Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

REZA OLANGIAN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Second Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Is a defendant deprived of a fair trial when government witnesses are invited to comment on his credibility and candor, and when he in turn is asked to comment on their truthfulness?

2. Where an uncalled witness in a foreign country is a long-term government informant with whom the government was still in contact at the time of trial, and where defense counsel was unable to contact or speak to him, is it error for the trial court to instruct the jury that the witness is equally unavailable to both sides?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States of America and petitioner Reza Olangian.

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United States v.Olangian,
803 Fed. App'x 536 (2d Cir. 2020)

Decision: May 5, 2020

The decision of the Court of Appeals was an affirmance of the conviction and sentence imposed by the United States District Court for the Southern District of New York (Hon. Loretta A. Preska, J.), entered March 14, 2018, upon a jury verdict adjudging Petitioner guilty of conspiracy to acquire and transfer anti-aircraft missiles, attempt to acquire and transfer anti-aircraft missiles, conspiracy to violate the International Emergency Economic Powers Act ("IEEPA"), and attempt to violate the IEEPA, and sentencing Petitioner to concurrent prison terms totaling 25 years.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit in a criminal case. The instant petition is timely because the Second Circuit's decision affirming Petitioner's conviction and sentence was issued on May 5, 2020, less than 90 days before the filing of this Petition. There have been no orders extending the time to petition for *certiorari* in the instant matter.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 5

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

STATEMENT OF FACTS

On October 19, 2012, a four-count indictment was lodged against Petitioner Reza Olangian in the United States District Court for the Southern District of New York. (A26-34). The indictment charged Mr. Olangian with conspiracy to acquire and transfer anti-aircraft missiles in violation of 18 U.S.C. § 2332g; attempt to acquire and transfer anti-aircraft missiles; conspiracy to violate the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 et. seq.; and attempt to violate IEEPA. (A26-34).[1] The gravamen of the charges was that Mr. Olangian, a dual Iranian and American citizen residing in Tehran, attempted to purchase Russian-made IGLA-S anti-aircraft missiles on behalf of the Iranian government in violation of American and international sanctions.

Petitioner notes that the sole basis for the district court's criminal jurisdiction in this case was his American citizenship. At the time of the alleged offenses, Mr. Olangian had resided in Tehran for years, all the conduct that allegedly constituted such offenses took place in Iran, Ukraine, and/or Estonia, and the purported source of the missiles was Russia. Any other Iranian citizen performing or attempting to perform the same acts could not have been charged in an American court, and only Mr. Olangian's dual citizenship allowed the Government to do so in this case.

At trial, the historical facts were largely undisputed. Mr. Olangian did not deny making the great majority of communications the Government alleged that he made,

[1] Citations to "A" refer to the appendix on appeal in the Second Circuit, a copy of which will be provided upon request.

nor did he deny taking part in recorded meetings and conversations with undercover Government informants. His defense was instead that he did not intend to follow through with the IGLA-S missile deal, and that he was instead a dissident who opposed the Iranian regime and wanted to embarrass the government of Iran by implicating it in a plot to violate international sanctions. Although the Government claimed that this defense was farfetched, it was in fact - as will be discussed infra - corroborated by contemporaneous photographs and documents, admitted into evidence, showing that Mr. Olangian was in fact opposed to the Iranian government and had been part of a protest movement.

The Government's case at trial was offered primarily through three categories of witnesses. The key witness, Max Buchinsky, was a paid informant of Russian origin who was tasked by the DEA with conducting undercover communications with Mr. Olangian. He testified in detail concerning how he made contact with Mr. Olangian, engaged in communications with him via email, telephone and text messages, and arranged a series of meetings at a hotel in Kiev. These meetings, which Mr. Buchinsky attended along with another paid DEA informant named Muboriz (also spelled "Muboritz" in some parts of the trial transcript)_, were recorded by audio and video. (A439-698). The defendant did not dispute the acts and communications to which Mr. Buchinsky testified.

Additionally, computer specialists Christine Seidsma (A335-438), Jill Mossman (A703-34) testified to their examination of various electronic devices, storage devices and email accounts recovered from defendant, and DEA agent Joseph Catalano

(A828-67) testified concerning certain airline tickets and concerning specific documents recovered from the devices and email accounts. The communications to which they testified were also undisputed.

