No._____

IN THE

Supreme Court of the United States

SANTOS REYES-VILLATORO,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's well established rulings in *Giglio v. United States*, 405 *U.S.* 150 (1972) and *Napue v. Illinois*, 360 *U.S.* 264 (1959), as to the sacred duty of a prosecutor not to capitalize on the presentation of false or misleading evidence so as to deny an accused his due process right to a fair trial, should this Court grant *certiorari,* vacate the judgment of conviction and the sentence to imprisonment for life without parole, and remand the matter to the district court for a new trial ?

2. Without admission into evidence of the untruthful documentary evidence, i.e., the vehicle title which falsely stated that the Defendant's vehicle was transferred without consideration as a gift, and to a party other than the actual intended recipient, was there any basis in the trial record to permit any reference at trial to the vehicle's transfer, and thus to support a jury charge of consciousness of guilt ?

PARTIES TO PROCEEDING

The Parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. United States of America
2. Santos Reyes-Villatoro

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NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019-2020

SANTOS REYES-VILLATORO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, Santos Reyes-Villatoro, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

DECISION BELOW

The United States Court of Appeals for the Third Circuit affirmed Petitioner's conviction and sentence with a non-precedential opinion issued on October 16, 2019. (PA1-18).[1]

JURISDICTION

The United States District Court for the District of New Jersey (D.N.J. No. 13-CR-261) exercised jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Third Circuit Court of Appeals (No. 16-4237) had

[1] "PA" refers to Petitioner's Appendix.

jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The United States Court of Appeals for the Third Circuit entered judgment on October 16, 2019. (PA19-21). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely filed within 90 days of the entry of judgment.

RELEVANT STATUTORY PROVISION

The Fifth Amendment to the Constitution of the United States provides:

> 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.

RELEVANT RULE OF EVIDENCE

> **Rule 803. Exceptions to the Rule Against Hearsay--- Regardless of Whether the Declarant Is Available as a Witness**
>
> The following are not excluded by the rule against hearsay regardless of whether the declarant is available as a witness:
>
> . . .
>
> **(6) Records of a Regularly Conducted Activity.**
>
> A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made at or near the time by --- or from information transmitted by --- someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. (emphasis added).

. . .

(8) Public Records. A record or statement of a public office if:

. . .

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness. (emphasis added).

STATEMENT OF THE CASE

A. Background.

On September 19, 2013, a Federal Grand Jury returned an Indictment (A301-365)[2] alleging the existence of a criminal enterprise involving a local branch ("clique") operating in and around Plainfield, New Jersey, of an international street gang known as La Mara Salvatrucha, a/k/a "MS-13." The Indictment sets forth in 26 counts in which various defendants are named that at least from December, 2008, through September, 2013, this gang of Hispanic males engaged in murders, attempted murders, sexual assault, drug trafficking, robberies, extortion, possession and use of firearms and

[2] "A" refers to the Joint Defense Appendix submitted with counsels' Appellate Briefs to the Third Circuit Court of Appeals. The Appendix included the entire trial transcript.

other weapons, and other criminal activities. The Defendant, Santos Reyes-Villatoro, also known as "Mousey," was alleged to be the leader and co-founder of this local "clique" and is charged in Count One with being a member of a conspiracy to operate a racketeering enterprise in violation of 18 U.S.C. §§ 1962 (c) and (d); in Count Two that in furtherance of the racketeering conspiracy he ordered/participated in the murder of a rival gang member, Christian Tigsi, on February 8, 2009, in violation of N.J.S.A. 2C:11-3(a)(1), 2C:11-3(a)(2), 2C:2-6, and 18 U.S.C. §§ 1959 (a)(1) and (2); in Count Three that during the commission of said murder he used and carried a firearm, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2; and in Count Four with causing the said death through the use of a firearm, in violation of 18 U.S.C. §§ 924(c), 924(j) and 2. He was further charged in Count Five with the commission on October 31, 2009, of two assaults with a dangerous weapon in violation of N.J.S.A. 2C:12-1(b)(2), 2C:2-6 and 18 U.S.C. §§ 1959 (a)(3) and 2; and in Count Six with using and carrying a firearm during the commission of said assaults in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2.

