IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

_____

No. _____

STEVEN WILLIAMS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

_____

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

_____

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November 6, 2019

QUESTION PRESENTED

Whether it is a violation of due process for the government to bolster the testimony of cooperating witnesses by introducing the 'truth-telling' aspects of their cooperation agreements during direct examination, before their credibility had been questioned, and for the government to improperly vouch for its witnesses by suggesting that it knows the 'truth,' and by linking its credibility to that of its witnesses.

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TABLE OF AUTHORITIES

Petitioner, Steven Williams, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 13, 2019.

OPINION BELOW

The decision of the Second Circuit, United States v. Williams, ___ Fed. Appx. ___, 2019 WL 4389136 (2d Cir. 2019), appears in the Appendix hereto, at 25-31.

JURISDICTION

The judgment of the Second Circuit was entered on September 13, 2019. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was charged by Superseding Indictment with conspiracy to distribute, and possess with intent to distribute, one kilogram or more of

heroin and five kilograms or more of cocaine, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(A), and 846, and money laundering, in violation of 18 U.S.C. §1956(a)(1)(A)(i) and (2). After a jury trial, Petitioner was convicted of the drug count and acquitted of the money laundering count. The court sentenced him to 150 months' imprisonment, to be followed by a five-year term of supervised release.

The evidence, viewed in the light most favorable to the government, showed that Petitioner, who was in the music promotion business, transported cocaine and heroin from California to New York. Patrick 'Fifty' Edwards, a cooperating witness, testified that Petitioner had him rent a storage unit in California. Petitioner leased a storage unit in the New York area. According to Edwards, Petitioner arranged to use freight shipping companies both to send the drugs to New York, and to send the proceeds back to California. The drugs and money would be hidden inside large copying machines or music equipment such as speaker boxes. Records of the freight shipping companies showed over two hundred shipments between Edwards and Petitioner.

This arrangement continued from approximately 2008 through 2015, initially with different suppliers furnishing the drugs to Edwards. In 2013, however, Edwards began dealing exclusively with Juan Arreola, who

supplied one to ten kilograms of cocaine on a monthly basis. Beginning in 2014, Arreola also supplied approximately two kilograms of heroin monthly to be shipped to New York.

The scheme came to a close in September 2015, with Edwards' arrest after he participated in a delivery of a kilogram of heroin at a mall in Queens. Facing both criminal charges and immigration issues, Edwards became a government informant. He was the only member of the conspiracy who dealt with Petitioner. No other conspirator had any contact with or knowledge of Petitioner. No drugs were ever found on Petitioner, he was never caught or even referred to on intercepted calls and texts, and no evidence of drug distribution by Petitioner in New York (or elsewhere) was ever uncovered.

REASONS FOR GRANTING THE PETITION

This case presents important questions of federal law that have not been, but should be, settled by this Court.

A. Improper bolstering

At trial, three cooperating witnesses testified for the government. Louis Lombard, a middle man in the scheme, testified pursuant to a cooperation agreement. The government introduced that agreement in its direct examination. It asked Lombard about his obligations under the agreement, to which Lombard replied: "To not commit any further crimes,

to tell the truth, to be available to meet with the government and also to testify."

After extensive questioning about his hopes for a 5K1 letter, this colloquy ensued:

> Q. Mr. Lombard, what do you hope to get when you are ultimately sentenced?
>
> A. I hope to get time-served.
>
> Q. Mr. Lombard, as you understand it, what happens if you don't tell the truth today?
>
> A. I wouldn't be eligible for the 5K1 letter.
>
> Q. What effect would that have on your potential sentence?
>
> A. I wouldn't be able to get under the mandatory minimum, 10 to life.
>
> Q. If you tell the truth during your testimony and the defendant is found not guilty at this trial, do you get your 5K1 letter?
>
> A. Yes.
>
> Q. If you lie during your testimony today, but the defendant is found guilty, do you get your 5K1 letter?
>
> A. No.

On cross-examination, the court sustained objections to questions about who decided whether or not the witness had been truthful.