The remaining leg of the Government's case consisted of the testimony of DEA Special Agents Jeffrey Higgins and Derek Odney. Agent Higgins testified concerning the circumstances leading up to the investigation - confirming, inter alia, that Muboriz was the informant who initially brought Mr. Olangian to the DEA's attention (A84, 87) and that he directed first Muboriz and then Max Buchinsky to set up communication with Mr. Olangian and arrange meetings with him (A89) - and described the arrangements he made with Muboriz and Mr. Buchinsky to conduct the undercover communications and meetings (A89-186). Agent Higgins' investigation included numerous interviews and meetings with Muboriz which were conducted via a translator. (A90, 251), and Muboriz was the one who sent many of the initial emails to the defendant (A96-108, 166-67), whose email account was provided to the Government (A250-51), and who attended the undercover meetings (A251).

Agent Higgins also testified extensively concerning interviews that he and Agent Odney conducted with Mr. Olangian after they lured Mr. Olangian to Tallinn, Estonia on the pretext of a meeting in Russia[2] and secured his arrest at the Tallinn airport. (A187-238). It is undisputed that, during these interviews, Mr. Olangian was interested in cooperating with the Government. Near the close of Agent Higgins' direct

[2] Interestingly, Mr. Olangian's passport did not show a Russian visa, which would have been necessary had he actually planned to attend such a meeting.

testimony, the government elicited the following testimony as to why a cooperation agreement was not reached:

> Q. At the conclusion of your interviews with the defendant, did the DEA decide to pursue further cooperation with the defendant?
>
> A. I'm sorry. Just to clarify in all of the interviews?
>
> Q. Yes, in all six of -
>
> A. Well, we decided not to pursue cooperation.
>
> Q. Tell us why not?
>
> A. We didn't feel that the answers we were receiving were truthful and we felt like there may be things omitted as well.

(A236).

Agent Odney likewise testified concerning his participation in the investigation, the planning and execution of the undercover meetings, and the post-arrest interviews. (A734-824). During his testimony, the government again elicited testimony concerning Mr. Olangian's credibility during cooperation, asking him as follows:

> Q. And in connection with that October 31st meeting describe for us how the defendant's demeanor appeared as compared against the October 10th and October 11th meetings.
>
> A. He didn't seem as forthright. He didn't seem as he was wanting to explain all the information in detail. He repeated a lot of what he had said at the first meeting and we didn't obtain a lot of new information and the people that he did talk about it was people that we weren't able to really pursue an investigation of.

(A767-68) (emphasis added).

As a final part of the Government's case, it was stipulated between the parties that Mr. Olangian did not possess a license or authorization issued by the United

States Department of Treasury Office of Foreign Assets Control (A827) and that IGLA-S missiles were anti-aircraft missiles (A856-57).

Muboriz was not called as a witness on the Government's case, and the government rested after the close of Mr. Catalano's testimony (A868).

Two witnesses testified on the defense case: Dr. Patrick Clawson and Mr. Olangian himself. Dr. Clawson, the director of research for the Washington Institute for Near East Policy and an expert on Iran, gave historical background concerning Iran's recent history. (A871-80, 892-903). In particular, he discussed how the former Shah of Iran was overthrown in the Islamic revolution of 1979, how the initial revolutionary coalition was taken over by Ayatollah Ruhollah Khomeini who implemented repressive religious rule, how an opening occurred after the election of Mohammed Khatami as president in 1997, but that President Khatami's successor, Mahmoud Ahmadinejad (who was elected in 2005) ended the reformist experiment. (A876-80, 892-98). In 2009, President Ahmadinejad was re-elected in a vote that many reform-minded Iranians viewed as fraudulent, leading to massive protests, known as the Green Movement, that were violently repressed by the government. (A898-903).

