

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ELISHA PAUL HARLEY,

Petitioner.

-v-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KIMBERLY S. TRIMBLE
Federal Defenders of San Diego
225 Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Kimberly_Trimble@fd.org

Attorneys for Petitioner

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	<i>Prefix</i>
OPINION BELOW.....	1
JURISDICTION.....	1
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE PETITION.....	3
I. The magistrate judge should have followed the law of the case and excluded the evidence of the racist comments attributed to Petitioner.....	5
II. This case is fit for review.....	8
CONCLUSION.....	9
APPENDIX	
PROOF OF SERVICE	

QUESTION PRESENTED

Whether a trial court may depart from the law of the case on an evidentiary ruling after a mistrial when the initial legal ruling was not clearly erroneous and did not result in a manifest injustice.

Prefix

TABLE OF AUTHORITIES

	<i>Page</i>
Federal Cases	
<i>Arizona v. California</i> , 460 U.S. 605 (1983)	7
<i>Pepper v. United States</i> , 562 U.S. 476 (2011)	<i>passim</i>
Constitutional Provision	
Sixth Amendment	8
Federal Statutes	
18 U.S.C. § 111	1
18 U.S.C. § 1361	1
28 U.S.C. § 1254	1
Federal Rules	
Federal Rules of Evidence 403	3, 6
Federal Rules of Evidence 404(b)	3

OPINION BELOW

The Ninth Circuit's unpublished memorandum disposition is appended to this Petition. See Pet. App. 1a-3a.

JURISDICTION

Petitioner appeals from his convictions and sentences for misdemeanor assault on a federal officer in violation of 18 U.S.C. § 111(a)(1) and misdemeanor depredation of government property in violation of 18 U.S.C. § 1361. The court of appeals entered judgment on October 24, 2019. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Ninth Circuit's final judgment.

STATEMENT OF THE CASE

Petitioner is a United States citizen who was detained at a border patrol checkpoint after his car had been referred to secondary inspection and he and his siblings, who had been passengers in the car, were being disruptive while the car was being inspected. Petitioner was locked in a holding cell, and he repeatedly kicked the door. He was told that he was being charged with destruction of government property because he had damaged the door of the holding cell, and border patrol agents moved him to a patrol car to be taken to a border patrol station for processing. While the agents were moving him into that car, Petitioner resisted and his saliva landed on the face of Agent Fernandez, resulting in the second charge of assault on a federal officer.

The trial focused on whether Petitioner intentionally damaged the door and whether he intentionally spit on Agent Fernandez. Petitioner did not dispute

evidence that he was screaming and disrespectful to the agents that day. But he argued that the government should not be able to introduce evidence of racist comments attributed to him because those specific comments were irrelevant propensity evidence and unfairly prejudicial. Specifically, he argued that the government should not be able to introduce evidence that he told a Hispanic border patrol agent that he should go back to his landscaping job.

The magistrate judge presiding over the trial initially agreed with Petitioner and excluded this evidence. But when the first trial resulted in a mistrial, the magistrate judge reversed that decision and allowed that evidence to be admitted. Over objection, the magistrate judge also allowed the government to admit evidence that Petitioner asked another Hispanic border patrol agent whether he was from Culiacan, Sinaloa, Mexico.

Notably, neither of the racist comments was made to Agent Fernandez, the alleged victim. Rather, they were directed toward other Hispanic border patrol agents. Nevertheless, the government then relied on those racist comments in closing to support its argument that Petitioner was a “violent” and “wild” person who intentionally spit on Agent Fernandez because he “has a problem with” and “doesn’t like these Hispanic border patrol agents.”

Petitioner was convicted. On appeal to the district court judge, Petitioner argued, *inter alia*, that the magistrate judge’s erroneous decision to admit evidence of racist comments attributed to Petitioner, combined with the prosecutor’s improper comments during closing argument, violated Petitioner’s rights. Specifically, he

argued that the magistrate judge's decision to reverse her decision to exclude the evidence violated Federal Rules of Evidence 403 and 404(b), as well as the law of the case doctrine. He urged the district court to reverse his convictions and remand his case for a new trial where the evidence of the racist comments should be excluded. But the district court affirmed his convictions.

Petitioner appealed to the Ninth Circuit, where he raised the same arguments. A panel again affirmed Petitioner's convictions. The panel held that the magistrate judge did not abuse her discretion by admitting evidence of the racist comments because "numerous changed circumstances warranted reconsideration of that ruling, including Harley's reliance on a lack of intent defense at the first trial." Pet. App at 1a. The panel also held that this evidence was admissible under Federal Rules of Evidence 403 and 404(b) because it was probative as to Petitioner's intent and any prejudice was minimized by the limiting instructions that were given.