The trial began on February 9, 2016, and concluded on June 1, 2016. Defendant was found guilty of Counts One, Two, Three and Four. The jury returned not guilty verdicts as to Counts Five and Six. On November 30, 2016, Mr. Reyes-Villatoro was sentenced to concurrent life sentences on each of Counts One (the life sentence here was imposed as a result of an affirmative response by the jury to an interrogatory that he committed the

murder of Christian Tigsi), Two and Four and a term of 120 months on Count Three to be served consecutive to the life sentences. (A11517-11519).

The defense filed timely Rule 29 and 33 Motions, for a Judgment of Acquittal, or in the alternative, for a New Trial, which were denied by the trial court on September 30, 2016. (A11581-11613). The timely appeal of Defendant's convictions and sentence followed. (A1).

B. The Trial.

In a trial that lasted almost four months, the Government called approximately 125 witnesses. There were no witnesses called on behalf of Mr. Reyes-Villatoro. Some witnesses were called on behalf of some of the co-defendants.

The Government sought throughout the trial to depict Defendant, Santos Reyes-Villatoro, as the central figure of the Plainfield Locos Salvatrucha ("PLS"). Witnesses were presented and photos were shown to identify the MS-13 tattoo on his stomach as evidence of his long-standing membership within the organization, as the founder in the 1990's of this PLS clique, and as its leader until his arrest in September, 2013. While the Government sought to link him to a number of acts of violence, with varying degrees of seriousness from minor assaults to shootings, it was the murder of 18 year old Christian Tigsi on February 8, 2009, that was the centerpiece of the prosecution's case against him. It was a conviction for this crime which meant an automatic life sentence without the possibility of parole.

During the course of presenting its proofs relating to this murder, the Government sought to introduce evidence relating to the disposal of a car registered to the Defendant, Santos Reyes-Villatoro. The Government endeavored to show that that vehicle, a 1996, 4 door green Toyota Corolla with a spoiler attached to its trunk, generally fit the description of an eyewitness, Linda Mercado, who testified that she observed the shooter run and enter the vehicle and flee the scene. Another Government witness, Edgar Martinez, recalled seeing Mr. Reyes-Villatoro driving a car at the scene.

The Government's main cooperator in the case against all of the defendants, Jose Ortiz, ("Maphache") testified that he was with defendant and the other gang members the night of the incident before and after the shooting, but did not go. He stated that when they left to shoot a rival gang member, defendant was driving his car that evening (evidence was presented that the vehicle was also registered to defendant), a 4 door 2007 gray Honda Accord, which he identified when shown a Government exhibit, a photograph of the vehicle.

Several weeks after the offense, Plainfield Police Detectives investigating the crime met with the Defendant at his home to obtain a buccal swab. At the time they noticed that he was the registered owner of a car that appeared to fit the description provided by Ms. Mercado. The detectives learned soon thereafter that the Defendant no longer owned the

vehicle.[3] It was located in nearby South Bound Brook being offered for sale for $1300.00. Antonio Lopez ("Tony") identified himself as the owner. He provided a 7 page sworn statement in which he said that he bought the car from Santos Reyes-Villatoro for $1100. (PA22-28). He stated that since he did not have a driver's license, he asked a friend, Fanny Quintela, to take title for the vehicle. Thus, her name appears on the Motor Vehicle Commission sale document along with the notation as to consideration "Gift." (PA29-30). Lopez was named on the Government's pretrial potential witness list, but was not called to testify, nor did the prosecution seek to offer into evidence his (admittedly hearsay) 7 page sworn statement. Thus, the prosecution withheld from the jury the true unrefuted fact as to the vehicle's transfer, i.e., that it was actually purchased and not a "gift," and the validity of and reason why the name "Fanny Quintela" appeared on the sale document.

The Government entered into evidence through the testimony of one of the Plainfield Police Department's lead detectives on the case, Cosimo Tripoli, the aforementioned Motor Vehicle Commission sale document. The defense stipulated to its admission in evidence as a business record. (A2283-2285). The Government also elicited testimony from Tripoli, asking if he had interviewed Lopez. The Government prefaced its inquiry of Tripoli by stating

[3] Had the defense been aware that no witness would be called to substantiate the transfer of the vehicle (i.e., Antonio "Tony" Lopez), the defense would have objected to any reference to the Defendant's ownership of the vehicle.

