19-6597

No. 18-798

IN THE
SUPREME COURT OF THE UNITED STATES

THIODORE IGOROVICH GALITSA

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully Submitted;

X_____
THIODORE IGOROVICH GALITSA
In the Pro Se Petition
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Staten Island, New York 10305

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Statement of Jurisdiction This is an appeal from a final judgment rendered on March 16, 2018, and entered on March 22, 2018, in the United States District Court for the Southern District of New York (Hon. Valerie E. Caproni), convicting appellant of illegal reentry after deportation and making false statements, and sentencing him to 15 months of incarceration and two years of supervised release. A notice of appeal was timely filed

on March 19, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

Question Presented

> Was Mr. Galitsa denied his right to a fair trial by the government's repeated questioning about allegations from a case dismissed for lack of evidence, the underlying facts of a prior conviction, and his prior arrests?

Statement of the Case

Thiodore Igorovich Galitsa was convicted after a jury trial of illegal reentry, in violation of 8 U.S.C. § 1326(a) & (b)(1), and making false statements, in violation of 18 U.S.C. § 1001(a)(2). On March 16, 2018, the court sentenced him to 15 months of incarceration on each count, to run concurrently, and two years of supervised release.

This Court continued the appointment of the Federal Defenders of New York as counsel on appeal under the Criminal Justice Act.

Statement of Facts

Introduction

Thiodore Galitsa was charged with illegally reentering the United States after being deported and making false statements to immigration officials that he had not been deported. At trial, he testified that, in 2011, immigration officials did not put him on an airplane to Ukraine and that he remained in the United States. His testimony that he had not been deported was the crux of his defense and his credibility was the key issue for the jury

Before trial, the defense moved to preclude the government from cross-examining Mr. Galitsa about his prior arrests and convictions. The court granted counsel's request in part, but allowed the government to inquire into the underlying facts of two petit larceny allegations. After Mr. Galitsa's direct testimony, however, the court changed this ruling, allowing questioning about a previously-excluded 1997 conviction and a 2014 forgery case. The forgery case had been dismissed and sealed due to a lack of evidence a crime had been committed.

Over numerous defense objections, the government asked Mr. Galitsa dozens of questions about the dismissed and sealed case, accusing Mr. Galitsa of forging checks to steal $25,000 from an old, sick man. It also it mischaracterized the petit larceny facts, calling it a grand larceny and exaggerating the allegations, making it seem as though Mr. Galitsa was lying when in fact it was the government that was confused. It also repetitively inquired about Mr. Galitsa's prior arrests.

Defense counsel's mistrial motion was denied and Mr. Galitsa was convicted.

Defense motion to exclude cross-examination questions about Mr. Galitsa's criminal history.

Before trial, the defense moved to preclude the government from introducing evidence of Mr. Galitsa's prior convictions and arrests. ECF 17-cr-324, Dkt. 36.[1] It included a chart:

[1] Page citations preceded by "A" refer to appellant's appendix, those preceded by "T" refer to pages of the trial transcript. Citations to "Dkt" refer to the ECF docket number for case number 17-cr-324.

Arrest Date	Conviction Date	Charge	Disposition
12/14/1996	2/7/1997	NY Penal Law 140.20: Burglary in the Third Degree	Felony conviction
8/21/2008	8/25/2008	8 U.S.C. § 1325: improper entry by alien	Misdemeanor conviction
8/26/2011	8/29/2011	8 U.S.C. § 1325: improper entry by alien	Misdemeanor conviction
7/14/2014	N/A	Charges include grand larceny and possession of stolen property	Dismissed
1/30/2015	N/A	Petit larceny	Dismissed
6/22/2015	1/25/2017	NY Penal Law 155.25: Petit Larceny	Misdemeanor conviction
2/13/2016	N/A	NY Penal Law 165.15: Intent to Obtain Transportation Without Paying	Dismissed

The defense argued that evidence of Mr. Galitsa's prior arrests were irrelevant and that there was a high risk of prejudice that the jury could convict based on a perception that he was a "bad person" even if the charges had been dismissed. *Id.* It also argued that the evidence of his prior convictions should be excluded under Federal Rule of Evidence 609. *Id.* Specifically, the 20-year-old burglary conviction was so remote that it had extremely little probative value. *Id.* Counsel argued that the misdemeanor convictions were not admissible because they did not require admitting a "dishonest act or false statement," citing *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977); *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005).

The government responded that it did not seek to introduce evidence of Mr. Galitsa's arrests or convictions. It did, however, seek to "challenge" his "character for truthfulness" by "inquiring as to specific instances of conduct" under Federal Rule of Evidence 608(b). Dkt. 38, citing, *inter alia*, *United States v. Elfgeeh*, 515 F.3d 100, 128 (2d Cir. 2008); *United States v. Desposito*, 704 F.3d 221, 234 (2d Cir. 2013). The government described the January 2015 case, which was dismissed, as Mr. Galitsa taking items from a store shelf, concealing them, and attempting to leave. It described the July 2015 case, which resulted in a 2017 misdemeanor conviction, as Mr. Galitsa changing the "price tag on an item to a less expensive price, self-scann[ing] the item at checkout, and attempt[ing] to leave." *Id.* at 7. It argued that using a "false pretense of switching price tags in order to pay a lower price" was probative of his character for truthfulness. *Id.*

The government noted that Mr. Galitsa was arrested by the New York Police Department ("NYPD") on March 1, 1999 and July 14, 2014, but the records were sealed. *Id.* The government stated that if it obtained those records it "may request permission" to inquire into that conduct as well. *Id.*

In reply, the defense argued that the government should not be permitted to use Rule 608 (b) to circumvent the strict provisions of Rule 609, citing, *inter alia*, *United States v. Osazuwa*, 564 F.3d 1169 (9th Cir. 2009). Dkt. 48.