Miguel Chavez, another cooperating witness who earned commissions by introducing people to drug suppliers testified at trial. The government

introduced his cooperation agreement in its direct examination. This questioning followed:

> Q. Mr. Chavez, as you understand it, what are your obligations under the cooperation agreement?
>
> A. My obligations are to be honest with the government, to not commit any more crimes, testify, and just tell the truth.

After a long examination about the witness's hopes for a 5K1 letter, the questioning continued:

> Q. Mr. Chavez, as you understand it, what happens if you don't tell the truth today?
>
> A. I don't get a 5K1 letter.
>
> Q. What effect will that have on your potential sentence?
>
> A. It would keep my sentence at a ten-year minimum to life.
>
> Q. As you understand it, what happens if the government learns that you lied during your cooperation at any point?
>
> A. I don't get the 5K1 letter.
>
> Q. If you tell the truth during your testimony today but the defendant is found not guilty at this trial, will you still get a 5K1 letter?
>
> A. Yes.
>
> Q. If you lie during your testimony today but the defendant is found guilty, do you still get your 5K1 letter?
>
> A. No.

Patrick Edwards, the only witness who linked Petitioner to the drug scheme, also testified pursuant to a cooperation agreement. When asked on direct examination about his obligations under the agreement, Edwards answered: "To speak the truth, to testify, attend all meetings, commit no more crimes." After an extensive exchange about the 5K1 letter he hoped to receive, the government inquired further:

> Q. What is your understanding of what happens today if you don't tell the truth?
>
> A. I don't get a 5K1.
>
> Q. What effect does that have on your possible sentence?
>
> A. It wouldn't make my sentence lower.
>
> Q. It wouldn't make your sentence lower?
>
> A. Yes.
>
> Q. You testified earlier that you are a citizen of Jamaica.
>
> A. Yes.
>
> Q. Have you been promised any immigration benefits as a result of your cooperation?
>
> A. No, ma'am.
>
> Q. What is your understanding of what happens if at any point prior to your sentencing the government learns that you lied during your testimony?
>
> A. I won't get a 5K1.

Q. What effect does that have on your potential sentence?

A. My sentence won't be lowered.

Q. What happens if you tell the truth today but the defendant is found not guilty? Do you get your 5K1 letter?
A. Yes, ma'am.

Q. What happens if you lie during your testimony today but the defendant is found guilty? Do you get your 5K1 letter?

A. No, ma'am.

"Cooperation agreements … demand careful treatment under principles governing attack on and rehabilitation of witnesses' credibility." United States v. Cosentino, 844 F.2d 30, 32 (2d Cir.), *cert. denied*, 488 U.S. 923 (1988). The government is permitted to use cooperation agreements – specifically, the 'truth-telling' provisions – to rehabilitate witnesses whose credibility has been questioned. Id. at 33. The government may not do so, however, unless and until the witness's credibility has been challenged. United States v. Certified Environmental Services, Inc., 753 F.3d 72, 86 (2d Cir. 2014).

"[A]bsent an attack on the veracity of a witness, no evidence to bolster his credibility is admissible." United States v. Arroyo-Angulo, 580 F.2d 1137, 1146 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978). Whatever form the attack takes – in the defense opening statement or in cross-examination – "unless and until it occurs the Government may not

rehabilitate a witness by introducing the bolstering aspects of an agreement, whether by introducing the truth-telling provisions in particular or the agreement as a whole." Certified Environmental Services, Inc., 753 F.3d at 86.

Here, the government improperly bolstered the credibility of the cooperating witnesses on its direct examination. As to Lombard and Chavez, the government was not rehabilitating them, because their credibility had not been attacked. The Second Circuit held that although "the prosecution's elicitation of testimony regarding the truth-telling provisions of their respective agreements appears to have come before the defense attacked their credibility," this error did not seriously affect the fairness, integrity or public reputation of judicial proceedings. Williams, slip op. at 4, Appendix at __.