"without telling us what Tony said," presumably to avoid a response that would constitute inadmissible hearsay. The witness confirmed that he had interviewed "Tony," and that he had provided information consistent with the other information that was received from the New Jersey Motor Vehicle Commission. (A2297). During the prosecutor's closing argument he stated in the both closing and rebuttal that Defendant gave the car away for "free," something only a guilty person would do.

The statement stunned the defense, which knew that these assertions were not the truth. As discussed below, the case against defendant was weak, indeed there were compelling reasons challenging the Government's proofs. This allegation, although not true, could not be refuted at this point of the trial, and it was believed by the defense to have the capacity to produce an unjust result. The defense was desperate to find a means by which to correct the lie that was being perpetrated by the Government and preserve the fairness of the trial. The Court overruled the defense objections and refused to either remove the document as an exhibit or instruct the jury as to the falsity of the Government's remarks.

C. Appeal.

On October 16, 2019, a panel of the United States Court of Appeals for the Third Circuit (Smith, Chief Judge, McKee and Restrepo) issued a non-precedential opinion affirming the judgment and convictions as to all defendants, rejecting the arguments raised collectively and that raised

individually by Mr. Reyes-Villatoro as to the prosecutorial misconduct. The defense had argued that the information contained in the title transfer document was untrustworthy and it was improper for the prosecution to have capitalized on it in its summation despite its unrefuted falsity. In discussing the defense argument the Third Circuit stated

> Even if the government's reliance on the title was improper, Reyes-Villatoro cannot show prejudice. The government points out that it does not matter whether he gave his car away for free or sold it after he learned that law enforcement suspected his involvement in the murder. The jury could conclude that the fact that Reyes-Villatoro found a way to get rid of the car demonstrated consciousness of guilt. The district court's consciousness of guilt instructions made that same point. (PA18).

The Court's "harmless error" conclusion fails to take into account that had the Court granted the defense request that the document should be removed from the jury's consideration there would have been no evidence at all of the vehicle having been transferred by the Defendant, and thus the Court would not have been able to charge the jury as to the highly prejudicial consciousness of guilt instructions.

REASONS FOR GRANTING THE WRIT

I. IN LIGHT OF THIS COURT'S WELL ESTABLISHED RULINGS IN GIGLIO V. UNITED STATES, 405 U.S. 150 (1972) AND NAPUE V. ILLINOIS, 360 U.S. 264 (1959), AS TO THE SACRED DUTY OF A PROSECUTOR NOT TO CAPITALIZE ON THE PRESENTATON OF FALSE OR MISLEADING EVIDENCE SO AS TO DENY AN ACCUSED HIS DUE PROCESS RIGHT TO A FAIR TRIAL, DEFENDANT'S

CONVICTION AND SENTENCE TO IMPRISONMENT FOR LIFE WITHOUT PAROLE SHOULD BE VACATED AND THE CASE REMANDED TO THE DISTRICT COURT FOR A NEW TRIAL.

In its closing argument urging the jury to convict Mr. Reyes-Villatoro the prosecution placed particular emphasis on the importance of the title transfer document.

> You heard in the defense opening that Mr. Villatoro was a hard-working man just trying to make a living in Bound Brook. Who gives away a car for free? That's the auto title, gifted away. This car was being sold for $1300 on the lot where the police found it, and you can look at the auto title. He gives it away. (A10615).

Following the Government's summation the defense objected to the comments --- "It's simply not the truth." The Court overruled the objection and after the defense summations, the Government "doubled-down" on the subject in its rebuttal summation, arguing

> Hard-working guy, hard-working guy, hard-working guy gets rid of a car for free. Why? Because it was the car that was on North Avenue and was used in the murder of Christian Tigsi. (A11165-11166; emphasis added).