Court excludes cross-examination about arrests and convictions, but allows questions into the conduct underlying two petit larceny cases, under Rule 608(b).

In an oral decision, the court addressed the interplay between Rules 608 and 609, noting that the Second Circuit "has not spoken on this precise issue," and rejecting the reasoning of the Ninth Circuit. A. 26-27. The court did not "perceive the same unfairness" as the Ninth Circuit in using Rule 608 to get in evidence excluded under Rule 609 "because the fact of a criminal conviction is especially damaging to credibility and likely to cause prejudice," which is why Rule 609 "requires heightened scrutiny." A. 27. The court asserted that, from the "standpoint of character for truthfulness, there is no reasoned distinction between shoplifting that is not prosecuted and shoplifting that results in a misdemeanor conviction." A. 26-28, citing *United States v. Barnhart*, 599 F.3d 737 (7th Cir 2010).

The court excluded the 1997 burglary conviction and underlying facts because the risk of prejudice outweighed any potential probative value given that the conviction was more than 20 years old and Mr. Galitsa was quite young. A. 28. It excluded both illegal reentry convictions because they were not relevant to Mr. Galitsa's character for truthfulness and the risk of prejudice was high. A. 26, 29. It also excluded cross-examination about the July 2014 arrest, "pending more information," and excluded questions about the 2016 arrest for fare evasion. A. 29-30. It permitted the government to cross-examine only about the facts underlying the 2017 petit larceny conviction and about the January 30, 2015 arrest. A. 29-30.

Trial

Prosecution Case

The parties agreed that Mr. Galitsa was a Ukrainian citizen who had never been a United States citizen. From August 26, 2011 to October 20, 2011, he was held in immigration custody in Texas and had an order of removal. On October 20, 2011, he was flown from San Antonio, Texas to New York's JFK Airport for the purpose of being deported to Ukraine. T. 34.

Kathrine Rey and Carlos Diaz, Immigration and Customs Enforcement deportation officers, met Mr. Galitsa at JFK after his flight from Texas landed and were in charge of accompanying him to the next flight. T. 40-41. Neither Rey nor Diaz remembered Mr. Galitsa. T. 51, 121. They testified only about their general practice, saying that they generally met people at the gate when one flight landed, stayed with them until the next flight boarded, and then waited at the gate until the flight took off. T. 47-49. Sometimes, in between flights, they would drive off the airport grounds and take people who were waiting for deportation to check cashing places or to pick up food. T. 70, 129.

Records indicated that Mr. Galitsa's first flight landed at JFK at 12:16 p.m. and his scheduled departure flight took off at 7:54 p.m. T. 36, 41, 89, 113-14. Because Aerosvit Airlines had since gone out of business, there was no passenger manifest list for the departure flight. T. 266. Mr. Galitsa's name did appear on an "Advance

Passenger Information System" passenger list, which is created 72 hours before a flight departs and is supposed to be updated until take-off. T. 137-39.

A warrant of removal with Rey's signature and Mr. Galitsa's fingerprint was entered into evidence. T. 52-53. Generally, Rey signed that type of form after the person's flight took off. T. 53. On Mr. Galitsa's paperwork, Rey entered a comment on October 20, 2011, at midnight[2] stating: "Departed from JFK/NYC Aerosvit 132 without incident." T. 57. Diaz wrote that the person was "very cooperative, departed without incident around 7:30 p.m." T. 126.

In April 2015, Mr. Galitsa was taken to 26 Federal Plaza, and told Gabriel Hoke, an ICE deportation officer, that he would not sign any documents stating that he was removed from the United States in 2011 because the agents had released him at the airport and he had stayed in the United States. T. 166-69, 173. Based on Mr. Galitsa's comments, Hoke referred the case to the Office of Professional Responsibility, which investigated Rey and Diaz. T. 171.

On June 29, 2015, Joseph Jerla interviewed Mr. Galitsa as part of the investigation. He did not record the interview, but remembered that Mr. Galitsa told him that, as he was waiting for his flight to Ukraine, Diaz had signed his paperwork and let him go. T. 177, 179-80, 188-89. Rey was there, but said nothing. T. 181. Mr.

[2] The defense argued that midnight was the first minute of October 20, 2011, meaning that the comment was entered *before* the flight to Ukraine took off.

Galitsa took a taxi to Madison Square Garden, where he tried to reach a lawyer friend and called his mother. T. 181. He went home to his mom's house in Manhattan. T. 182. Although he had opened a bank account in Texas in 2011, he had sent the card to his ex-wife in Ukraine. T. 182.

As part of the investigation, Mike O'Neill, another immigration officer, met Mr. Galitsa twice, on July 27, 2016 and April 25, 2017. T. 198. O'Neill, who also did not record these meetings, recalled Mr. Galitsa saying that while talking with Diaz outside of the terminal, Diaz told him that he was free to go. T. 199. Rey was not there when this happened. T. 199. Afterward, Mr. Galitsa went to Madison Square Garden, tried to make a call, but did not reach the person, and started living on the streets. T. 200. He did not tell his mother he was still in the country. T. 200. With respect to his Texas bank account, he said that he had a temporary debit card and that the permanent card was mailed to his mother, who sent it to Ukraine, where his friend and ex-wife used it. T. 201.

Jerla asked Mr. Galitsa to locate documents showing that he had been living in the United States since 2011. T. 183. Mr. Galitsa produced Greyhound bus receipts from September 2013 and tax returns for 2011, 2012 and 2015. T. 205-06. Mr. Galitsa's tax preparer, testified that when he prepared Mr. Galitsa's 2013 income taxes in January 2014, Mr. Galitsa mentioned that he wanted to file his earlier tax returns

too. T. 192-93, 196. Dipre prepared the returns, but did not file them, and the IRS could not find a record of filed returns for 2011 and 2012. T. 194, 209.