Petitioner Olangian was the final witness in the case. Mr. Olangian testified that he was born in Iran and was a dual American and Iranian citizen. (A905). In the 1950s, his mother had been arrested and imprisoned by the Shah, and his father's nephew was imprisoned by the Shah's secret police until 1979. (A906-07). After the revolution, his father's nephew was proscribed by the new regime and executed. (A907-08). His brother was also arrested and beaten by the revolutionary regime in

an incident where the religious militias also beat and stabbed his mother. (A909-10). His brother later died due to complications from this beating. (A911-12).

Mr. Olangian himself came to the United States as a student in 1979. (A912). He initially supported the revolution but became disaffected with it due to the repression and the Iran-Iraq war. (A914-15, 921-22). After his studies, he stayed out of politics and became a software engineer, working for various companies and ultimately starting his own company, and in the process getting married and becoming a United States citizen. (A916-23).

In 2004, Mr. Olangian separated from his wife and moved back to Iran, where he started another software company. (A923-24, 926-30). He wanted to be closer to his family and was encouraged by the greater openness in Iranian society during the Ahmadinejad era. (A925-26). By 2008, he developed a romantic relationship with his secretary in this company, Banafshe, who eventually became his second wife. (A929-30, 932-33).

Mr. Olangian described how after the 2005 election and the inauguration of President Ahmadinejad, all the achievements of the Khatami era slipped away and society became repressive, with religious police harassing both men and women in the streets. (A930-31). His secretary and future wife Banafshe, who had formerly been a journalist, was politically connected and introduced him to the Iranian opposition movement. (A931-32).

During this period, Mr. Olangian made international business connections through his company and visited Tajikistan to discuss various business deals.

(A933-40). He discussed these deals with Banafshe and learned that due to sanctions, Iran was prohibited from importing certain materials, and he got the idea to take action for the opposition, as opposed to just talking, by exposing the Iranian government in a violation of the sanctions. (A940-44). Initially, this plan related to a purchase of the metal osmium which is used in rockets and also included discussions of plutonium, but the negotiations fell through. (A944-46, 949-51).

During these failed discussions, the contacts that petitioner had developed in the Iranian Ministry of Defense expressed interest in IGLA missiles, and the idea developed to conduct a sham IGLA deal as a sting against the Iranian regime. (A951-67). There was no intent to actually go through with the deal. (A955-56, 964). A copy of the sham contract prepared for the Ministry of Defense in or about August 2008 was admitted into evidence. (A958-59). This deal did not proceed to the point of completing the sting because Mr. Olangian's connection fell through and he was conned out of the deposit money. (A967-71).

Any further efforts to conduct a sting were interrupted by the 2009 election and resulting protests. During the election campaign, Mr. Olangian gave the opposition the use of his office and handed out pamphlets during street rallies. (A980-81). The opposition, known as the Green Movement, began massive street demonstrations on the night of the election in which Mr. Olangian and his family participated. (A981-82). Mr. Olangian intervened to prevent the harassment of women and was attacked with pepper spray, and his wife and son were beaten on the streets. (A983). Numerous contemporaneous photos and videos taken by Mr. Olangian were admitted into

evidence, showing him participating in rallies with his family, documenting violence by the security forces, and intervening to prevent harassment. (A984-91). Mr. Olangian further recounted that he briefly returned to California in November and December of 2009 but that after his return on December 25, he was caught up in the most brutal day of the protests. (A991). During this protest, he attempted to intervene on behalf of an elderly couple, and he and his wife were beaten, resulting in him suffering a broken wrist, injured shoulder and broken head. (A991-92).

Petitioner testified that as a result of these protests and their violent repression, the opposition "started to expose the government as much as we could" by getting into and exposing the government's economic activities. (A992-93). Among other things, he wrote and attempted to publish an article concerning economic corruption in Iran, which was admitted in evidence. (A998-99). He detailed how the political events provided him with the motivation to get involved in other fake deals, including the revival of the fake IGLA deal that resulted in the charges in this case. (A999-1006). He then gave an account of the communications with Muboriz, the resulting meetings, and post-arrest interviews with the DEA. (A1006-44).

