No. 19-6232

ORIGINAL

In The
Supreme Court of the United States

JASON JAMES NEIHEISEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Pro se, Jason James Neiheisel
68726-018

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QUESTIONS PRESENTED

A fundamental principle of our jurisprudence is that the burden of proof rests solely with the government. The circuits' split and inconsistent application concerning this issue begs the Supreme Court to remedy the principle's devolution by establishing the threshold of reversible error and what constitutes sufficient evidence, otherwise, appellate courts will continue affirming convictions which lack an essential element of the crime.

The questions presented are:

I. Whether the Eleventh Circuit, on review for sufficiency of evidence, can affirm a conviction citing the verdict itself; on the supposition the jury could have found the defendant's demeanor to be "substantive evidence of guilt," filling the gap in the government's proof. The Fourth, Fifth, Seventh and Eleventh Circuits are firmly in contrast with the Second, Sixth and DC Circuits.

II. Whether the Eleventh Circuit committed reversible error, as is believed by the First and Ninth Circuits, in allowing a prosecutor to ask a testifying defendant if a federal agent is lying.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jason James Neiheisel, respectfully petitions for a writ of certiorari to review judgement of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion was published at United States v. Jason James Neiheisel, 2019 U.S. App. LEXIS 13466 (filed May 6, 2019) (Pet. App. 01a). Petitioner timely filed a Petition for Panel Rehearing which was denied by the original panel on July 16, 2019.

JURISDICTION

The Eleventh Circuit issued its opinion on May 6, 2019. See Pet. App. 01a. The Petition for Rehearing was denied July 16, 2019. See Pet. App. 17a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

2252 Certain activities relating to material involving the sexual exploitation of minors.

Section 2252(a)(2) of Title 18 provides, in relevant part:

(a) Any person who--

(2) knowingly ... distributes, any visual depiction using any means ... of interstate ... commerce ... by any means including by computer.

Section 2252(b)(1) of Title 18 provides, in relevant part:

(b)(1) Whoever violates ... paragraph ... (2) ... of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years.

RELEVANT CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution provides, in relevant part:

No person shall be ... deprived of ... liberty ... without due process of law.

Amendment VI of the United States Constitution provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... ; to be confronted with the witnesses against him ...

STATEMENT OF THE CASE

1. Jason James Neiheisel and his fiance shared a two-bedroom ground floor apartment within a large complex in Jacksonville, Florida. Mr. Neiheisel, his fiance and guests accessed the internet through a wireless router connected to an I.P. address assigned to their apartment. Both Neiheisel and his fiance owned computers. Neiheisel owned a personal Microsoft tablet as well as a laptop provided by his employer, General Electric. A floor to ceiling window of the guest bedroom was adjacent to the front door, dog path and general sidewalk, which connected to the nearby pool and common area. The password to the wireless router was prominently displayed by the couple on a chalkboard just inside the guest bedroom; posted so guests could access the internet.

2. In February 2016, a Columbia County sheriff's deputy searched for and found a host computer in the Jacksonville area that contained files indicative of child pornography videos. This unknown computer was using the I.P. address number assigned to Neiheisel's apartment. Beginning on February 6, 2016, the deputy began to download file titles from an unknown computer and did so through February 8, 2016. After two video segments were downloaded on February 7, 2016, he turned the results of the investigation over to the FBI's Jacksonville office in May of 2016. The FBI assigned the case to a new agent who conducted a limited investigation consisting of two meetings with Neiheisel in April of 2017. The interviews were not recorded or summarized to be confirmed and signed. The two agents conducting the interviews seized Neiheisel's Microsoft tablet computer during the first interview. A written FBI report ("302") stated they had done so because Neiheisel admitted to just recently viewing the two videos in question on his Microsoft tablet. The inspection, however, later revealed no evidence that Neiheisel had ever

searched for, viewed, downloaded, saved or distributed any form of child pornography. Therefore, a second unrecorded interview was set up in April of 2017 and another FBI report ("302") was written. Neiheisel was arrested May 4, 2017. A two count indictment charged that Mr. Neiheisel, knowingly distributed on or about February 6 and 7 2016 (counts one and two), images of a minor, depicting the minor engaging in sexually explicit conduct, using a facility of interstate or foreign commerce, both in violation of 18 U.S.C. 2252(a)(2). After trial, the government dismissed count 2.