Mr. Galitsa also gave O'Neill his bank statements, which showed that Mr. Galitsa's mother deposited money in his account in 2011 and 2012. T. 228, 247. Records from the detention facility in Texas showed that on September 15, 2011, the facility received a visa card for Mr. Galitsa. T. 222. From October 21, 2011 until July 9, 2013 all withdrawals were made in Ukraine. T. 234-35. From September 2013 until August 2016, all of the withdrawals were in the United States. T. 240. In July and August 2013, there were withdrawals from an airport in Moscow and from Sikleborg, Denmark. T. 236-37.

O'Neill requested border crossing documents from the Ukrainian governemnt from 2011, and although a first request turned up no records, a second search "found a border crossing record" of Mr. Galitsa entering Ukraine on October 21, 2011. T. 211, 215-16. O'Neill failed to find any records of Mr. Galitsa crossing a border in 2013. T. 268-69.

Before the break for lunch, and before the government finished its last witness, the prosecutor noted that the defense had informed them that they "may be calling" Mr. Galitsa to testify. T. 243. The government asked for a break after the government rested and the court agreed. T. 243, 278.

Defense case: Mr. Galitsa's testimony

Fyodor Galitsa was 42 years old and was born in the USSR. A. 31. He first came to the United States in 1996 and left in 2004. A. 31, 35. He was a Jehovah's Witness and did not believe in bearing arms. A. 36. He left Ukraine fleeing persecution because of his religion and to avoid joining the military. A. 36. After 2004, he tried and failed to come back to the United States a few times: he applied for a visa that was denied; he flew to Cuba and took a boat to Florida, but the current was too strong. A. 35-36. In 2008, he made it through Mexico to the United States, but was arrested about a week later. A. 36. He applied for asylum, but his application was denied. A. 37. Instead he pleaded guilty to illegal entry and was deported in 2009. A. 37. In 2011, he came back through Mexico again and he was again charged with illegal entry and sentenced to 15 days. A. 38-39. He was placed in immigration detention in Texas. A. 287.

On October 20, 2011, he expected to be deported, but he was not. A. 32. He flew from Texas to JFK, where he was met by two officers, placed in a van, and driven off airport grounds into Queens. A. 34. He started talking to Diaz, while Rey went into a Verizon store. A. 34. Diaz asked what his story was and he "described how I tried to come to this country for my freedom." A. 40. The officer was "fascinated or impressed" with his story. A. 42. After the Verizon store, they went to get pizza and did more errands before returning to the airport. A. 40-41. After many

hours together, Diaz gave Mr. Galitsa back his phone and passport and said "I'm going to let you go, but don't get caught." A. 43.

Mr. Galitsa took a cab to Madison Square Garden, where he called his mother and let her know he was okay. A. 43. He told her that he was living in Ukraine because he was afraid to tell her the truth in case the agents went to her house. A. 44-45. The next day he looked for work, starting to do deliveries for a grocery store in Brighton Beach and then construction in Long Island. A. 43-44. His mom was a home attendant and when one of his mom's patients broke her hip in 2013, he started seeing her again and helped her care for her patient. A. 46-47.

When he was taken into immigration detention in August 2011, he had his new, temporary debit card on him. A. 48. Border Patrol had misplaced his card and found it again later. A. 48-49, 66. His permanent card was mailed to his mom's address in New York and Mr. Galitsa asked his mom to mail the card to his ex-wife to pay bills he had in Ukraine. A. 50-51. His ex-wife gave the card to his friend Volodya, who later gave it to another friend, Alexander. A. 51, 53. In 2014, he asked his friends to mail the card back to him in the United States. A. 54.

Even though Mr. Galitsa did not have a legal status in the United States, he was filing taxes because he heard that it could look good for his record for future immigration. A. 54. In 2011 and 2012, he was living on the streets, so he did not have records to provide to the government. A. 95.

Government's last-minute request to cross-examine Mr. Galitsa about previously excluded bad acts.

After Mr. Galitsa's direct testimony, the government asked for another recess, stating that because Mr. Galitsa testified that he left the United States in 2004, the government should be able to establish that he had an "order of removal" for a "burglary offense." A. 58. Defense counsel objected, saying that eliciting that there was an "order of removal" was sufficient to explain why he left. A. 58. The government argued that Mr. Galitsa "presented to the jury" a "very earnest person who just wants to live in the United States" and the 1997 conviction "puts it in context." A. 58-59. The court said it was not "buying" the government's argument, but nonetheless, allowed the government to elicit that Mr. Galitsa was deported because he was convicted of something. A. 59-60. Counsel renewed his objection. A. 60.

During this discussion, the court was concerned that it was already late in the afternoon, explaining that it wanted to "be able to hear [the parties] out" but there was a nursing mother on the jury that needed to break at 4:45 p.m. A. 59. The court considered stopping for the day, before continuing the legal discussion. A. 59.

The government next asked to inquire about the underlying allegations of a "2016" sealed arrest, misleadingly saying that questions about this case were "well within the bounds of [the court's] prior ruling." A. 60, 62. The government said that the case "has to do with false checks that Mr. Galitsa passed after having stolen them

from the man that he was doing renovation work for." A. 60. The Manhattan District Attorney's Office dismissed the case because of "problems with the evidence" because the "forgery wasn't clearly a forgery," but, according to the prosecutor, the "man stood by his accusation." A. 60. It was the government's position that this dismissed, sealed case was "probative of [Mr. Galitsa's] truthfulness as a 608 matter." A. 60. The government incorrectly stated this case occurred in 2016, when it was actually the July 2014 case the court had excluded pretrial, "pending more information." A. 29-30.

Defense counsel objected, arguing that the charges were dismissed and there was no basis to determine that the forgery occurred. A. 61. He said that "[a]ll that's going to happen is [Mr. Galitsa] is going to deny it, but the question alone is prejudicial." A. 61. He also objected that the request was untimely. A. 61.