As to Edwards, it is true that the defense questioned his veracity in its opening statement. However, the problem with introducing a cooperation agreement promise of truthfulness is that "the fair implication is that the government has a means of evaluating the truthfulness of the witness's testimony." United States v. Renteria, 106 F.3d 765, 767 (7th Cir. 1997). In essence, the government is portraying itself as a guarantor of truthfulness.

The repeated references to the truthfulness provision in Edwards' cooperation agreement implicitly misled the jury:

> Such remarks are prosecutorial overkill. They inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts – something the prosecutor usually is quite unable to do.

Arroyo-Angulo, 580 F.2d at 1150 (Friendly, J., concurrence). "[T]he unspoken message is that the prosecutor knows what the truth is and is assuring its revelation." United States v. Roberts, 618 F.2d 530, 536 (9th Cir. 1980).

Moreover, the defense never challenged the truthfulness of the other two cooperating witnesses in its opening. Indeed, even in its extensive cross-examination of Lombard and Chavez, the defense did not attack the credibility of either. Accordingly, this was not simply an error in the timing of the introduction of the bolstering aspects of the cooperation agreement. Cf. Arroyo-Angulo, 580 F.2d at 1147. The 'truth-telling' provisions of the cooperation agreements should never have been introduced into evidence, much less repeatedly emphasized during the government's direct examination as they were here.

This error was exacerbated by the government's closing argument. It argued that "the reason why they're telling the truth, they're in sentence [sic] because if they lie even once, they don't get their 5K1 letters." It elaborated:

> Under the cooperation agreement, the only way they get out of that mandatory minimum is by getting a 5K1 letter, and the way they get that 5K1 letter is by telling the truth. They don't know what witnesses the government is talking to, they don't know the evidence the government has. For that reason, they knew that if they lied, they would get caught and they would go to jail for a long time. The risk they face by lying is enormous. The downside is devastating. So there is no reason for them to sign the cooperation agreement unless they had decided to tell the truth, and that is another reason you know they were telling the truth.

In it closing argument, the defense attacked the credibility of Patrick Edwards, but expressly did not challenge the credibility of the other cooperating witnesses. In fact, defense counsel said: "I'm not going to attack the cooperators in this case. I'm not going to attack what Mr. Chavez had to say because I submit to you what Mr. Chavez had to say was believable. What Mr. Lombard had to say, believable." Yet in its rebuttal closing, the government again stressed "[t]heir incentives are to tell the truth."

The entire case against Petitioner rested on the testimony of the cooperating witnesses. Although there was evidence corroborating certain aspects of their testimony, if the jury disbelieved the testimony of these witnesses, there would have been no conviction. The government certainly

recognized the importance of these witnesses: it referred to Chavez 30 times by name in its initial closing argument, Lombard 34 times by name, and Edwards an astounding 138 times by name. In its rebuttal, the government referred to Chavez 11 times, Lombard 12 times, and Edwards another 39 times.

The rule on witness bolstering is not complicated: unless and until a witness's credibility is impugned, the 'truth-telling' aspects of the cooperation agreement cannot be introduced, much less extensively inquired into by the government. "For us to disapprove of the present procedure permitting bolstering of the witness's testimony and then to declare it harmless error would make our remarks in the previous cases purely 'ceremonial.'" United States v. Borello, 766 F.2d 46, 58 (2d Cir. 1985).

B. Improper vouching

The government may not vouch for its witnesses' truthfulness, United States v. Carr, 424 F.3d 213, 227 (2d Cir. 2005), *cert. denied*, 546 U.S. 1221 (2006), nor suggest to the jury that information available to the government but not introduced at trial supports the credibility of witnesses. United States v. Spinelli, 551 F.3d 159, 168-69 (2d Cir. 2008), *cert. denied*, 558 U.S. 939 (2009). Prosecutorial vouching "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment

rather than its own view of the evidence." United States v. Young, 470 U.S. 1, 18-19 (1985).