During Mr. Olangian's cross-examination, the issue came up of whether defendant had told the DEA agents that Yousefiy - who he had identified as a friend of his - was from the Iranian Ministry of Defense. (A1167). Petitioner responded that he would not have said that, to which the government responded "[s]o the agents made that up too?" (A1167). Defendant promptly objected to this question on the ground that it was "improper to try to impeach a witness with the prior testimony of another

witness by the way the question was asked." (A1167). After a short colloquy, however, the court stated, "It's already in. I'll permit it. Let's go." (A1168).

On summation, the Government referred back on several occasions to Agent Higgins' testimony regarding Mr. Olangian's credibility. During the initial summation, the prosecutor stated:

> The second thing that I want you to understand about this is that the DEA decided not to pursue cooperation with the defendant, and you all have now had the opportunity to see the principal reason why the DEA decided not to work further with the defendant. His testimony was not and is not credible.

(A1347). Shortly afterward, the government continued, "the defendant is guilty of a whole lot more than lying, and the reason that the DEA did not pursue cooperation with the defendant is clear." (A1348).

During rebuttal summation, the Government again argued, "Second, remember that the DEA decided not to cooperate the defendant because they ultimately didn't find him credible. It was not something they could rely on, his telling the truth." (A1401).

The trial then proceeded to the charging stage. Earlier, at the charge conference, defense counsel Ginsburg had raised the issue that they had requested information from the Government concerning "at least one, if not more, of [its] confidential sources," specifically Muboriz,[3] and that an agent had "contacted him and

[3] Muboriz' name was not mentioned in defense counsel's initial request, but later in the colloquy, he made clear that Muboriz was the informant he was talking about. (A889).

he was unwilling to speak with us." (A885). Petitioner contended that at some point in time - including the period when discovery was ongoing - Muboriz was available to the Government and that he had been used for source and background information "some of which came in either directly or indirectly during the course of the trial," but that he had never been available to the defense. (A885-86). The Government responded that it was Muboriz' decision not to talk to defense counsel, and that because Muboriz was a voluntary paid informant residing outside the United States, "it was [their] position that he is equally unavailable to both parties." (A886-87).

Defense counsel reiterated that the Government had contact with Muboriz and used his information during trial, which was inter alia the source of the "problem with AK-47s and things of that nature," and that the Government "had the benefit of using information from that witness as a sort of door-opener to other things that they then did or said to their witness" but that the defense was only permitted to contact him through Government agents and was unable to speak to him. (A888). Defense counsel pointed out that if the Government had asked Muboriz to testify, it could have called him, and therefore it was "not an equal balance." (A888). In other words, "to put a charge in here which… suggests to the jury that [defendant] could have as easily gotten a hold of Mr. Muboriz as the government or gained some benefit from him or spoken to him or used information form him as the government has used is simply not the state of play." (A889).

In response to the Government's reiteration of its position that Muboriz was a "voluntary witness" (A890), counsel argued further that due process should not allow

the Government to maintain contact with a confidential source "up until some point in time as we get close to trial" and then have the witness absent himself from the United States and be unwilling to speak to the defense, it would be unfair for the court to charge the jury that such witness was equally unavailable to both sides when in fact one party had obtained the greater benefit. (A890-91).

The district court concluded the colloquy by stating that it would "permit the instruction on uncalled witnesses to remain" in order to keep the jury from "think[ing] crazy things" and because it didn't "see any prejudice because of the hearsay that was elicited from the agent." (A891). Thus, when the jury was charged, the court instructed it as follows:

> There are people whose names you've heard during the course of the trial but who did not appear here to testify. I instruct you that all parties have an equal opportunity or lack of opportunity to call these witnesses. Therefore, you should not draw any inferences or reach any conclusion as to what they would have testified to had they been called. Their absence should not affect your judgment in any way.

(A1479).

During its deliberations, the jury sent a note requesting a readback of testimony regarding Mr. Olangian's cooperation as well as the testimony of Agents Higgins and Odney. (A1494). Shortly after the note was sent, the jury returned with a verdict convicting Mr. Olangian of all counts. (A1505-06).

On March 14, 2018, the district court sentenced Mr. Olangian to the statutory minimum prison term of 25 years on Counts One and Two and sentenced him to 20 years on Counts Three and Four, all sentences to run concurrently. (A21). Judgment

was entered on the same date (A1509-16).