The court ruled for the government, saying said that this questioning was "squarely within what is permissible under 608" because "it would be an attempted fraud against a poor old man with Parkinson's disease." A. 62.

Repeated questions about 2014 grand larceny case that was dismissed because the NYPD determined the checks had not been forged.

The government asked Mr. Galitsa numerous questions about the 2014 case:

> Q. On July 14, 2014, you were arrested for stealing checks and forging them, stealing checks from a person you worked for, forging a signature and depositing approximately $25,000 worth of checks, correct?

A. I was accused, but I did not do that.

Q. You were working for that individual doing some basic home renovations? He's an elderly man about in his late seventies. And he has Parkinson's disease.

A. No he has scoliosis. A. 84-85.

Despite Mr. Galitsa's answer that he had not stolen checks from this person, the prosecutor continued accusing him of stealing checks for over a page of trial transcript:

Q. And you stole ten checks from him?

A. No I did not.

Q. And you forged his name on those checks?

A. I did not.

Q. And you deposited those checks into your account?

A. I deposited the checks that he wrote, that he wrote.

Q. And you deposited about $25,000 worth of stolen checks?

A. I did not steal the checks.

Q. And you stole checks and deposited an additional $25,000 on top of that?

A. I did not steal the checks.

Q. You were just hired to do a few home renovations, correct?

A. No. There was multiple work that I've done in the past four years.

Q. So including building a desk for him?

A. Building the desk, bathroom renovation, etc.

Q. And he paid you a total of $40,000, that's your testimony, correct?

A. I can't recall the total number, but it sounds approximately right.

Q. But he said he only paid you $15,000?

A. I didn't say that. I know that he was paying me for my work.

Q. And you stole checks and deposited an additional $25,000 on top of that?

A. I did not steal the checks. A. 85-86.

Later, the prosecutor returned to this incident:

Q. And in 2014, you were arrested, as we said, for stealing checks, forging those checks, depositing about $25,000 worth of checks into your own account, correct?

A. I didn't steal the checks. They was given to me for my work and I deposited them in the bank, the same bank of the owner who gave me or wrote those checks for me for my work.

Q. So the owner though is the person who accused you of stealing all those checks, right?

A. Yeah, he did file the complaint.

Q. Because he said he was only going to pay you $15,000, but you somehow ended up with $40,000?

A. It's a little bit more complex. I was working for him for four months and then later on I learned that I could not do the work

for him on more and I was accused, but then I was redeemed. The complaint was dismissed.

Q. The complaint was dismissed, but the accusation still stands that you stole that $25,000 from that old man?

A. Yeah, the complaint was in the beginning and then it was dismissed. A. 103-04.

The government also accused Mr. Galitsa of calling the "old man" a liar:

Q. So the old man must also be lying?

A. He was not truthful about those checks. I was paid by him and the checks were signed by him.

Q. And so if he's saying that you did not get those checks for work that you did, he's lying?

A. He's lying that I forged the checks or steal the checks because checks were written by him and signed by him and the handwriting expert, he admit that and the case was dismissed. A. 104.

The government directly connected the check allegation to the testimony about October 2011 saying, "That brings us up to seven people, at least," referring to the government witnesses and the employer who accused him of stealing checks, "who are lying, even though you're the one telling the truth every single time, correct?" A. 104. Mr. Galitsa replied that the people who said "things about me on the airplane was not true and then I did not forge the checks." A. 105.

Cross-examination about Mr. Galitsa's prior arrests.

After the court's ruling allowing the 1997 conviction, defense counsel asked Mr. Galitsa if he was convicted of a crime and that was why he was deported in 2004 and he said "yes." A. 63. On cross-examination, the government asked if Mr. Galitsa was arrested in 1997 and counsel objected. A. 74. At a side bar, the court said, "This arrest is out, I thought." A. 75. The government said it was going to ask "as a result of that arrest, you were removed." A. 75. The court said, "That's fine. He's not going to go into why he was arrested. It's the arrest that led to the conviction that led to the deportation." A. 75. Counsel said, "fine. Thank you" and the court said his objection was overruled. A. 75-76.[3]

After this sidebar, the government repeated that Mr. Galitsa had been arrested, asking, "You were arrested in 1997 in New York, correct?" Mr. Galitsa said yes. The government continued:

> Q. And you were convicted of a crime?
>
> A. Yes.
>
> Q. And a result of that conviction, you were order removed from the United States?
>
> A. Yes, and...

[3] Later during counsel's mistrial motion, the court said that counsel had withdrawn the objection because he said "fine." Counsel explained, "I took your point that you had already overruled it. To the extent I said it's fine, it's not what I intended." A. 108.

Q. So the answer to that questions, Mr. Galitsa, is yes, right? You were under an order of removal from the United States – let me finish sir – as a result of your conviction in 1998, you were subject to an order of removal from the United States?

A. I was subject to order of removal but not because of conviction, because of the political asylum was lost because I applied for political asylum in 1996 as well.

Q. After you were convicted of the crime and ordered removed, you applied for asylum, correct?

A. I applied for asylum, yes.

Q. After you were convicted and ordered removed from the country, you applied for asylum?

A. Yes. A. 76

The government proceeded to ask about Mr. Galitsa's other arrests, saying "during this period of time while you're been in the United States, you've been arrested numerous times, haven't you?" Counsel's objection was overruled and Mr. Galitsa said "yes." A. 77. The government continued by asking, "You were brought to immigration attention because of an arrest that occurred in 2014, correct?" adding, "You were arrested by the NYPD in 2014, correct?" Mr. Galitsa responded "yes." The government added, "And you were arrested in 2015 as well?" A. 77. Counsel again objected. A. 77. The court overruled the objection saying obliquely, "What we just talked about" and defense counsel said, "It's fine. It's fine." A. 78.