The defense repeated its objection based on the fact that the Government knew from its own investigation that the evidence proved otherwise. The only person who provided information as to the actual circumstances of the vehicle's transfer was one Antonio Lopez ("Tony"). He provided a 7 page sworn statement to investigators which contradicted the key, but false information on the document that the Government was now

relying upon, rendering it untrustworthy. As such, it should have been removed from the jury's consideration, even at that late point of the trial. Instead, the prosecutor persisted, ignoring the blatant falsity in the document as well as the unexplained identity of the title-named vehicle recipient, one "Fanny Quintela." That conduct violates the Government's solemn duty to seek justice and not a conviction. *Giglio v. United States*, 405 *U.S.* 150 (1972) and *Napue v. Illinois*, 360 *U.S.* 264 (1959). The document in question was untrustworthy and should not have been admitted. *See Evid. Rule* 803(6)(E) and 803(8)(B). Despite knowledge of its falsity, the prosecutor nevertheless embarked on a strategy intended to deliberately mislead the defense, the Court and ultimately the jury. *Compare United States v. Bigeleisen*, 625 *F.2d* 203, 208 (8th Cir. 1980) ("The duty to correct false testimony is on the prosecution, and that duty arises when the false evidence appears."); *Mills v. Scully*, 826 *F.2d* 1192, 1195 (2nd Cir. 1987)(due process is violated where prosecution presents false evidence even though defense counsel knows of the falsity where "prosecutor reinforces the deception by capitalizing on it in closing argument or by posing misleading questions to the witnesses."). *See also United States v. LePage*, 231 *F.3d* 488, 491-492 (9th Cir. 2000); *Mastrian v. McManus*, 554 *F.2d* 813 (8th Cir. 1977).

The defense agreed pretrial to accede to the Government's request to stipulate into evidence as a business record the vehicle title transfer document. It was only later after summations when the full effect of the

Government's deception became apparent that the defense sought to remove the exhibit from the jury's consideration. A review of the facts and circumstances leading to the stipulation demonstrates the Government's bad faith deceptive conduct, indeed trickery, resulting in the defense's failure to anticipate the title document being used to present to the jury false testimony that the vehicle had been "gifted away" to a person otherwise unknown to the jury, one Fanny Quintela, when in fact the truth was that the Defendant had sold the vehicle to Antonio Lopez ("Tony").

The discovery in the case revealed two sources of information as to the fact Defendant transferred ownership of a vehicle about seven weeks after the murder of Christian Tigsi which took place on February 8, 2009: (1) a witness, Antonio Lopez ("Tony"), who provided a sworn statement to police detectives that he purchased the vehicle for $1100.00 from Reyes-Villatoro (PA22-28); and (2) a NJ Motor Vehicle Commission Certificate of Title (PA29-30) indicating that Reyes-Villatoro had actually transferred the vehicle to one "Fanny Quintela" as a "Gift." At trial, the title document (PA29-30) (its admissibility having been stipulated to by the defense) was introduced by the prosecution through the testimony of investigating detective, Cosimo Tripoli, who identified the document. (A2275-2292). The prosecution then elicited testimony from Tripoli that he had interviewed Lopez, who provided him with information about when he, Lopez, "received" the vehicle that "was consistent with the other information that [he] had received from the Motor

Vehicle Commission," i.e., the title document (PA29-30). (A2294-2298). The fact that this testimony conflicted with the title document referencing Fanny Quintela as receiving the car was of no import at the time and the defense had been willing to stipulate to the admission of the document as a business document exception to the hearsay rule (*Evid. R. 803(6)*), since the Government would be calling Antonio Lopez as its witness and Lopez would be available through his testimony to correct the document's false and misleading information. This testimony outrageously, and effectively, misled the jury.

Without the jury having the opportunity to hear the complete testimony of Lopez, the title document standing alone stating that "Fanny Quintela" received the car as a "Gift" is not the truth, and therefore rendered the document unreliable and untrustworthy. To be sure, such a false document being offered as an exhibit by the Government knowing that the prosecution would not clear up the misleading nature of the false information through Lopez's testimony constitutes extremely prejudicial, reversible error. Indeed, the defense would respectfully submit that the document constitutes "testimony" that was presented for the jury's consideration, "testimony" that the Government knew to be false and misleading, and therefore in a sense perjurious. *See United States v. LePage, supra*, 231 *F.3d* at 491-492. "Testimony" that was extremely prejudicial to the defense, and undeniably "affected the fairness, integrity or public reputation of judicial proceedings."