Petitioner filed a timely notice of appeal (A1517). On appeal to the Second Circuit, he argued *inter alia* that he was deprived of a fair trial because (i) the prosecutor called upon Agents Higgins and Odney to comment on his credibility and candor as well as vice versa; and (ii) the trial court improperly instructed the jury that Muboriz was equally available to both sides when in fact he was not.

By decision dated May 5, 2020, the Second Circuit affirmed Mr. Olangian's conviction and sentence. (App. 1-3).[4] On the issues pertinent to this Petition, the Second Circuit stated:

> On Olangian's challenges to the testimony of the two law enforcement officers, we do not find that the testimony deprived Olangian of a fair trial. "When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important as an initial matter to place the remark in context." Greer v. Miller, 483 U.S. 756, 765-66, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (internal quotation marks and brackets omitted). Generally, the testimony of government witnesses "cannot be used to direct the jury to trust the Government's judgment rather than its own view of the evidence." United States v. Aquart, 912 F.3d 1, 33 (2d Cir. 2018) (internal quotation marks and brackets omitted). But here, unlike in Aquart, Olangian's attorney admitted in his opening statement that, during the post-arrest interviews, Olangian told the agents "a story which is not completely true." App'x at 68. In addition, the agents' testimony was limited to describing Olangian's demeanor and lack of candor during his participation in post-arrest interviews, which was separate from his testimony as a trial witness. See Aquart, 912 F.3d at 34; see also United States v. Pujana-Mena, 949 F.2d 24, 33 (2d Cir. 1991) (finding no improper vouching where an agent

[4] Citations to "App." refer to the appendix to this Petition.

> "testified as to a general DEA policy regarding an informant's veracity ... after defense counsel had repeatedly suggested that [the agent] had not done enough to corroborate [the informant]'s information").
>
> As to Olangian's second argument, while our precedent forecloses the government from compelling a testifying defendant from stating that a government witness is lying, see United States v. Richter, 826 F.2d 206, 209 (2d Cir. 1987), we again consider the question in context. Defense counsel objected to the question before it was answered, and the district court instructed the jury that "a question put to a witness is not itself [ ] evidence." App'x at 1427. The jury instruction together with the fact that Olangian never answered the question are sufficient to cure "potential bias posed by the question [ ]." United States v. McCarthy, 54 F.3d 51, 56 (2d Cir. 1995).
>
> Third, Olangian argues that the district court erred by giving an uncalled witness charge. But we afford district court judges "considerable discretion" in deciding whether to give a missing witness instruction, United States v. Gaskin, 364 F.3d 438, 463 (2d Cir. 2004), and review a refusal to do so for abuse of discretion and actual prejudice, see United States v. Ebbers, 458 F.3d 110, 124 (2d Cir. 2006); United States v. Adeniji, 31 F.3d 58, 65 (2d Cir. 1994) ("The decision whether to give a missing witness instruction is within the discretion of the trial court, and its failure to give the instruction rarely warrants reversal."). Here, Olangian fails to show that the district court abused its discretion or that he otherwise suffered actual prejudice under these facts.

(App. 2-3).

Notably, the issue upon which the Second Circuit's resolution of the Odney/Higgins issue hinged – the supposed "context" provided by the petitioner's opening statement – was not raised in the government's briefs and was brought up by them for the first time at oral argument.

Now, for the reasons set forth below, Petitioner seeks a writ of certiorari as to the issues of (i) whether it was a deprivation of a fair trial for the government to elicit testimony from Agents Higgins and Odney about his truthfulness and credibility, and/or to request that he comment on their truthfulness; and (ii) whether, given the imbalance that exists where an uncalled witness is a long-term government informant who is unavailable to the defense, it was a deprivation of a fair trial for the district court to instruct the jury that he was equally unavailable to both sides.