To warrant reversal, an improper remark by a prosecutor must cause the defendant "substantial prejudice so infecting the trial with unfairness as to make the resulting conviction a denial of due process." Carr, 424 F.3d at 227 (citation omitted). Here, the government repeatedly vouched for its witnesses during its initial closing argument. For example, it told the jury "if they lie even once, they don't get their 5K1 letters." This is the government telling the jury that (1) it knew what the truth was, and (2) that is why the jury should accept the testimony of these witnesses.

It argued that the cooperators "knew that if they lied, they would get caught and they would go to jail for a long time." This was unsupported by record testimony. The evidence was that the witnesses believed that if they got caught lying, they would lose their 5K1 letters. The government was telling the jury, again, that it knew the truth, and that because it knew the truth, the witnesses would never lie.

The Second Circuit held that, even if certain of these statements could be construed as references to evidence outside the record, they did not cause Petitioner substantial prejudice or rise to the level of flagrant abuse. Williams, slip op. at 6, Appendix at __. The Second Circuit was wrong.

This was not simply a "rhetorical flourish." United States v. Williams, 690 F.3d 70, 76 (2d Cir. 2012). The government was telling the jury that it had the ability to divine the truth, and that it would not grant leniency if the witnesses lied.[1] It gave the jury its personal assurance why the jury should believe the cooperators – that is, that it would withhold the 5K1 letters from anyone who lied. "Because that recommendation [of leniency] is dependent upon whether the witness testifies truthfully, it is easy for a prosecutor to imply, either intentionally or inadvertently, that the prosecutor is in a special position to ascertain whether the witness was, in fact, testifying truthfully." United States v. Francis, 170 F.3d 546, 550 (6th Cir. 1999).

Vouching occurred here when the government improperly referred to evidence outside the record to argue that Edwards had told the truth. It argued:

> Ladies and gentlemen, I'd like to pause on all of those documentary records there. Think about it. Edwards has no idea that we have all of these. You heard from Special Agent Peters about all the work he did to subpoena these records…

[1] Not only was this remark improper vouching, it was incorrect factually. For example, Edwards hid his involvement in two shipments of marijuana, totaling over 100 pounds, until two weeks before trial. Edwards lied on his immigration documents, and did not inform the government of that until shortly before trial.

However, there was absolutely no evidence whether or not Edwards knew what records the government had in its possession. The record is bereft of anything that would show that Edwards had "no idea" that the government had those documents.[2] The government was arguing that information outside of that presented at trial – that is, what Edwards had or had not been told or confronted with at proffer conferences, for example – supported the version of events to which Edwards testified at trial.[3]

The government made a similar argument based on other evidence not presented at trial to argue that all three of the cooperating witnesses were truthful:

> Under the cooperation agreement, the only way they get out of that mandatory minimum is by getting a 5K1 letter, and the way they get that 5K1 letter is by telling the truth. They don't know what witnesses the government is talking to, they don't know the evidence the government has. For that reason, they knew that if they lied, they would get caught and they would go to jail for a long time. The risk they face by lying is enormous. The downside is devastating. So there is no reason for them to sign the cooperation agreement unless

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[2] Indeed, given that the government only procured the documentary records – the shipping records, the records of the storage unit – after Edwards disclosed the system he and Petitioner used to transport the drugs and money, it is unlikely that Edwards had "no idea" the government eventually obtained those records.

[3] The assertion by the government that the jury had "heard from Special Agent Peters about all the work he did to subpoena these records" was similarly unsupported by any evidence presented at trial (as well as irrelevant to the question of guilt).

> they had decided to tell the truth, and that is another reason you know they were telling the truth.

Again, there was no testimony presented to show that Lombard, Chavez, and Edwards lacked knowledge of witnesses to whom the government was talking or evidence the government had. The statement "they knew that if they lied, they would get caught and they would go to jail for a long time" presupposes that the government always finds out the truth, and always punishes those who lie. It puts the integrity of the government behind the testimony of the cooperating witnesses, and acts as an inducement to the jury to trust the government's assessment of the evidence rather than its own.