REASONS FOR GRANTING THE PETITION

This is the rare case where this Court should grant review for the purpose of error correction. At issue is what conditions must be present for a trial court to depart from the law of the case after a mistrial. This issue is worthy of review for error correction because both parties agreed that the trial court's decision to reverse its evidentiary ruling changed the landscape of the case. Specifically, at the first trial, the government was allowed to introduce evidence of Petitioner's disrespectful and boisterous behavior to provide context for his interactions with the border patrol agents to the jury. The government was thus permitted to rely on Petitioner's

disrespectful attitude to argue that he had intentionally damaged the door of his holding cell and that he had intentionally spit on Agent Fernandez. But it was not allowed to introduce evidence that Petitioner had said that another Hispanic border patrol agent should go back to his landscaping job. Nor was the government allowed to introduce evidence that Petitioner had asked yet another Hispanic border patrol agent whether he was from Culiacan, Sinaloa, Mexico. The jury was unable to reach a verdict, and the magistrate judge declared a mistrial.

But prior to the second trial, the government asked the magistrate judge to reconsider her decision to exclude evidence of the racist comments. The magistrate judge concluded that Petitioner had put intent at issue in the first trial and used that as a reason to change her ruling and allow the government to admit this evidence. Because of the trial judge's departure from the law of the case, the government was permitted to admit what it referred to as an entire "bucket of evidence" about specific racist comments attributed to Petitioner, even though none of those comments were directed at the alleged victim. The government then relied on that prejudicial evidence in his closing argument to argue that Petitioner had "a problem with Hispanic border patrol agents."

The jury that heard evidence about the racist comments convicted Petitioner at his second trial. Yet before deciding to admit this evidence, the trial judge had not found that its initial decision to exclude the evidence was clearly erroneous or would result in a manifest injustice. *See Pepper v. United States*, 562 U.S. 476, 506 (2011) (observing that that conditions in which the law of the case doctrine would not apply

are “if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice”). Absent these findings, the trial judge should not have departed from the law of the case and the jury should not have heard or considered evidence of those racist comments. This Court should therefore grant review for purposes of error correction in this case.

I. The magistrate judge should have followed the law of the case and excluded the evidence of the racist comments attributed to Petitioner.

This Court has stated that the law of the case doctrine means “that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Pepper*, 562 U.S. at 506. Importantly, the doctrine limits a court’s discretion and not its power. *Id.* But that discretion should only be exercised “if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice.” *Id.* at 507 (alterations accepted and quotations and citations omitted).

That did not happen in this case. Instead, the magistrate judge departed from the law of the case based on the theory of defense Petitioner had offered at the first trial. At the first trial, Petitioner had argued that he had not intended to damage the holding cell door, but had merely been trying to get agents’ attention. And he had argued that he had not intended to spit on Agent Fernandez, but that his spit had landed on Agent Fernandez’s face as the result of the commotion that came about when Petitioner was getting put in the patrol car.

So the magistrate judge's reversal of her evidentiary ruling before the second trial was not based on a holding that her previous ruling was clearly erroneous. It was also not based on a holding that her previously ruling resulted in a manifest injustice. Rather, it was based on the magistrate judge's perception that Petitioner's decision to contest an element of both offenses—his intent—justified a departure from the law of the case. That was wrong.

The government is always required to prove all elements of every offense beyond a reasonable doubt. Thus, the probative value of any evidence challenged under Rule 403 must be based on how probative it is to those elements. The magistrate judge rightly concluded before the first trial that the probative value of the specific language attributed to Petitioner was substantially outweighed by the danger of unfair prejudice against Petitioner. The racist nature of the comments did nothing to add to their probative value; the important point was that Petitioner was being disrespectful and making targeted comments to specific agents to convey his disrespect.

Nothing about the magistrate judge's ruling before the first trial prevented the government from eliciting the fact that Petitioner was making personally targeted disrespectful comments toward agents. The probative value of the fact Petitioner made personally targeted comments toward agents was not enhanced by revealing that the comments were racist in nature. And all that was excluded was the racist nature of these comments, because the specific racist comments had the potential to create unfair prejudice. This decision was thus not clearly erroneous and did not

result in a manifest injustice given that the government had plenty of other evidence to rely upon to demonstrate the Petitioner was disrespecting agents in a personally targeted manner.

Indeed, the magistrate judge did not find that her initial decision was clearly erroneous or resulted in a manifest injustice. In fact, the government did not even argue that the initial decision was clearly erroneous or resulted in a manifest injustice. Rather, the government asked the magistrate judge to reconsider her decision. And the magistrate judge did so, despite finding that the government had only posed the same argument it had presented before the first trial.

The law of the case doctrine exists to prevent this kind of flip-flopping during litigation. It was “crafted with the course of ordinary litigation in mind” in order to guide a court’s discretion. *Arizona v. California*, 460 U.S. 605, 618–19 (1983), *decision supplemented*, 466 U.S. 144 (1984) There would be no purpose for the doctrine if it did not limit a judge’s ability to reconsider its own decisions at any time. Thus, this Court has explained some conditions that would allow for a departure from the law of the case—such as a clearly erroneous initial decision that would result in a manifest injustice. Absent a finding that the initial decision was clearly erroneous and resulted in a manifest injustice, a court should not change its legal rulings. *See Pepper*, 562 U.S. at 507.