REASONS FOR GRANTING THE WRIT

I. IT IS A DEPRIVATION OF A FAIR TRIAL WHEN THE PROSECUTION ASKS THE DEFENDANT AND GOVERNMENT WITNESSES TO COMMENT ON EACH OTHER'S CREDIBILITY AND CANDOR

1. It is a fundamental tenet of a fair trial that the jury, and the jury alone, is the arbiter of witness credibility. It is not for prosecution witnesses to comment on the credibility of defense witnesses, thus putting an official stamp on the government's contention that those witnesses should not be believed. Nor is it fair or equitable to place a defendant in a position where, in order to make his case, he or she will have to directly call a prosecution witness a liar.

Both of these principles have been recognized by the very appellate court that affirmed petitioner Olangian's conviction. In United States v. Aquart, 912 F.3d 1 (2d Cir. 2018), the Second Circuit found "significant error" in the government's attempt to elicit testimony from a case agent indicating that a defense witness "did not receive a cooperation agreement because it was determined he was lying." Id. at 33. The court

found that such inquiry "ran afoul of established law holding that cross-examination cannot be used to direct the jury to trust the Government's judgment rather than its own view of the evidence." Id., quoting United States v. Henry, 47 F.3d 17, 21 (2d Cir. 1995). While the court noted that it was proper to "elicit the simple fact that [the putative cooperator] never had a cooperation agreement with the government," id., it was not permitted to go further and ask whether its agents found the cooperator to be credible, because "[t]he concern... [is with] the law's insistence that witness credibility be left exclusively for determination by the jury." Id. at 33-34, quoting United States v. Truman, 688 F.3d 129, 143 (2d Cir. 2012).

Similarly, the Second Circuit has repeatedly held that a defendant may not be cross-examined in a way that "compels him to characterize government witnesses as lying." United States v. Bell, 531 Fed. App'x 117, 118 (2d Cir. 2013); United States v. Richter, 826 F.2d 206, 208-09 (2d Cir. 1987). This rule, too, is a function of the fact that "[d]eterminations of credibility are for the jury, not for witnesses." Richter, 826 F.2d at 208; see also Truman, 688 F.2d at 143 (noting that "the Government improperly asked Truman whether lay witnesses for the government were 'mistaken or lying' and twice asked him if his son was 'lying'"). Moreover, where the witnesses upon whose credibility the defendant is asked to comment are law enforcement officers, such cross-examination may also serve "to improperly suggest that [the defendant's] personal views of the police [as liars[rendered his testimony less credible." Truman, 688 F.3d at 143. In other words, cross-examination such as occurred in the instant case not only intrudes upon the jury's prerogative but has the effect of undermining the

defendant's credibility, and concomitantly enhancing the credibility of the law enforcement officers, by pitting him directly against them.

2. What happened in Aquart, Richter and Truman is precisely what happened here. The government elicited testimony from not one but two government agents, not only that Mr. Olangian did not receive a cooperation agreement (which would have been permissible) but that the reason for this was that they, the agents of law enforcement, determined him to be untruthful. Moreover, the government emphasized this testimony on summation, not merely inviting but directly urging the jury to adopt Agents Higgins and Odney's view of Mr. Olangian's credibility. And at the same time, they asked Mr. Olangian whether *the agents* were "making up" their testimony – a question which, contrary to the Second Circuit's opinion, *was* answered, as evidenced by the trial court's comment, "*[i]t's already in*. I'll permit it. Let's go." (A1168) (emphasis added).

The Second Circuit's attempts to minimize the significance of these intrusions into the fairness of Mr. Olangian's trial are unavailing. As to the questioning of Agents Odney and Higgins regarding Mr. Olangian's credibility, it is immaterial whether thier testimony "was limited to describing Olangian's demeanor and lack of candor during his participation in post-arrest interviews." (App. 2). The testimony found to be improper in Aquart was "limited" to precisely the same thing – the agents' assessment of a defense witness' credibility during his proffer statements. But the Aquart court nevertheless found error, precisely because such testimony is *not*, as the Second Circuit found in this case, "separate from his testimony as a trial witness" (App. 2). To the

contrary, credibility is credibility, and a contention that a person was not credible during interviews with law enforcement will inevitably bleed over to the jury's consideration of his or her credibility as a witness. Juries are routinely instructed on the principle of *falsus in uno*, as indeed the jury in this case was (A1439), and therefore, consideration of a person's credibility as a cooperator and his or her credibility as a witness cannot be divorced from each other.

