Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

IGNACIO REYES-YANEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

1. Should a writ of certiorari be granted to address whether the Government can tell a jury that, "when [a defendant] testifies, there's no presumption [of innocence] that attaches to his testimony?"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

No.

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OPINION BELOW

There was one decision below, which is attached to this petition.

United States v. Reyes-Yanez, No. 18-50076, 2020 U.S. App. LEXIS 7383 (9th Cir. Mar. 6, 2020).

JURISDICTION

The order of the Court of Appeals was decided on March 6, 2020, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The presumption of innocence under the Fourteenth Amendment due process clause.

STATEMENT OF THE CASE

Reyes-Yanez was convicted, following a jury trial, of Conspiracy to Distribute Methamphetamine in the United States District Court for the Southern District of California, and was thereafter sentenced to 180 months' imprisonment. The Ninth Circuit Court of Appeals affirmed his conviction on March 6, 2020.

STATEMENT OF FACTS

The Government's Case

Following a canine alert, Nancy Alvarez was arrested on July 26, 2015 at the Calexico Port of Entry after concealing .25 kilograms of methamphetamine on her body. Alvarez then took Special Agent Chad Lindsly, employed by the Homeland Security Investigations in Calexico, California, to an apartment complex, located at 699 Wake Avenue, Apartment 4, in El Centro, California. There, Agent Lindsly began conducting surveillance of Apartment 4 and identified the full-time residents as Petitioner, as well as husband and wife Emanuel Nunez and Monica Aguirre. He also obtained a search warrant to monitor the telephones of all three. He later found the husband and wife had engaged in text messages that indicated they were trafficking in narcotics.

On December 8, 2015, Agent Lindsly intercepted calls and text messages over a telephone used interchangeably by Nunez and Aguirre, discussing the distribution of four ounces of methamphetamine, which, the Government alleged, Petitioner helped to sell.

SUMMARY OF ARGUMENT

After the government unsuccessfully obtained a conviction in Petitioner's first trial, which resulted in a hung jury, it misstated the law in the second trial when it argued to the jury that, once the defendant testified, the presumption of innocence no longer attached.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE GOVERNMENT CAN TELL A JURY THAT, WHEN A DEFENDANT TESTIFIES, THERE IS NO PRESUMPTION OF INNOCENCE THAT ATTACHES TO HIS TESTIMONY.

In his closing argument, defense counsel explained the presumption of innocence to the jury:

> So the presumption of innocence is an easy thing to say. Everyone is innocent until proven guilty. But what it means is that[,] from the minute you walked into this door, Mr. Reyes was innocent until proven guilty. Regardless of what he's charged with, as the evidence was progressing, he's innocent until proven guilty. Looking at in any other way before you deliberate is a misuse of the law. He is innocent until proven guilty. What he's saying is the truth. And you say, you guys give me proof that he's not. And until they've done that, then you can shed it. So you start with the presumption of innocence, and then after that you have to be convinced beyond a reasonable doubt. Okay?

The prosecutor then replied, in rebuttal:

> Now the main problem with the defendant's defense – and I think Mr. Carlos misspoke a little bit. He's presumed innocent, but the trial is about whether he's guilty or not. That's your decision, and *when he testifies, there's no presumption that attaches to his testimony* (emphasis added).

The Court overruled defense counsel's objection and issued no curative instructions. The district court should have, however, sustained the objection because a criminal defendant has a constitutional right to the presumption of innocence when he testifies, and the correlative right to have his guilt proved beyond a reasonable doubt. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice")(citation omitted); *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)("It [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process'")(*quoting Leland v. Oregon*, 343 U.S. 790, 802-03, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952)(Frankfurter, J., dissenting).

Contrary to the Government's claim, the presumption of innocence neither disappears nor dissipates when a defendant testifies, or even when evidence to the contrary is received. It can, in fact, only be overcome by

evidence, beyond a reasonable doubt, *after* the jury has heard all the evidence, has been instructed on the law by the Court and has applied the law to the facts, in jury deliberations. The presumption of innocence continues until the duly empaneled jury reaches a guilty verdict, based, as a matter of due process, solely on proof beyond a reasonable doubt--and not a moment before. *See Reed v. Ross*, 468 U. S. 1, 4, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984)("Prior to conviction, the accused is shielded by the presumption of innocence, the bedrock, axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law")(internal quotation and grammatical marks omitted).

The prosecutor in *United States v. Flores-Perez*, 311 F. App'x. 69, 71 (9th Cir. 2009), committed an error that is similar to this case. He argued that the presumption ended when the jury entered the jury room. Here, in contrast, the prosecutor claimed it ended when the defendant testified. Both, in fact, are wrong. In a dissenting opinion, Judge Andrew Kleinfeld said it was "egregious misconduct" for the prosecutor to argue there that, "when you retire to the jury room to deliberate, the presumption [of innocence] is gone. You are not only no longer obligated to presume innocence, but you are obligated to draw rational conclusions

from the evidence." In fact, a defendant's presumption of innocence does not end when he testifies or when the jury retires; on the contrary, it can only be punctured when the jury, after hearing all the evidence, the closing arguments and court's instructions, concludes that the government has proven its case beyond a reasonable doubt. Were the prosecutor's formula accepted, the jury would be allowed to find that a defendant did not have a presumption of innocence during his testimony, no longer keep an open mind, and, without either hearing all the evidence, receiving the court's instructions, or even engaging in any deliberations, simply decide to convict. Of course, that is not and cannot be the law.