This Court should thus grant review in this case in order to correct the magistrate judge’s error in departing from the law of the case doctrine without adequate justification.

II. This case is fit for review.

The government may argue that this case is not fit for review because the law of the case doctrine is merely a guide to a court's discretion such that the magistrate judge was not required to apply it. The government may also point out that the panel found that Petitioner's decision to contest intent was a changed circumstance that warranted reconsideration of its initial decision and a departure from the law of the case.

But this Court has not endorsed the view that a court may change its legal rulings based only on a defendant's theory of the case. Such a rule would undermine the fairness of the trial proceedings. That is because a defendant is always entitled to challenge every element of his offense. He should not have to worry that a persuasive theory will result in the trial judge reversing legal rulings that he has relied upon to develop his defense. That would undermine his Sixth Amendment right to present a defense.

Instead, this Court should grant review and use this case as an opportunity to explain its prior statement that a trial court may depart from the law of the case based on a clearly erroneous initial ruling that resulted in a manifest injustice. *See Pepper*, 562 U.S. at 507. This should be a limiting rule that guides a trial court's discretion so that absent this finding, a trial judge may not depart from the law of the case.

Because the magistrate judge departed from the law of the case without such a finding in this case, it is an ideal vehicle for reviewing this issue. The departure

from the law of the case in the case affected the outcome. Petitioner was convicted at his second trial even though the jury had been unable to reach a verdict in the first trial. The most notable difference in the government's presentation of evidence at the second trial was the admission of these racist comments. This Court may therefore conclude that the departure from the law of the case affected the outcome for Petitioner. This Court should thus grant review in this case.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

Dated: January 22, 2020



KIMBERLY S. TRIMBLE
Federal Defenders of San Diego
225 Broadway, Suite 900
San Diego, California 92101-5097
Telephone: (619) 234-8467
Kimberly_Trimble@fd.org
Attorneys for Defendant-Appellant

APPENDIX

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCT 24 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ELISHA PAUL HARLEY,
Defendant-Appellant.

No. 18-50285

D.C. No.
3:16-cr-02761-BLM-BEN-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted October 15, 2019**
Pasadena, California

Before: NGUYEN and MILLER, Circuit Judges, and VITALIANO,*** District Judge.

Elisha Harley appeals his convictions for assault on a federal officer and depredation of government property. We have jurisdiction pursuant to 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Eric N. Vitaliano, United States District Judge for the Eastern District of New York, sitting by designation.

§ 1291, and affirm.

1. The district court did not abuse its discretion in admitting Harley’s racist remarks. The court reversed its initial in limine ruling because numerous changed circumstances warranted reconsideration of that ruling, including Harley’s reliance on a lack of intent defense at the first trial. *See United States v. Mende*, 43 F.3d 1298, 1301–02 (9th Cir. 1995) (affirming admission of evidence probative of the defendants’ knowledge because their presentation of a lack of knowledge defense warranted reversal of a prior in limine ruling). Those changed circumstances make this case different from *United States v. Alexander*, in which “the only change in circumstances . . . was the mistrial.” 106 F.3d 874, 876 (9th Cir. 1997). The probative value of these remarks was also not substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403. The remarks offered insight into Harley’s intent, and any prejudice was minimized by the limiting instructions that were given. Nor were the remarks introduced for an impermissible purpose. They were introduced to establish Harley’s intent—not to show that he acted in conformity with a character trait. *See Fed. R. Evid. 404(b)(2)*.

2. The district court also did not abuse its discretion in excluding evidence of Harley’s later interactions with Border Patrol Agent Sebastian Fernandez. Such evidence was not relevant to any question before the jury.

3. Lastly, there was no prosecutorial misconduct during closing argument. The government’s reference to Harley’s handcuff “trick,” and its description of Harley as “wild” and “violent” and a person who “has a problem with Hispanic border patrol agents,” reasonably described the evidence presented at trial. *United States v. Rude*, 88 F.3d 1538, 1548 (9th Cir. 1996) (holding that no prosecutorial misconduct is committed where the “terms and phrases” the government uses in closing are “reasonably descriptive” of the evidence adduced at trial). The government did not engage in improper vouching by describing closing arguments as providing an opportunity to summarize the evidence presented at trial, or by characterizing the evidence admitted in this case as sufficient to support a guilty verdict. *See United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) (“Prosecutors can argue reasonable inferences based on the record”). Nor did the government impermissibly disparage defense counsel by criticizing her litigation tactics. *United States v. Barragan*, 871 F.3d 689, 703 (9th Cir. 2017) (“Criticism of defense theories and tactics is a proper subject of closing argument.”) (quoting *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997))).

AFFIRMED.