Similarly, the government's statement in closing that "if they lie even once, they don't get their 5K1 letter" relied upon a matter outside of the record. There was no evidence presented as to the prosecution's intent to grant or withhold the 5K1 letter, nor was this relevant to any issue in the case. The government's assertion that it would not issue the 5K1 letter "if they lie even once" was impermissible testimony on the part of the prosecutor. The remark put the government's imprimatur on the witnesses, and wrongly invited the jury to rely on its assurances that the witnesses couldn't be lying.

The fact that these remarks were made in the government's initial closing argument makes them that much more egregious. In United States v. Edwards, 723 Fed. Appx. 48 (2d Cir. 2018)(summary order), in which the Second Circuit upheld the conviction of coconspirator Juan Arreola, the defendant challenged almost identical remarks in the government's rebuttal. The government said, speaking as if one of the cooperating witnesses:

> I am going to know all along that the government is going to be doing background research, they are going to be investigating what I am telling them to try to see if I am lying. If I am lying, I know this is a risk, if I am lying, if they find out that I am lying, I'm going to go to jail for a long time.

The court held these remarks to be allowable because, unlike in the instant case, they were made in rebuttal of the defense closing. It found that "[t]he challenged statement was properly used as a hypothetical during the government's rebuttal in order to point out how defense counsel's assertion that 'all three of [the government's witnesses] lied to falsely convict Juan Pablo Arreola' was implausible." Id.

In this case, the defense had not yet made its closing argument when the government vouched for its witnesses. This was not a situation where the prosecutor's remarks were 'invited.' Cf. Young, 470 U.S. at 11-14. Indeed, in its closing, the defense did not attack the credibility of two of the cooperating witnesses, Lombard and Chavez. Therefore, the challenged

remarks by the government were not allowable as a "respon[se] to an argument that impugns its integrity or the integrity of its case." Carr, 424 F.3d at 227, *quoted in* Edwards, 723 Fed. Appx. at 52.

The government referred to other information not introduced at trial to vouch for Edwards in its rebuttal closing. It argued:

> Think about Patrick Edwards. He told the government about G, Mole, Mylo, Doug, Rudy, Chris, Juan. That's seven drug dealers who aren't Steven Williams. He didn't have to add Steven to get credit for cooperating. He's only got downside for lying. There is only risk to him if he lies and no upside.

The assertion that Edwards "didn't have to add Steven to get credit for cooperating" suggests that Edwards would have been eligible for a 5K1 letter if he only named the suppliers, and not the alleged buyer, of the drugs. There was absolutely no evidence to support this proposition, which seems unlikely at best.

At the end of its rebuttal, the government returned to this theme:

> You know these guys' incentives. You know Patrick Edwards' incentives. Their incentives are to tell the truth. None of these witnesses would ever think that they could get away with lying about Steven.
>
> You heard them testify. They know what they say is going to be investigated. They know the next person to be arrested could walk through those doors and blow their story out of the water.

Again, the government is vouching for 'these guys.' Specifically, the government is arguing that the cooperators could not get away with lying about Petitioner, because the government knows the truth.

Indeed, the government's statement that the cooperators "know what they say is going to be investigated" was not only unsupported by any evidence, it was actually belied by the record. This exchange occurred on redirect of Lombard:

> Q. Do you know all of the investigative steps the government has taken with respect to your case?
>
> A. No.
>
> Q. Do you know if the government has taken other steps to get information on your bank accounts?
>
> A. No.

By arguing that the cooperating witnesses were telling the truth because of their cooperation agreements, and implying that the government could and did ascertain that these witnesses were telling the truth, and suggesting there was evidence not presented at trial that corroborated the testimony of the cooperators, the government denied Petitioner his right to a fair trial – specifically, his right to have the jury, not the government, decide if the witnesses were telling the truth or were lying.

Nor were the jury instructions sufficient to cure this problem. Although the court told the jury that it had to determine whether the witnesses were being truthful, it did not tell the jurors that the prosecutors' assessment of credibility was irrelevant in that regard. Petitioner's right to due process right was violated here by both the witness bolstering and the witness vouching.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

November 6, 2019

Respectfully submitted,

/s/ Tina Schneider

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