3. The case proceeded to trial, and the focus of trial centered on the two meetings Mr. Neiheisel had with the agents. The agents testified that Neiheisel admitted during their first interview, that he used his Microsoft tablet to search for child pornography on the internet, download the pornography on occasion, and store it in saved folders. The agents also testified that Neiheisel admitted in this interview to having downloaded and viewed the two videos (counts one and two) on the seized computer, having viewed one only a week before that April 11, 2017 meeting. Most importantly, to proffer the knowledge element of the offense, the agents testified that Neiheisel admitted during the second interview that he understood using a peer-to-peer software program allows files in a shared folder to become available to others. Neiheisel testified on his own behalf; that he did not tell the agents he had searched for, viewed, downloaded, saved or knowingly distributed any child pornography. He also denied telling the agents he understood how a peer-to-peer program allows others to access other computers and their files. He testified to telling the agents he had only ever downloaded one commercially made movie, "Elf." The FBI's forensic expert agreed with Neiheisel; there was no evidence that child pornography had ever

been searched for, viewed, downloaded or placed into a shared folder. The expert testified to there being one commercial movie ever downloaded; "Elf." The case, therefore, hinged solely on the jury's credibility determinations. On cross-examination, the prosecutor asked Neiheisel six times to state whether he believed the federal agents were being truthful in their testimony or whether they were making it up. Neiheisel tried repeatedly to refuse calling the federal agents liars. The trial judge criticized Neiheisel's reluctance to answer the improper questions, overruled his attorney's objections of them, and ordered Neiheisel to answer the improper questions. See Initial Brief of Appellant 25-27 (filed October 25, 2018). The resulting Motion for Mistrial based upon those improper questions was denied. At the close of trial, the Motion for Judgement of Acquittal for insufficient evidence was also denied.

4. On appeal, Mr. Neiheisel argued insufficient evidence supported his conviction and the uncorroborated confession could not be considered evidence of his guilt. Pet. App. 03a. See Initial Brief of Appellant 16-22 (filed October 25, 2018). The only evidence of the knowledge element was proffered through circumstantial testimony by the agents, conflicting with Neiheisel's testimony, and not for any reason made more credible than Neiheisel's testimony. Therefore, without any evidence of where Neiheisel was on the dates charged, proof he had the mens rea to distribute the videos from an unknown computer, or any other evidence outside the agents' attacked testimonies, proof beyond a reasonable doubt of knowing distribution was not offered to the jury. Mr. Neiheisel also argued, amongst other instances of prosecutorial misconduct, that the precedent set forth in United States v. Schmitz, 634 f.3d 1247, 1268 (11th Cir. 2011) deprived him of a fair trial when the prosecutor asked him six times to state whether the federal agents were lying. Pet. App. 07a. See

Initial Brief of Appellant 25-27 (filed October 25, 2018).

5. The Eleventh Circuit quickly rejected both claims. The opinion stated regarding sufficient evidence that United States v. Shabazz, 887 f.3d 1204, 1220 (11th Cir. 2018) allows Neiheisel's testimony denying guilt to now in fact on appeal become "substantive evidence of his guilt," which suddenly satisfies the missing knowledge element. Pet. App. 06a. Recognizing the six "were they lying" questions on cross-examination were error, the opinion stated that these properly preserved errors did not effect Neiheisel's substantial rights, citing sufficient evidence of guilt including "false testimony at trial," which is only assumed by the appellate court by way of the challenged verdict. Pet. App. 11a. No further explanation was made in how prosecutorial misconduct damaged Neiheisel's credibility and affected his testimony, which is now said to prove an element by substantive evidence, and therefore is used to deem the initial prosecutorial misconduct as harmless.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to settle wide circuit split regarding an unanswered question of federal law. This important Constitutional question impacts the rights of every future defendant and will have nationwide consequences in front of every judge and juror.

Absent the issue of credibility, the government would have had no case. The defense calls its next witness, and as the defendant makes his way towards the stand, the United States District Attorney sits back with a feeling of relief. He knows he can now cross the bounds of acceptable questioning and even commit misconduct. This case is surely to be decided on witness credibility and he knows to proceed at any cost; damage the defendant's credibility by any means possible and bolster the government's. After all, circuit precedent is allowing misconduct and error to be deemed harmless upon review based simply because the defendant testified. What does an appellate

court do when the government presented some evidence, but that evidence is insufficient to affirm the conviction, and the district court did not end the case? Should the appellate court affirm on the supposition the defendant's demeanor filled the gap in the government's proof; or should the court reverse because the record does not reveal sufficient evidence to support the conviction? United States v. Zeigler, 994 f.2d 845 (D.C. Cir. 1993). Courts must assume, guess or speculate what the jury might have observed at trial, yet some will apply that as additional affirmative evidence for the government; as if it were a confession on record. The defendant's testimony becomes substantive evidence of guilt, making him a witness against himself and supplementing the government's burden. But does the government not bear its own burden of proof?