See United States v. Olano, 507 U.S. 725, 731-32 (1993). See also United States v. Mastrangelo, 172 F.3d 288 (3d Cir. 1999). This Court has long ago made clear that the deliberate deception of a court and jury through the knowing presentation of false evidence does not comport with the "rudimentary demands of justice." *Mooney v. Holohan*, 294 *U.S.* 103, 112 (1935). *See also Pyle v. Kansas*, 317 *U.S.* 213 (1942).

Contrary to what the Government has asserted below that there was nothing 'false' about the Government's evidence and, in turn, its argument to the jury, and that there was no reason to doubt the validity of the title's contents, the evidence is in fact demonstrably false.

The Government's argument at trial that Antonio Lopez should not be believed and that his seven page sworn statement is suspect is inconsistent with the Government's effort to use Lopez to authenticate and render reliable the information in the document. After all, one is left wondering who is "Fanny Quintela," especially when one considers that there is no indication at all in the evidence as to her. The prosecution made no reference at trial to the name or its having any relationship to the transfer of the vehicle. The Government's effort to render worthless the word of Lopez is disingenuous when one considers that the prosecution at trial referenced the interview with him, and the fact that he provided information that sought to legitimize the document. (PA29-30).

Finally, the defense submits that had the Government disclosed pre-trial that Antonio Lopez would not be testifying and that they would be seeking to introduce the title document standing alone to evidence the transfer of the vehicle the defense would have made an *in limine* motion to preclude the introduction of the title document as untrustworthy and sought to prevent the Government from eliciting the testimony from Detective Tripoli that Lopez had been interviewed and he provided information that he received the vehicle and the time and circumstances of the transfer.

Shaken by the Government's comments, the defense sought the Court's intervention to ameliorate the effect of the Government's persuasive but false assertion that the car was given away by the Defendant for free, irrefutably inferring that it was the act of a guilty person.[4] It is respectfully submitted that the Court should have granted the defense request and instructed the jury to disregard the prosecutor's objectionable comments in closing and repeated in rebuttal, as well as removing the "false" title document from the jury's consideration.[5] It was clearly apparent at that time that the document

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[4] In *United States v. LePage, supra* at *F.3d* 491-492, the Court aptly summarized the occasional dilemma faced by defense counsel: "All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial. The jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism. A prosecutor has a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials. 'It is a much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one.'" (Citations omitted.) *United States v. LePage, supra*, 231 *F.3d* at 492.

[5] Without the document in evidence, there was no evidence that the Defendant's vehicle had been transferred, and the Government would not have been able to make any comment thereon.

and the information set forth therein was not trustworthy, especially in light of the fact that the Government insisted that the source of the information, Antonio Lopez, had no credibility. Simply stated, the Government should not have it both ways, i.e., maligning the credibility of Lopez while at the same time maintaining that "it had no reason to doubt the validity of the title contents."

II. THE GOVERNMENT'S MURDER CHARGE AGAINST DEFENDANT WAS WEAK, AND WITHOUT THE FALSE DOCUMENTARY EVIDENCE THERE WAS NO BASIS FOR THE GOVERNMENT TO MAKE ANY REFERENCE AT TRIAL TO THE VEHICLE'S TRANSFER AND ACCORDINGLY NO BASIS FOR THE CONSCIOUSNESS OF GUILT CHARGE, WHICH, CONTRARY TO THE THIRD CIRCUIT'S FINDING, WAS NOT HARMLESS BUT RATHER RESULTED IN THE DEFENDANT'S CONVICTION.