Indeed, if anything, Agents Higgins and Odney's commentary on Mr. Olangian's credibility was more egregious than in Aquart, because (i) Mr. Olangian was not merely a defense witness but the defendant himself, and (ii) unlike Aquart, the trial court did not sustain an objection to the improper testimony, but instead, the testimony remained in the record for the government's use on summation. This was a direct intrusion into the province of the jury which went directly to the heart of its determination of guilt or innocence, and as such, deprived Mr. Olangian of a fair trial.

The Second Circuit also, citing this Court's holding in Greer v. Miller, 483 U.S. 756, 765-66 (1987), found that the challenged testimony in this case was mitigated because of its "context." (App. 2). But while this finding was framed as an application of Greer, it in fact did violence to Greer because the "context" at issue here did not in fact mitigate the harm. In Greer, the "context" cited by this Court consisted of "a single question, an immediate objection, and two curative instructions," Greer, 483 U.S. at 766 – which itself is markedly different from this case, where the improper testimony was neither stricken nor cured – whereas in the instant case, the "context" cited by the Second Circuit consisted of ambiguous remarks made in an opening

statement days earlier.

Moreover, the remark at issue is itself taken out of context, because what was actually said during the defense opening was as follows:

> And when [Mr. Olangian] speaks to the United States representatives he has in mind one major thing and that is he's been arrested, his wife assisted him in some of these things. She is in big danger and exposed. And he speaks to the agent and tells them mean things which you'll hear which were written out in and turned into reports which we're not contesting. But he arranges with the agents to be able to speak to his wife and to be able to get her to some degree of safety and continues to talk to the agents and tells them a story which is not completely true.
>
> But what he also does is he reaches out to his wife and asks his wife to send him documents about the things he was doing. And not only did he do that when he was in Estonia but he is then brought to the United States to come into the United States court system and he again asks to meet with the government. And his lawyers turn over to the government various documents including contracts that purport to be contracts that would agree, if he wanted to go forward with it, to sell and buy these various weapons, given to the government by his own lawyers, not afraid to do that. Not something you're going to do if you're guilty and you're going to turn over all the evidence.

(A68-69). In other words, by focusing on one particular phrase of the opening statement – "tells them a story which is not completely true" – the Second Circuit elided (i) that, according to defense counsel, the "not completely true" story was told only for a limited time and for the specific purpose of getting Mr. Olangian's wife out of Iran; and (ii) that defense counsel then went on to emphasize that Mr. Olangian's *subsequent* attempts at cooperation were genuine and candid. The agents' testimony, in contrast, was that Mr. Olangian's untruthfulness was pervasive and that it *did not*

end when he came to the United States, because it ultimately prevented him from obtaining a cooperation agreement. There is a vast difference between defense counsel's limited discussion of stories that were "not completely true" and the agents' bald conclusion that Mr. Olangian was a liar, and thus, this is not the type of "context" that could mitigate the prejudice under Greer.[5]

And as to the government's questioning of Mr. Olangian about whether the *agents* "made up" a portion of their testimony, not only was the response "already in" as stated above (A1168), but the only other factor cited by the Second Circuit in declining to find error was a boilerplate instruction to the jury that "a question put to a witness is not itself evidence" (App. 2-3), which again, did nothing to cure the prejudice to petitioner in the moment.

3. Moreover, the Second Circuit considered each of the above issues separately rather than in combination. By permitting Agents Higgins and Odney to testify regarding Mr. Olangian's truthfulness *and* leaving in the record Mr. Olangian being compelled to state whether the agents "made up" their testimony, the trial court created a feedback loop in which, by compelling Mr. Olangian to characterize the agents' credibility - a characterization which the prosecutor obviously hoped the jury would disbelieve - the Government reinforced their testimony including their comments on whether Mr. Olangian was credible. Whether or not each of the

[5] Petitioner again reiterates that this "context" was nowhere mentioned in the government's brief to the Second Circuit and was brought up for the first time at oral argument, meaning that petitioner had no opportunity to brief the issue.

challenged rulings *by itself* deprived Mr. Olangian of a fair trial – which they did – the prejudice of the two rulings *together* was certainly sufficient to do so.