"Do not testify!"

Attorneys have the duty to inform their clients that taking the stand poses a risk. Any defendant fit for trial must know that if he lies or gives unbelievable testimony, surely it will be used in the government's favor. Yet a defendant offering truthful testimony must not fear that the judicial process will punish him for doing so. Why then, are attorneys continuing to tell defendants, "do not testify." How has our judicial process been allowed to devolve to a point where defendants are being warned about the dangers of defending themselves; that before trial ever begins, a defendant learns the Fifth and Sixth Amendments have been pulled from his table and the scales are tipped against maintaining innocence and taking the stand? It is because our courts today have lessened the threshold for proof beyond a reasonable doubt, allowing violation of defendants' basic rights and the requisite for a fair trial - the due process of law found in the Fifth Amendment.

Since 1995[1] and advanced still today[2], the evolution of a dangerously vague statement has allowed the Eleventh Circuit to erroneously transfer the government's burden of proof and thereby effectively silence defendants or penalize them for defending themselves. "A statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt." United States v. Shabazz, 887 f.3d 1204, 1220 (11th Cir. 2018). The Eleventh Circuit has taken this language born out of conspiracy case law and molded it into an ironclad stamp of affirmation for all cases with a testifying defendant.

The Fifth Amendment orders the government's burden of proof to be proof beyond a reasonable doubt. Either this threshold is met or it is not. When the threshold is met, surely there is no need to point to a defendant's testimony denying guilt as additional affirmative evidence of guilt, unless that testimony in fact clearly offered evidenced guilt. On the other hand, if the reviewing court sees need to credit the government with additional affirmative evidence of guilt from the possibility the jury disbelieved the defendant, is that not an acknowledgment that the threshold of sufficient evidence was not met? Why else would there be need to continue to search for and explain this "now affirmative evidence" on review? The burden of proof beyond a reasonable doubt lies in the district court room, at the hands of the government and made known by the jury. It should not be, but currently is, the appellate court's pleasure to opine, after trial, whether there could still be found any additional affirmative evidence to uphold an otherwise deficient case. Our appellate courts, while reviewing sufficiency of evidence, have the duty to uphold the Fifth and Sixth

1 United States v. Brown, 53 f.3d 312, 314 (11th Cir. 1995)
2 United States v. Shabazz, 887 f.3d 1204, 1220 (11th Cir. 2018)

Amendments and protect citizens from wrongful convictions rather than find the missing element of the case. Sufficient evidence of guilt must be established before a jury and the day we find our appellate courts citing this failure, then resolving it themselves by way of the defendant's own profession of innocence, must give us pause. The time is ripe to review the Constitution and correct this standard of review.

While beginning with United States v. Brown, 53 f.3d 312, 314-315 (11th Cir. 1995), the Eleventh Circuit has more recently used United States v. Shabazz, 887 f.3d 1204, 1220 (11th Cir. 2018) for, "A statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt." In other conspiracy cases like Brown and Shabazz, the application of "substantive evidence" has been correctly applied when one of two scenarios are apparent. First, in cases where credibility determinations are partnered with other "ample evidence" to support a conspiracy, and the defendant's testimony conflicts with that evidence, it can reasonably be assumed the jury chose to disbelieve the defendant's testimony. See Shabazz at 1220. Secondly, and more definitively in Brown, "the [defendant's incredible testimony], combined with other evidence of his involvement in these conspiracies, convinces us that there was sufficient evidence to sustain his convictions." United States v. McCarrick, 294 f.3d 1286, 1293 (11th Cir. 2002). When testimony conflicts with ample evidence or when the testimony itself is impossible, the court can rightfully draw factual conclusions in its declaration of substantive evidence by way of testimony. But it must be remembered this is only one part of review. "Our cases since Brown have reiterated the government's fundamental obligation to establish guilt in its case-in-chief." McCarrick at 1293.