The prosecutor continued questioning about arrests while also mischaracterizing the facts underlying the 2015 arrest:

Q. For the arrest in 2015, that was for grand larceny, correct?

A. 2015, no.

Q. The June 22, 2015 arrest, was that for grand larceny?

A. I believe it was 2014.

Q. That's a different arrest, sir. I'm asking you about the June 2015 arrest that went to trial.

A. It was not grand larceny no.

Q. You were arrested for larceny. Excuse me. You were arrested for larceny.
A. 78.

Counsel asked to approach, explaining that the government had already been instructed not to ask about arrests and only to ask about the underlying facts under Rule 608, adding that the cross-examination questions on these topics were "too much." A. 79. The court said that defense counsel was right and that the "point is what's the bad act." A. 79.

Numerous questions about petit larceny allegations.

The government asked numerous questions about the 2015 shop-lifting charge:

Q. On June 22, 2015, you stole several items from a Home Depot ... correct?

A. No.

Q. [ ] On June 22, 2015, which is about two months after you met with ICE . . . you committed a crime in New York, stealing items from a Home Depot?

A. I didn't steal item from Home Depot. I was charged, but I did not steal. A. 84.

The government returned to this Home Depot incident later:

Q. In June of 2015, you stole multiple items from Home Depot, correct?

A. No.

Q. You were caught and accused of stealing multiple items from Home Depot?

A. They accused me that it was one backpack.

Q. That you filled with items from Home Depot?

A. No. The accusation was on the one backpack.

Q. That you filled with things and then walked out of the store.

A. No, it was not the accusation. It was just saying one backpack which was wrongly scanned.

Q. So that accusation is also a lie?

A. Absolutely. A. 103.

Although this line of questioning strongly implied Mr. Galitsa was lying, it was the government who had the facts wrong. In June 2015, Mr. Galitsa was arrested for changing the price tag on one item to a less expensive price and was charged with petit larceny. Dkt. 38.

Mistrial motion

Counsel moved for a mistrial based on the government's questioning about Mr. Galitsa's arrests, convictions, and prior bad acts. A. 106-07. Counsel argued a new trial was warranted because the government mischaracterized the facts of the petit larceny case, calling it a grand larceny and incorrectly accusing Mr. Galitsa of filling a backpack with stolen items. A. 108-10. He also argued that the "accusation that he forged an old man's checks is extraordinarily bad in terms of how he's going to be perceived by the jury" and Mr. Galitsa should have been able to consider whether the government would question him about the forged checks before deciding to testify. A. 113.

The court admitted that it was "not sure that [it] understood at side bar that it was the police department handwriting expert" who said the checks were not forged. A. 116. The court chastised both parties saying, "You knew that this was going to be devastating." A. 116. "I agree that the government took it on as their responsibility that they would move" to admit it, but "either one of you [lawyers] could have raised it and should have other than at side bar when we were coming up against the end of the day." A. 116-17. It withheld a decision until after the jury verdict. A. 116.

Jury instruction and deliberations

During the final jury charge, the court said, "During the government's cross-examination of Mr. Galitsa, you heard references to occasions in the past when Mr.

Galitsa was arrested. I instruct you that the mere fact that someone might have been arrested is not evidence of any actual misconduct. I instruct you therefore to disregard any references to Mr. Galitsa's prior arrests. You may draw no inference against him based on those reference." T. 452. No limiting instruction was provided with respect to the other bad act impeachment evidence.

During deliberations, the jury asked to rehear testimony about Diaz's note taking process and how he transcribed his notes. T. 467. The jury also asked for clarification of the intent element for the false statements charge. T. 467. After receiving answers to these questions, the jury convicted Mr. Galitsa of both counts.

Motion for a new trial

The defense moved for a new trial, explaining that, "[w]hile the cold transcript doesn't reflect it, the whole tenor of the trial changed" as the government repeatedly accused Mr. Galitsa of stealing checks from an 'old man" with Parkinson's disease and that "courtroom observers felt a significant shift in the jury during questioning." Dkt. 86, at 2, 21. The government "successfully communicated to the jury – as fact – that Mr. Galitsa had stolen and forged checks, and thus could not be believed when he testified." *Id.* at 2. Defense counsel also asked for a new trial because the government repeatedly asked about Mr. Galitsa's arrests and when it asked about his conduct, "got its facts wrong." *Id.* at 23.

The government responded that it had interviewed Mr. Galitsa's employer by phone and that he "believed that [Mr. Galitsa] stole blank checks from him, forged his signature, and deposited the checks into an account." Dkt. 92 at 7. The government speculated that Mr. Galitsa "could have used [legitimate checks] to trace forged signatures onto other checks" and that the $40,000 that he received for his work "appeared to be excessive." Dkt. 92 at 14. The government apparently did not consult a handwriting expert, nor did it explain any basis to disagree with the conclusion of the NYPD handwriting expert that the checks did not appear forged. Despite pretrial motions filed by the defense on just this topic, the government claimed it did not raise the issue sooner because it "thought it was extremely unlikely that the defendant would testify, because the objective evidence of guilt was so overwhelming." Dkt. 92 at 15.

In an oral ruling, the court held that the mention of Mr. Galitsa's arrests in 2014 and 2015 "was not" "fair game" but found the error was harmless. A. 124-125. It held there was no error in introducing the allegations "that Mr. Galitsa defrauded his employer" because they "were highly probative of Galitsa's credibility." A. 122. The court believed there was a sufficient basis to ask the questions because his employer said Mr. Galitsa was "paid an excessive amount for the work done, the checks were cashed out of order, and the victims said that they were stolen." A. 123. The court believed that the "fact that the charges against Mr. Galitsa were ultimately

dropped does not mean the allegations were so unlikely to be true that admitting them was unfairly prejudicial." A. 122.