The Government sought throughout the trial to depict Defendant as the founder and leader of the Plainfield clique of La Mara Salvatrucha. He had an MS-13 tattoo on his stomach and was alleged to be the subject of a "shout-out" by the gang's international rap star icon, "El Chema." Supposedly for many years, he would habitually cruise Plainfield and surrounding towns in his car with guns and other weaponry ready to attack rival gangs. Yet, despite his notoriety and his participation in this alleged reign of terror, his first arrest did not occur until 2009, when he was 36 years old, when in November, 2009, he was arrested for the Coddington Avenue assaults with a firearm on October 31, 2009. (Counts Five and Six of the

instant indictment for which Defendant was acquitted). His only prior involvement with law enforcement was when a few months prior as part of the Christian Tigsi murder, Defendant, along with several other individuals being investigated, was required to provide a buccal swab. There was no indication that throughout the previous fifteen years he had ever even been stopped for questioning or had any contact with law enforcement whatsoever.

To be sure, a large part of the defense effort was spent on establishing Defendant's innocence of the two substantive offenses in the indictment, (as well as another incident on January 25, 2009, involving the shooting of two of four occupants of a car thought to be Latin King members as set forth in an overt act of the racketeering conspiracy). The Government sought to prove that while Mr. Reyes-Villatoro was not the actual shooter in any instance, he was guilty nonetheless since he ordered the commission of the crimes, provided the weapon, was present at their commission and on each occasion drove the car that was involved in the crimes. Yet, with regard to the October 31, 2009, incident, despite the eyewitness testimony of Erin (Henry) Bonilla identifying Defendant as driving the car from which he stated the shots were fired, (A2767-2769), and the testimony of Government cooperator Jose Ortiz, who stated that Defendant admitted to him that he was driving the car from which Kelvin Mejia fired the gun striking two victims, (A1609), the jury perceived the weakness of the evidence and acquitted the Defendant of these serious charges (Counts 5 and 6) (A333-334). In a similar fashion,

given the obvious parallel nature of the proofs, the defense sought to undermine the Government's case against Mr. Reyes-Villatoro as to his alleged involvement in the Christian Tigsi murder. Here too, the Government sought to portray Reyes-Villatoro as the gang leader responsible for the planning and aiding in carrying out of the murder, but in this case also not the shooting itself. Once again, in order to try to prove Defendant's guilt, the Government relied on cooperators, an eyewitness (Edgar Martinez) who stated that he saw Defendant in a car at the scene at or about the time of the shooting, and another eyewitness, (Linda Mercado) who recognized a car that the shooter ran to after the shooting and then in court some 7 years later identified a photo of the car that she said "resembled" the car she saw that night.[6] (A749-751). The photographs depicted a vehicle that was registered at the time to Defendant.

As with the evidence relating to the October 31, 2009, incident, the weaknesses in the Government's proofs could not have gone unnoticed by this jury. There was no DNA or other forensic evidence linking Mr. Reyes-Villatoro to the crime scene or the firearm, which was never recovered. There were no wire tapped conversations, videos, or still photographs that connected him to the incident. Nor did Court approved searches of vehicles registered to him provide a nexus, nor was any evidence recovered from his

[6] The car was recovered and the photographs were taken in April, 2009. (A2294-2298). Ms. Mercado was not asked to view the car or photographs of it at that time, and was first shown a photograph of the vehicle when the prosecution showed it to her in February, 2016, shortly before she testified in Court. (A750).

residence. Moreover, his behavior following February 8, 2009, the date of the Tigsi murder failed to reveal anything suspicious or a departure from his usual, normal activities. There was no evidence that he did not show for work, continue to play soccer with his team or maintain his close family relationships. Importantly, there was no indication that he fled the Plainfield area, conduct that the Government stressed in its presentation that was frequently carried out by MS-13 members who commit crimes and want to avoid arrest. (*See, for example*, the Government's reliance on testimony that co-defendant, Mario Oliva, (Zorro), left his job and fled to a MS-13 safe haven in Maryland to escape apprehension for the murder of Jessica Montoya). (A10628-10629).