Eleventh Circuit District Judge Corrigan has already opined his fears of this precedent. "I regard the Court's discussion of Brown concerning the use of the defendant's denial of guilt as substantive evidence of guilt as dicta and potentially problematic."[3] He also stated that it remains unclear in the Eleventh Circuit when negative inferences from a defendant's denial of guilt can be used by an appellate court to remedy an otherwise deficient government case. While precedent states there must be some corroborative evidence, Judge Corrigan's reasoning is spot on. "How much evidence is necessary, short of evidence establishing guilt beyond a reasonable doubt?" Cases of precedent are silent and it remains unclear today. Other courts have recognized this problem, too. The Second Circuit in Sliker[4] held demeanor evidence could not remedy a deficiency in the government's case. The Fourth Circuit in Burgos[5] directly contradicts the Second Circuit. However, Judge Michael (joined by four others) chose to adopt the Second Circuit's long standing view (see Dyer v. MacDougall[6]) and stated, "to hold that the Government can be credited with additional affirmative evidence of guilt based on negative credibility determinations made against the defendant would relieve the Government of the burden of proving its case." Burgos at 892 (dissenting in part and concurring in part). Also adopting the Second Circuit's rule, the Sixth Circuit in Bailey[7] stated, "Although the sufficiency-of-the-evidence standard is highly deferential to the jury, we cannot let this deference blind us on review to the government's burden to prove guilt beyond a reasonable doubt." In Nishikawa v. Dulles[8], the Supreme Court

3 United States v. Williams, 390 f.3d 1319 (concurring opinion) (11th Cir. 2004)
4 United States v. Sliker, 751 f.2d 477, 495 n.11 (2nd Cir. 1984)
5 United States v. Burgos, 94 f.3d 849 (4th Cir. 1995)
6 Dyer v. MacDougall, 201 f.2d 265 (2nd Cir. 1952) (Hand, J. raising the problem of allowing the government to prove its case by having appellate courts assume that which is at issue: whether there is substantial evidence to support the verdict, but now taking the view most favorable to the government)
7 United States v. Bailey, 553 f.3d 940, 947 (6th Cir. 2009)
8 Nishikawa v. Dulles, 356 U.S. 129, 137 (1958)

reversed because the government did not prove a "voluntariness" standard of proof by "clear, convincing and unequivocal evidence," and would not allow petitioner's story to fill in the evidentiary gap in the government's case. Yet in direct contrast, the Seventh Circuit in Zafiro[9] stated that this exact matter should be of little concern because, "if the government has presented no evidence, the district court will quickly end the case by entering a judgement of acquittal." This can only be regarded as true, though, if we assume no district court will ever err in its rulings. The D.C. Circuit stated well in Zeigler[10], disagreeing with the Seventh Circuit, "Appellate review of the sufficiency of the evidence protects against wrongful convictions. We refuse to destroy the protection in cases in which defendants testify." Why then, has the Eleventh Circuit been allowed to do just that?

In Petitioner's case, the court states its view on this matter as, "The jury's guilty verdict reveals that it found the agent's version of events more credible and disbelieved Neiheisel's version..." which means the jury was free to "use it as substantive evidence of his guilt." Pet. App. 06a. But when the verdict itself is under review, should it be cited as evidence to uphold itself? Regardless, this is a misapplication of law. Petitioner's testimony contradicted no fact or evidence, was not inconsistent or implausible, and in fact aligned with the forensic evidence which supported acquittal. Therefore, the Eleventh Circuit's only path to use his testimony as substantive evidence of the missing element was to cite the verdict alone. The Supreme Court in Jackson v. Virginia, 443 U.S. 307, 317 (1979) has already offered contrary guidance on doing so. "This sort of approach, beginning with the hypothesis

9 United States v. Zafiro, 945 f.2d 881, 888 (7th Cir. 1991)
10 United States v. Zeigler, 994 f.2d 845, 850 (D.C. Cir. 1993)

that the jury must have gotten things right, contradicts the reasons appellate courts review convictions for sufficiency of evidence -- that juries sometimes get things wrong." Zeigler at 849. The Supreme Court has wisely stated, "Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result." Holland v. United States, 348 U.S. 121, 140 (1954).