Summary of Argument

The only disputed issue at trial was whether Mr. Galitsa was deported to Ukraine on October 20, 2011. He testified that he was not. His defense hinged on the credibility of his testimony. In attacking his story, the government was not satisfied with cross-examining Mr. Galitsa about the day of his scheduled deportation and what he said to investigators. Instead, the court allowed the government to ask repetitive questions about his criminal history, including a forgery case that had been dismissed for lack of evidence, a two-decades old conviction, and a misdemeanor case about which it got the facts wrong. Allowing this extensive testimony about Mr. Galitsa's criminal history was erroneous. The cumulative effect of these evidentiary errors was to paint Mr. Galitsa as a dishonest person and deny him his constitutional right to a fair trial.

Argument

Mr. Galitsa was denied his right to a fair trial by the government's repeated questioning about allegations from a case dismissed for lack of evidence, the underlying facts of a prior conviction, and prior arrests.

Mr. Galitsa's testimony was crucial to his defense, but it was derailed by a host of errors by the court and the prosecution. The court erroneously allowed the government to question him at length about a forgery arrest that had no probative

value as it had been dismissed because of a lack of evidence a crime was committed. It also improperly allowed the government to ask about the underlying facts of a misdemeanor conviction excluded by evidentiary Rule 609, and to ask about a two-decade-old conviction that was excluded pre-trial. The government exacerbated the court's errors, by getting the facts wrong about the misdemeanor case in two respects, first, stating – incorrectly – that it was a grand, rather than petit, larceny case and, second, suggesting that Mr. Galitsa was minimizing what he had done, when it was actually the government who was mistaken. The government also ignored the court's ruling not to ask about arrests, asking Mr. Galitsa at least 10 separate questions about his arrest history.

Reference to a defendant's criminal record "is always highly prejudicial." *United States v. Pucco*, 453 F.2d 539, 542 (2d Cir. 1971). Here, the probative value of the questions about Mr. Galitsa's criminal history was well outweighed by the prejudicial effect. *See* Fed. R. Evid., Rule 403. In combination, the evidentiary errors made it essentially impossible for the jury to believe Mr. Galitsa. These were not just ordinary evidentiary errors,[4] but also deprived him of his constitutional right to a fair trial. *See Chambers v. Mississippi*, 410 U.S. 284 (1973). *See also Dowling v. United States*, 493 U.S.

[4] Standard of Review: This Court reviews the district court's evidentiary rulings for abuse of discretion. *E.g. United States v. Desposito*, 704 F.3d 221, 233 (2d Cir. 2013); *United States v. Weiss*, 930 F.2d 185, 198 (2d Cir. 1991) ("When the district court has performed this balancing [under Rule 403], we will not overturn the decision unless the district court abused its discretion or acted arbitrarily and irrationally"). An incorrect legal ruling is an abuse of discretion.

342, 352 (1990) (due process test asks whether introduction of the type of evidence is "so extremely unfair that its admission violates 'fundamental conceptions of justice'").

A. Evidentiary Rules 608 and 609

Federal Rules of Evidence, Rule 609 governs impeachment with a criminal conviction to "attack[ ] a witness's character for truthfulness." Rule 609 states, in relevant part, that felony convictions

> (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
>
> (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

Rule 608 discusses impeachment through "Specific Instances of Conduct." The rule states:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness.

The Advisory Committee Notes for Rule 608 add that that "[p]articular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination . . . concerning his character for truthfulness." Both Rule 609 and Rule 608 require the court to balance the probative value of the impeachment

verses the prejudicial effect. *See United States v. Weichert*, 783 F.2d 23, 25 (2d Cir. 1986); Fed. R. Evid., R. 403.

B. "Devastating" questions about a case that was dismissed due to a lack of evidence should have been excluded.

Mr. Galitsa was sandbagged midtrial. After he had taken the witness stand and given his direct testimony, the government asked to inquire about a forgery case that was dismissed because of a lack of evidence. Because the NYPD handwriting expert believed no crime had occurred, questions about the alleged forgery were not probative to Mr. Galitsa's character for truthfulness. It was also exceedingly prejudicial to Mr. Galitsa to have the jury think he had stolen $25,000 from an old man with Parkinson's disease. The court's decision to change its pretrial ruling and allow cross-examination about this case was error.

The probative value of questions about a case that resulted in a dismissal is exceedingly limited. As the Circuit has explained in the context of acquittals,

> Whether or not an acquittal technically estops the prosecution from eliciting the fact of prior misconduct, it will normally alter the balance between probative force and prejudice, which is already a close matter in many cases where prior misconduct of a defendant is offered. *See United States v. Schwab*, 886 F.2d 509 (2d Cir. 1989).

This is because:

> there is the blunt reality that a witness who has been acquitted will almost certainly deny the misconduct, either because he did no wrong or because he may understandably believe that when asked

about it after an acquittal, he is entitled to have the law regard him as innocent. *Schwab*, 886 F.2d at 513.

Thus, the "only purpose served by permitting the inquiry is to place before the jury the allegation of misconduct contained in the prosecutor's question, an allegation the jury will be instructed has no evidentiary weight." *Id.* To "permit the inquiry risks unfair prejudice, which is not justified by the theoretical possibility that the witness, though acquitted, will admit to the misconduct. When the witness is the defendant, the significance of the prejudice is magnified." *Id.*

This concern was borne out here. Even though the forgery charges had been dismissed because of a lack of evidence, the prosecutor was allowed to repetitively accuse Mr. Galitsa of stealing from an old man, asking over 20 detailed questions about the incident. While the government claimed it had a good faith basis to believe the forgery allegations were true, the evidence supporting this assertion was exceedingly thin. It did not state that it had engaged an expert who disagreed with the NYPD handwriting expert that no crime had occurred. It did not review receipts for Mr. Galitsa's work to determine how much he was owed and whether he had been overpaid. It did not explain why checks being cashed out of order indicated a crime had occurred. Because the evidence that a crime occurred was weak, the probative value of asking about these allegations was exceedingly small.

