

Petitioner did not lodge a contemporaneous objection to the admission of Steele's factual basis statement, so his claim of improper vouching is subject only to plain-error review under Federal Rule of Criminal Procedure 52(b). Under that standard, reversal is warranted only when there is "an 'error' that is 'plain' and that 'affect[s] substantial rights,'" and it "'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" United States v. Olano, 507 U.S. 725, 732 (1993) (citations omitted; brackets in original); accord Johnson v. United States, 520 U.S. 461, 466-467 (1997). Here, the court of appeals "caution[ed]" that it was "not a favored practice" to receive "sworn factual basis statements signed by lawyers into evidence and then allow[] the statements in the jury room during deliberations without redaction of all but the testimonial portions of the documents and the pleading defendant's signature." Pet. App. 9a. Nonetheless, it correctly found no reversible plain error in the context of the entire trial.

At the outset, no error occurred, much less an obvious error. Petitioner not only failed to object to the admission of Steele's factual basis statement, but instead acquiesced to its admission as a means of handling Steele's unavailability. The court asked petitioner's counsel whether he objected to the introduction into evidence of Steele's factual basis statement, and he responded "No objection. Your honor." Tr. 266. The district court further asked petitioner whether he objected to the court informing the

jury that petitioner planned to dispute the veracity of portions of Steele's factual basis statement, which presupposed its admission into evidence, and petitioner's counsel again responded, "No, Your Honor." Tr. 271; see Tr. 272. Petitioner also used the statement as a primary part of his defense strategy to attack the credibility of both Goings and Steele. Specifically, petitioner pointed to the similarity between their factual basis statements to support his argument that Goings and Steele "colluded to come up with the exact same factual basis statement" and that the jury should therefore disbelieve Goings's incriminating trial testimony that matched the factual-basis statements. Tr. 138; see, e.g., Tr. 639, 654 (defense closing).

As to the specific portion of the factual basis statement containing the parties' stipulation that the stated facts were true, the prosecutor did not highlight that aspect of the plea packet during trial, and the district court instructed the jurors that it was up to them to "decide how much, if any, to believe of Steele's factual basis statement." Tr. 272. The court also instructed the jurors that statements by the lawyers "are not evidence." Tr. 21; see Darden, 477 U.S. at 182-183 (concluding that prosecutor's improper comments did not deprive defendant of a fair trial in part based on instructions to jury that statements of counsel were not evidence).

Furthermore, even if a plain error had occurred, the court of appeals correctly determined that, "[d]ue to the overwhelming

evidence of [petitioner's] guilt," he "also has not demonstrated that he was prejudiced." Pet. App. 9a. Although petitioner's argument is premised on the assertion (Pet. 7-8) that he was convicted on the testimony of only a single unreliable witness, that is not in fact the case. First, two cooperating witnesses -- Goings and Bluebird -- testified at trial that petitioner participated in the vicious attack against Brings Plenty. See Pet. App. 5a ("Every witness who was able to identify the individuals involved testified about [petitioner's] active participation in the vicious group beating that killed Brings Plenty."); ibid. (determining that, even if petitioner played less of a role in the beating than Goings's testimony indicated, the jury "had before it ample evidence to find [petitioner] guilty of aiding and abetting second degree murder"). For example, Goings testified at trial that petitioner hit Brings Plenty with some kind of "brick" as Brings Plenty was trying to run away and then began kicking Brings Plenty in the face as he lay on the ground, while Steele hit him with a machete and others hit or kicked him as well. Tr. 112, 115-116; see Tr. 117-119. Bluebird similarly testified that petitioner was part of the group that "attacked" Brings Plenty, Tr. 190, and that he saw petitioner kick the victim, Tr. 199, 204.

Second, petitioner himself admitted at trial that he was involved in the attack, as he testified at trial that he was part of the group attacking Brings Plenty, he hit him three times, and

that it "wasn't a fair fight." Tr. 596; see Pet. App. 5a; also Gov't C.A. Br. 9-10. Petitioner's own prior statements to investigators were also part of the record evidence. A federal agent testified at trial about the development of petitioner's statements to investigators over the course of his various interviews, including petitioner's admission during those interviews that was a member of the group that went to the Quiver residence looking for a fight, Tr. 309; that he punched Brings Plenty in the face during the fight, Tr. 309, 311; and that he had lied to investigators when he made earlier statements minimizing his involvement, Tr. 309. And the jury heard a redacted recording of petitioner's fourth interview with investigators, Tr. 320, in which he admitted to hitting Brings Plenty twice and that he was "all for" the fight, Gov't C.A. Br. 8-10.

The fact that the jury heard petitioner's testimony, weighed his credibility, and rejected his efforts at trial to minimize his involvement in Brings Plenty's death provides strong additional evidence of his guilt. See United States v. Williams, 390 F.3d 1319, 1325 (11th Cir. 2004) ("Most important, a statement by a defendant if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt.") (quoting United States v. Brown, 53 F.3d 312, 314 (11th Cir. 1995), cert. denied, 516 U.S. 1111 and 116 S. Ct. 909 (1996)). The court of appeals thus correctly determined that petitioner was not entitled to reversal of his conviction on plain-error review.

2. This decision below does not implicate any conflict among the courts of appeals. Petitioner contends (Pet. 8) that "every circuit to confront the question has found reversible error when a criminal conviction depends upon the vouched-for credibility of a key government witness." In appropriate cases, the court below has done so as well. See Maurer v. Dep't of Corrections, 32 F.3d 1286, 1289-1291 (8th Cir. 1994). But it correctly determined that such relief was unwarranted here.

In the circuit decisions on which petitioner relies, the courts acknowledged, as did the court of appeals here, that the challenged comments must be examined in context of the entire trial -- in light of factors such as the severity of the misconduct, the extent to which the prosecution relied on the vouched-for statements, any curative instructions, and the strength of the government's other evidence. See, e.g., United States v. Manning, 23 F.3d 570, 574 (1st Cir. 1994). For example, in United States v. Gracia, 522 F.3d 597 (2008), the Fifth Circuit noted that, "more often than not, [it] ha[d] held instances of witness bolstering by prosecutors to be error but ha[d] gone on to find such error harmless rather than reversing the jury conviction of a defendant." Id. at 605-606. The court reversed the conviction in that particular case because of "the degree of the prosecutor's violations," id. at 606, which involved four statements in his closing argument improperly vouching for the credibility of government witnesses, and because it found no evidence other than

the vouched-for statements to establish the defendant's guilt, id. at 508, 604-606.

Those decisions accordingly do not establish that any court of appeals would have reversed petitioner's conviction on the specific set of facts here. No further review of petitioner's fact-bound claim is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SANGITA RAO
Attorney

SEPTEMBER 2019