Petitioner's case was close as evidenced by the overwhelming void of evidence, lengthy jury deliberations, written questions from the jurors looking for credibility information, and the district judge having to rely on the Allen Charge for a Friday night, 11th hour verdict. An essential element of the offense could only be found if the jury believed the government agent's testimony over Petitioner's. The Eleventh Circuit acknowledges credibility damaging misconduct occurred six times during Petitioner's cross-examination, yet it still chose to remedy all of this by taking Petitioner's own sworn testimony of innocence and making it affirmative evidence of his guilt, which is then also cited in making harmless those very errors which affected his testimony and substantial rights. The appellate court took the evidence in the light most favorable to the government, but it cannot be assumed the jury did.

II. This Court should grant review to settle circuit split and establish when this prosecutorial misconduct affects a defendant's substantial rights, as it invades the province of the jury.

For the last several decades, appellate courts have pleaded with the office of the United States Attorney to abide by the rule calling "were they lying" questions improper.[11] Yet the courts' demands are largely ignored and in nearly every circuit this misconduct is performed. It is no secret, misunderstood technicality or honest mistake. Why, then, does the government

11 "It is improper for the government to ask a testifying defendant whether other witnesses are lying." See United States v. Schmitz, 634 f.3d 1247, 1268 (11th Cir. 2011) collecting cases.

continue to toy with one of the most prestigious aspects of our trials; witness credibility determinations being the sole province of the jury? "[T]he Supreme Court has never held that a prosecutor commits misconduct when he asks a defendant whether another witness is lying."[12] In cases hinging on close witness credibility, the United States Attorney continues to find safe and effective a form of misconduct that openly destroys the fundamental fairness of trial. All the while, defendants across the country are forced into no-win credibility battles in front of the jury.

At what point will our judges enforce that testifying defendants are not to be forced into making credibility assessments of adversary government witnesses in front of the jury, especially when the purpose of doing so carries no probative value. Every circuit other than the Fourth and Eighth has agreed these questions are improper. They 1) violate Fed. R. Evid. 608a, 2) ignore other possible explanations for inconsistent testimony, 3) force the defendant to appear accusatory and 4) invade the province of the jury.[13] But prosecutorial misconduct warrants reversal only when the misconduct affects the substantial rights of the defendant. Without Supreme Court guidance, the circuits have and will continue to split in their rulings of whether this misconduct is substantially prejudicial or merely harmless. The courts will continue to rule differently on the same misconduct citing failure to have clearly established federal law made by the Supreme Court.

Petitioner was asked six times, over objection, to sate that FBI agents lied since their testimony directly conflicted with his. The analysis of this misconduct differs greatly depending on which circuit would review.

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12 Carrillo v. Arnold, 2017 U.S. Dist. LEXIS 30633 at 28 (9th Cir. 2017)
13 United States v. Schmitz, 634 f.3d 1247, 1268-69 (11th Cir. 2011)

As expected, the first steps most courts will take in review is to find whether the error is plain or if the misconduct was properly preserved. In two similar cases, the First Circuit[14] reversed after reviewing only the specific questions properly preserved while the Ninth Circuit[15] reversed for the same misconduct even under a plain error analysis. Petitioner's Eleventh Circuit deemed the same misconduct, properly preserved, as harmless error. Pet. App. 16a. It is remarkable that one circuit will rule plain error while another rules it harmless, even though the harmless error doctrine had no place in that instance. After all, the government's case against Neiheisel existed only through circumstantial evidence as witness testimony was the only proffer of one of the statute's essential elements. Absent the issue of credibility, the government would have had no case. This highlights a second portion of analysis which some courts primarily focus on. Judges frequently weigh their independent views of the misconduct against any affirmative or mitigating evidence brought forth in the case. And, sans independent substantial evidence, the courts have no benchmark to consistently weigh the severity of the misconduct. Petitioner never accused or suggested the agents lied before the improper questions were asked. Yet in some instances, courts give opinion that this third consideration of "opening the door" to the questions can be used to lessen their prejudicial impact. A fourth topic of discussion which some courts focus their evaluation on is the presence of any curative instruction. Some courts deem harmless the questions when they can safely point to a vigorous curative instruction. Without any curative instruction, Petitioner's trial judge told his attorney to sit down as he tried to object and furthermore chastised Petitioner for

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14 United States v. Pereira, 848 f.3d 17 (1st Cir. 2017)
15 United States v. Geston, 299 f.3d 1130 (9th Cir. 2002)

attempting to avoid the improper questions. The Eleventh Circuit still deemed the errors harmless. Even more, other opinions base discussion on the identity of the witness the defendant was asked about; whether they were a government agent or merely another lay-witness. After decades of agreeing these questions constitute misconduct, the courts cannot agree on a threshold which signals reversible error. Without some clearly established federal law, the disposition and reasoning behind each occurrence is anything but consistent or predictable. More importantly, this lack of clarity allows prosecutors to continue this known misconduct and see that the ambiguity of its review covers the real-time prejudicial impact it has in front of the jury.