There was also no dispute these questions were exceedingly prejudicial. The court called them "devastating." A. 116. Defense counsel described the "whole tenor

of the trial" changing. The ruinous effect of these questions was particularly acute because the jury was not given any instruction targeted at the 2014 allegations, and could not have known that Mr. Galitsa was being completely truthful in telling the prosecutor that the handwriting expert had determined the checks were not forged. It was an abuse of discretion to allow these questions.

The court's error can be partially explained by the government's unwarranted delay in waiting until the last moment, after Mr. Galitsa's direct testimony to ask for permission to inquire into the 2014 forgery allegations. By the time the government raised the issue, the court was rushed because it was trying to finish Mr. Galitsa's testimony before a juror needed a break. This urgency introduced confusion: The government inaccurately told the court it was asking about a 2016 arrest, inadvertently obscuring that it was asking about the 2014 case that the court had already precluded pretrial. The court also later admitted that it did not understand when it was making the decision that it was the police department expert who had decided the checks were probably not forged. A. 116.

While these hurried circumstances help explain the error, they do not excuse it. On the contrary, the lack of advance warning from the government increased the prejudice to Mr. Galitsa. When "a defendant seeks an advance ruling on admission of a prior conviction, it is reasonable to presume that the ruling will be an important factor in his decision whether to testify." *United States v. Lipscomb*, 702 F.2d 1049, 1069

(D.C. Cir. 1983) (en banc). Mr. Galitsa should have been aware that he would be questioned about the forgery allegations when deciding whether to testify.

Forcing Mr. Galitsa to answer "devastating" questions about the forgery incident, once he had no choice but to continue with his testimony, was fundamentally unfair.

C. The 2015 case that was excluded under Rule 609 should not have been admitted under Rule 608.

The government agreed with defense counsel that it could not inquire into Mr. Galitsa's theft convictions under Rule 609. This made sense as this Court has ruled that crimes of "steath" like "petit larceny" do not require a "dishonest act or false statement." *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977) ("petit larceny" does not fall under Rule 609(a)); *United States v. Estrada*, 430 F.3d 606, 614 (2d Cir. 2005) ("much successful crime involves some quantum of stealth" but "all such conduct does not" "constitute crime of dishonesty or false statement" for Rule 609). Instead, the court allowed the government to circumvent Rule 609, by using Rule 608 to inquire in detail about the facts underlying a petit larceny conviction. This decision was error.

The Second Circuit has not addressed the interplay between rules 608 and 609, but the circuit courts that have considered this issue have not allowed parties to get around Rule 609 exclusions by using Rule 608. *United States v. Osazuwa*, 564 F.3d 1169, 1174 (9th Cir. 2009); *United States v. Lightfoot*, 483 F.3d 876, 881 (8th Cir. 2007) (Rule

608 "confers upon district courts discretion to permit witness-credibility questioning on specific bad acts *not resulting in a felony conviction*") (emphasis added); *United States v. Whitmore*, 359 F.3d 609, 618 (D.C. Cir. 2004) ("Cross-examination pursuant to Fed.R.Evid. 608(b) is not confined to prior criminal convictions – they are governed by Fed.R.Evid. 609"); *United States v. Parker*, 133 F.3d 322, 327 (5th Cir. 1998) ("Prior bad acts that have not resulted in a conviction are admissible under Fed. R. Evid. 608(b) if relevant to the witness's character for truthfulness or untruthfulness.").[5] The Ninth Circuit analyzed this issue at length, explaining that it "recognize[d] the unfairness that would result if evidence relating to a conviction is prohibited by Rule 609 but admitted through the 'back door' of Rule 608." *Osazuwa*, 564 F.3d at 1174.

This Court should follow the persuasive reasoning of the Ninth Circuit and recognize that it is fundamentally unfair to exclude a conviction as too prejudicial under Rule 609 and then allow extensive detail of the charges to be admitted under Rule 608. It should, therefore, find that the court abused its discretion in allowing questioning about the facts underlying the petit larceny conviction here.

The harm in allowing the prosecutor to ask about the underlying facts of a conviction excluded by Rule 609 was further exacerbated here because the prosecutor

[5] Although the district court cited *United States v. Barnhart*, as support for its decision, in *Barnhart* the defendant conceded the issue and it was not analyzed by the court. 599 F.3d 737, 747 (7th Cir. 2010) (defendant "acknowledges that the government was permitted to go beyond establishing the mere fact of these convictions (permitted under Rule 609(a)(1) of the Federal Rules of Evidence) and question him regarding the specific conduct underlying his convictions pursuant to Rule 608(b)").

got the facts wrong, incorrectly stating that Mr. Galitsa was arrested for grand rather than petit larceny, and accusing him of stealing multiple items, when he had actually just paid a lower price for one item. Even assuming the prosecutor's misstatements were inadvertent, the prejudice to Mr. Galitsa was clear. The jury was never instructed that it was the prosecutor who was mistaken and that Mr. Galitsa's answers about the shoplifting incident were truthful. Without any explanation, the jury would have necessarily assumed that Mr. Galitsa was lying or minimizing his conduct. That inference was incorrect and exceedingly harmful to Mr. Galitsa's credibility.

These uncorrected prosecutorial misstatements further undermined Mr. Galitsa's right to a fair trial. *See United States v. Salameh*, 152 F.3d 88, 133 (2d Cir. 1998) (per curium) (citation omitted) (The "prosecutor has a special duty not to mislead" and should "never make affirmative statements contrary to what it knows to be the truth"); *United States v. Harris*, 542 F.2d 1283, 1307 (7th Cir. 1976) (citation omitted) (It "is improper conduct for the Government to ask a question which implies a factual predicate which the examiner knows he cannot support by evidence or for which he has no reason to believe that there is a foundation of truth.").