Apart from these factors, and perhaps most importantly as it relates to Defendant's innocence and the weaknesses in the prosecution's case, the versions of the incident presented by the "eyewitnesses" and the main cooperator, Jose Ortiz, were so inconsistent regarding Defendant's possible involvement as to be irreconcilable. There was no testimony explaining why or if Christian Tigsi was specifically targeted. His alleged Latin King involvement was, at most, sketchy. The sequence of events leading up to the shooting as described by Linda Mercado was vastly at odds with the testimony of other witnesses. She states that the incidents and its participants, including the victim, unfolded over a period of approximately one and a half hours in which the actors, including the shooter and victim,

left and returned to the location several times. (A720-732). On the other hand, Luis Camino, the driver of the car, and Mr. Tigsi's companion that evening, described no such encounter and recalled that they had just gotten to the area of the train station when the shots were fired. (A662-667). Edgar Martinez who had stated that he saw Defendant driving a car at the train station with other young Hispanic passengers shortly before the shooting acknowledged that he had been drinking alcohol to the extent that he asked a friend to drive his, Martinez's, car. In addition, he admitted that in the first statement when questioned by police, he did not mention having seen Mr. Reyes-Villatoro at all that evening or at or near the time of the shooting. (A888). Arguably, the most compelling, yet dubious Government's evidence was provided by the cooperator, Jose Ortiz. Although he does not place himself at the scene of the shooting, he describes the planning that preceded it and described Defendant's role and places him at the train station. The details he provides, however, (as in the January 25, 2009, and October 31, 2009, incidents) simply do not comport with the testimonies of the other witnesses. His rendition strayed further in critical ways from the accounts provided by the other witnesses. He stated that he, Ortiz, was in Green Brook Park at the rear of Leo Martinez's house, when at about 10:00 p.m. Mousey and others arrived. They stayed for about seven minutes when they left to shoot a "chavalas". Then, in approximately 15 to 20 minutes he heard shots fired (vastly at odds with the 2:00 – 2:30 A.M. time period when the

shooting actually occurred) which he learned the next day were the results of the Christian Tigsi murder at the train station. (A1438-1448). Importantly, Ortiz stated that Mousey was driving his car that evening, a 4 door gray Honda Accord, (which New Jersey Motor Vehicle showed was registered to him), the same vehicle he (Ortiz) said Mousey used at the other, aforementioned, shootings. He positively identified a photograph of the vehicle, taken by the police, a 2007 4 door grey Honda Accord. (A1612-1616). Whatever value one wishes to place on the word of Jose Ortiz, he certainly was familiar with the car he says Mousey was driving the night Christian Tigsi was killed, a 2007 4 door grey Honda Accord, **not** the vehicle described by Linda Mercado.

The defense urges that the above discussion demonstrates the weakness in the Government's proofs as to the Christian Tigsi homicide as it relates to the involvement of Mr. Reyes-Villatoro. The Government argued that outside the Leo Martinez home he planned the operation that evening, coaxed the co-defendant, Julian Moz-Aguilar, into carrying out the plan, provided the gun and then took everyone in his car to the train station to look for a "chavalas" to kill. All these details were provided by the discredited Jose Ortiz. The details simply do not comport with the other testimony elicited by the Government, and the disconnect exposes the very weak nature of the murder charge against the Defendant. The defense submits that had the Government not engaged in its improper but very persuasive closing

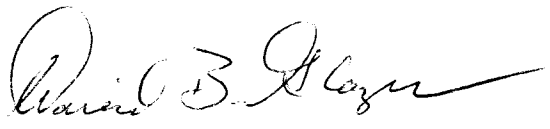
arguments (i.e., only a guilty person would give away a car for free) the jury would have readily recognized the deficiencies in the proofs, and just as they acquitted on the Counts Five and Six assault charges, they would have returned a Not Guilty verdict as to the murder charge.

The entire basis for the Court to grant the Government's request for a consciousness of guilt instruction to the jury was the title transfer document. As discussed herein, the individual who allegedly received the car, Antonio Lopez ("Tony") was not called by the Government to testify. In the absence of the document, along with the non-appearance of Antonio Lopez, there would have been no evidence that the defendant disposed of this vehicle either by sale or "gift," and the prosecutor would not be then able to make the argument in summation and the Court would not have been able to instruct the jury as to the highly prejudicial consciousness of guilt charge. The defense asserts that the prosecutor's remarks together with the Court's final comments on the subject to the jury resulted in an unjust verdict that violated Defendant's constitutional Fifth Amendment due process right to a fair trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted by the Petitioner, Santos Reyes-Villatoro, that this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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