Judge Kleinfeld noted that this error would "[o]rdinarily ... be corrected because the judge would instruct the jury of the correct standard after the lawyers made their closing argument. In this case, the judge instructed the jury before closing argument, so there was no subsequent judicial correction." *Id.* Here, too, there was no curative instruction and, thus, no subsequent judicial correction. If anything, by overruling the objection, the district court ratified the prosecutor's legal error and permitted the jury to consider the government's argument in its deliberations.

The Ninth Circuit nonetheless ruled that " ... Reyes-Yanez construes too broadly the government's statement of law; the government did not imply that the presumption of innocence falls away if a criminal defendant elects to testify on his own behalf." *United States v. Reyes-Yanez*, No. 18-50076, 2020 U.S. App. LEXIS 7383, at *2 (9th Cir. Mar. 6, 2020). It is incorrect. The prosecutor told the jury that the "problem" with defense counsel's closing argument about the defendant's presumption of innocence was that " ... when he testifies, there's no presumption that attaches to his testimony." Petitioner has, in fact, construed nothing too broadly; the prosecutor was telling the jury, in clear and unequivocal terms, that the presumption of innocence did not follow the defendant into the jury room but, in fact, ended when he testified. He told the jury that, if they did not credit the defendant's testimony, he immediately lost the presumption of innocence, without regard to any other evidence at trial, or even the closing arguments and jury instructions. Defense counsel objected precisely because that is gross misstatement of one of the single most important principles of criminal law. Certiorari should thus be granted to find that a defendant remains

cloaked in the presumption of innocence until a duly charged and deliberating jury returns a guilty verdict.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: April 11, 2020
Manhasset, New York

Respectfully Submitted,

Steven A. Feldman
Steven A. Feldman

UNITED STATES
SUPREME COURT

IGNACIO REYES-YANEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on April 13, 2020, we served a copy of Ignacio Reyes-Yanez's petition for writ of certiorari, by first class United States mail, on the United States Attorney for the Southern District of California, 940 Front Street, San Diego, CA 92101-8903, on Ignacio Reyes-Yanez, 72149-198, Federal Correctional Institution, P.O. Box 800, Herlong, CA 96113, and on the Solicitor General, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court.

Steven A. Feldman
Steven A. Feldman

NOT FOR PUBLICATION

FILED

MAR 6 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IGNACIO REYES-YANEZ, AKA Freddy, AKA Nacho, AKA Jose Juan Valles, Defendant-Appellant.	No. 18-50076 D.C. No. 3:16-cr-01283-MMA-3 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Submitted March 4, 2020**
Pasadena, California

Before: KLEINFELD and NGUYEN, Circuit Judges, and PAULEY,*** District Judge.

Ignacio Reyes-Yanez appeals his jury-trial conviction for conspiracy to

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* 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 William H. Pauley III, United States District Judge for the Southern District of New York, sitting by designation.

distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. The government did not mischaracterize the presumption of innocence or its burden of proof at trial, and the district court did not err in overruling defense counsel's corresponding objection and request for a curative instruction. The government's statement that "the trial is about whether [the defendant]'s guilty or not" did not diminish the government's burden of proof, where government counsel, defense counsel, and the jury instructions alike repeatedly told the jury that the government had the burden to prove its case beyond a reasonable doubt. The government was not required to repeat this standard every time it referenced the jury's task. Nor was the government's statement inaccurate. *See Williams v. Florida*, 399 U.S. 78, 86–87 (1970) (explaining that the criminal jury trial "rel[ies] on a body of one's peers to determine guilt or innocence").

The government also did not misstate the law when it explained that no special presumption attaches to a criminal defendant's testimony, and the testimony of a defendant should be judged just like that of any other witness. The overarching presumption of innocence in criminal cases does not dictate that testifying criminal defendants enjoy any greater presumption of credibility than other witnesses. In addition, Reyes-Yanez construes too broadly the government's statement of law; the government did not imply that the presumption of innocence

falls away if a criminal defendant elects to testify on his own behalf. And again, the court and counsel repeatedly instructed the jury that the defendant was to be presumed innocent.

2. The district court did not plainly err in permitting the government to ask the defendant during cross-examination whether he was lying. Although a witness may not be asked to opine on the credibility of *another* witness, *United States v. Geston*, 299 F.3d 1130, 1136–37 (9th Cir. 2002), there is no prohibition on questioning a witness about his own truthfulness.

AFFIRMED.