Supreme Court intervention is further needed in assisting the courts' ability to weigh the misconduct in each individual case upon review. As the Supreme Court has explained regarding a prosecutor's comments, "for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."[16] At Petitioner's trial, the government agent testimony was essential and primary to the government's case. Besides that testimony, there was no other evidence which could be inferred to support a conviction; the outcome hinged on witness credibility as that was the sole proffer of guilt. Lacking the advantage in credibility, the prosecutor knew he must tip the scales, and did so, through six examples of misconduct. The preserved errors were extremely prejudicial. The jury deliberated over the course of two days requiring the judge to eventually read the Allen Charge. The jury asked questions in an attempt to find more proof of witness credibility. Clearly they had not crossed the threshold of beyond a reasonable doubt. Had the misconduct not occurred,

16 United States v. Young, 470 U.S. 1, 11 (1985)

Petitioner's credibility would have remained intact as it already aligned with all forensic evidence. The Eleventh Circuit acknowledged the questions were misconduct, yet stated that "if the record reveals sufficient independent evidence of guilt, then the government's improper questions are deemed harmless because the questions did not change the outcome of the trial and, thus, did not affect the defendant's substantial rights." Pet. App. 08a. The sufficient independent evidence the court is referring to is Petitioner's "false testimony" and it becoming "substantive evidence of guilt" which are direct results of his damaged credibility and the resulting verdict. If Petitioner's testimony is said to carry so much weight that it can offer evidence of guilt, how can the errors affecting his testimony be harmless? The courts must fully look into the context of these misconducts and be able to accurately dispose of the appeals they bring. The court clearly did not review the misconduct in the environment it took place. For decades judges have written page after page about the seriousness of this misconduct, but because it has never been made into clearly established federal law, it is so often taken lightly as has happened here. The Eleventh Circuit stated, "Credibility determinations are left to the jury." Pet. App. 04a. At the same time this court in Schmitz at 1269 states this very misconduct "invade[s] the province of the jury."[17] The logic of these two holdings requires the court to see prejudice, but these improper questions lack the established law they need and therefore are swept under the rug.

The very structure of these questions is aimed at forcing the defendant to abandon his own testimony, which would otherwise be probative to the jury, and instead spend time becoming an accusatory witness suggesting a government official is trying to deceive the court. It becomes a simple tactic of forcing

17 United States v. Schmitz, 634 f.3d 1247, 1269 (11th Cir. 2011)

the defendant to look bad by avoiding the facts of the case and instead place blame on another witness. These questions focus on form over substance, as a witness cannot know whether another witness is trying to intentionally deceive the court. The questions have no possibility to ascertain any truth which proves they are designed entirely for another purpose. Neiheisel's experienced prosecutor knowingly deployed this tactic, stating, "Well, my question is designed to get your comment." Tr. Tr. 3-276. It is unfortunate that these questions have been able to occur as long as they have; that otherwise fair trials can be tainted with unfairly damaged witness credibility and the verdict left to stand because the disposition of the errors has not been appropriately addressed. The improper questions have and will continue to reach far and wide. Decades of appellate court opinion document both the lack of and need for uniform federal law that addresses this misconduct which invades the most precious aspect of our trials; the jury's province. If we will continue to rely on juries to be the sole judges of witness credibility, then so long as we have trials they should not be disturbed in their finding of it.

CONCLUSION

The guarantee of procedural fairness flows from the Fifth Amendment due process clause of the United States Constitution. Sufficient evidence must prove every element of a crime beyond a reasonable doubt, through a fundamentally fair trial. This Petition brings forth both procedural misconduct which affects the fairness of trial as well as appellate procedure which allows due process violations to stand. Our citizens rely on the Fifth and Sixth Amendment guarantees, and this Petition invites the Supreme Court to restore the safeguards related to the questions presented herein. For the foregoing reasons, this Petition should be granted.

I declare under penalty of perjury that this petition was placed within FCI Elkton's internal legal mail system and that first-class postage was prepaid on 10-4-2019.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 10-4-2019.

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