D. The defense did not open the door to questioning about the 1997 conviction.

Pre-trial the court correctly excluded questions about Mr. Galitsa's 20-year-old burglary conviction, noting the length of time that had passed and the fact that Mr. Galitsa was very young when it occurred. Evidence of a crime that is more than 10

years old may only be used if its probative value "substantially outweighs its prejudicial effect." Rule 609 (b)(1) (emphasis added). The court's initial ruling to exclude this conviction was correct.

Mr. Galitsa's brief and unremarkable testimony that he left the United States in 2004 was not a reason for the court to revisit its decision. Mr. Galitsa said only, "I left the United States in 2004," repeating afterward, "It was the end of 2004." A. 35. This testimony did not misrepresent anything. It did not imply that he had never been convicted of a crime or that he was blameless in his removal from the country.

This lack of contradiction between Mr. Galitsa's testimony and the conviction is in contrast to cases in which a defendant opens the door by testifying in a manner inconsistent with the prior bad act evidence. *Cf. United States v. Elfgeeh*, 515 F.3d 100, 128 (2d Cir. 2008) (because defendant gave an innocent explanation for sending money abroad, "the government was allowed to ask [] whether he knew that the money he sent was being used to buy arms and ammunition"); *see also United States v. Desposito*, 704 F.3d 221, 234 (2d Cir. 2013); *United States v. Payton*, 159 F.3d 49, 58 (2d Cir. 1998) (in "testifying he had nothing to hide on the night of the search" opened door to show that he was hiding something). Because Mr. Galitsa said nothing implying that he did not have a conviction, there was no cause for the court to reopen its ruling.

Even so, after the government asked to introduce "context" for him leaving in 2004, counsel agreed to elicit that Mr. Galitsa had left in 2004 because of an "order of removal." Counsel's concession would have fully addressed the government's concerns without introducing the highly prejudicial fact that he had a 1997 conviction. The court's decision allowing the conviction, over objection, was unsupported by Rule 609 and was an abuse of discretion.

E. Repeated questions about Mr. Galitsa's arrests should have been prohibited.

The court allowed the government to repetitively ask whether Mr. Galitsa had been arrested. The questions were not isolated, but served to incorrectly suggest that Mr. Galitsa had lived a life of crime, getting arrested frequently. The jury did not hear that many of those arrests did not lead to convictions. An "[a]rrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty." *Michelson v. United States*, 335 U.S. 469, 482 (1948). *See also Barber v. City of Chicago*, 725 F.3d 702, 709 (7th Cir. 2013) (noting the "well-established, general rule is that a witness's credibility may not be impeached by evidence of his or her prior arrests, accusations, or charges"); *Nelson v. City of Chicago*, 810 F.3d 1061, 1068 (7th Cir. 2016) (An "arrest is not, in itself, probative of the arrested person's character for truthfulness").

While the court eventually realized these questions should not have been allowed, the court's instruction telling the jury to disregard the prior arrests was not

sufficient to cure the harm, especially in the context of the other evidentiary errors. *See Puco*, 453 F.2d at 542 (The "average jury is unable, despite curative instructions, to limit the influence of a defendant's criminal record to the issue of credibility").

F. These errors were not harmless.

The cumulative effect of the errors was not harmless because they affected the crucial issue in the case. *See e.g., United States v. White*, 692 F.3d 235, 251–52 (2d Cir. 2012) (evidentiary error that "spoke directly to a critical element of the Government's case" was not harmless); *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000) ("In assessing the wrongly admitted testimony's importance, we consider such factors as whether the testimony bore on an issue that is plainly critical to the jury's decision") (internal quotation marks omitted).

Mr. Galitsa's defense depended entirely on his credibility. The only disputed issue at trial was whether Mr. Galitsa was successfully deported to Ukraine on October 20, 2011. He said he was not. No government witness could conclusively say that he was because the agents who were charged with deporting him did not remember him. The government instead asked the jury to infer from the deportation agents' general practice and from documentary evidence that he had gotten on the plane. But only Mr. Galitsa offered a first-hand account of what happened on October 20, 2011. The case hinged on his believability. The effect of the evidentiary

errors was to paint Mr. Galitsa as a bad guy and dishonest person, who lied repetitively. This completely undermined his defense.

Additionally, the errors were particularly harmful because the court did not provide the jury any limiting instruction about the 1997 conviction, the underlying facts of the 2015 conviction, or the questioning about the 2014 forgery charge. *Cf. United States v. Daugerdas*, 837 F.3d 212, 226 (2d Cir. 2016) (noting that the district court "instructed the jury that the jury's consideration of [the] guilty plea was limited to what it revealed about [his] credibility"). Without an instruction that the prior bad acts could only be used to assess Mr. Galitsa's credibility, the jury could well have considered these prior bad acts as evidence of his general propensity to commit crimes. Our "whole tradition is that a man can be punished by criminal sanctions only for specific acts," "not for general misconduct." *Michelson v. United States*, 335 U.S. 469, 489 (1948). *See also Old Chief v. United States*, 519 U.S. 172, 180-82 (1997) (evidence of prior bad acts "weigh[s] too much with the jury and [risks] overpersuad[ing] them as to prejudge one with a bad general record and deny [the defendant] a fair opportunity to defend against a particular charge").

Because of the evidentiary errors, Mr. Galitsa was never given a fair chance of the jury believing this testimony. Accordingly, this court should reverse his conviction and grant him a new trial.

Conclusion

For the reasons set forth above, the Court should vacate Mr. Galitsa's conviction and order a new trial.