4. Finally, the errors at issue here cannot be dismissed as harmless and/or immaterial to Mr. Olangian's substantial rights. This is a case in which the evidence of what Mr. Olangian *did* might be overwhelming, but the evidence of what he *intended* was not. His defense - that he was a dissident in Iran and was participating in the deal in order to undermine the Iranian government - didn't come out of thin air. Numerous photographs were introduced into evidence showing that Mr. Olangian did participate in the 2009 Green Movement protests and that he actively opposed the Iranian security forces during those protests and intervened when other protesters were being beaten. The fact that friends and family members of Mr. Olangian suffered under the Iranian government, including being imprisoned and tortured, was also real. Defendant was a person who really did have reasons to oppose the Iranian regime and who had, just three years before the events at issue in the trial, put his money where his mouth was by risking his life on Tehran's streets. This was not a defense that the jury was automatically destined to reject. Accordingly, this Court should grant certiorari on the issue of whether petitioner's right to a fair trial was prejudiced.

II. WHERE AN UNCALLED WITNESS IS A LONG-TERM GOVERNMENT INFORMANT AND AN IMBALANCE IN THE ABILITY TO CONTACT HIM EXISTS, AN "EQUALLY UNAVAILABLE" INSTRUCTION SHOULD NOT BE GIVEN

1. Petitioner was also deprived of a fair trial by reason of the district court giving an uncalled-witness charge informing the jury that all persons whose names

were mentioned but not called as witnesses - including government informant Muboriz - were equally available or unavailable to both sides. This is, quite simply, not a situation in which Muboriz was equally unavailable to the government and the defense. Not only did Muboriz provide the information that started the investigation in the first place, not only did his statements come into the trial via both hearsay testimony and his participation in the videotaped meetings that were played to the jury, and not only did information provided by him inform the government's conduct of the investigation and its examination of witnesses, but the colloquy at the charge conference made clear that the government was able to communicate with him and receive a response as late as one week before trial. (A886-87). In contrast, defense counsel could only request to contact Muboriz through government agents, and when Muboriz' refusal to speak to counsel was relayed back through those same agents, there was nothing more that defendant could do. Under these unique circumstances, giving an "equal opportunity" charge misled the jury and deprived the defendant of due process.

Again, the Second Circuit's own prior holdings make clear the deprivation of a fair trial that occurred in this case. The Second Circuit has held that "when [a] witness's testimony would be material and the witness is peculiarly within the control of [a] party" but the witness is not called, it is appropriate to instruct the jury that it may draw an adverse inference against that party. United States v. Caccia, 122 F.3d 136, 138 (2d Cir. 1997), citing United States v. Torres, 845 F.2d 1165, 1169 (2d Cir. 1988). "In such circumstances, it is more likely than not that the testimony of an

uncalled witness would have been unfavorable to the party with such control, and a jury may reasonably draw such inference." Id. at 138-39. Notably, for purposes of a missing witness charge, the "control" element hinges on whether the party, "in comparison with an adversary," lacks "meaningful *or pragmatic access* to the witness." Id. at 139 (emphasis added).

Even where a witness is not under the control of a given party, the Second Circuit has held that multiple options may be appropriate depending on the circumstances. Such options include, in addition to the uncalled-witness charge given by the district court in this case, "giv[ing] no instruction and leav[ing] the entire subject to summations" and/or "instruct[ing] the jury that an adverse inference may be drawn against either or both sides." Caccia, 122 F.3d at 139. The Caccia court held that a witness who "had assisted the government as an informant and had expressed unwillingness to speak to defense counsel before trial" was not meaningfully available to the defense. See id. That is, of course, exactly the case with respect to petitioner Olangian vis-à-vis Muboriz, precluding a finding that Mr. Olangian had equal access to him – especially since unlike the informant in Caccia, Muboriz had not ended his relationship with the government ahd indeed had spoken to government agents approximately one week before trial. (A886-87). As such, the government should not have been permitted to hide behind the claim that Muboriz was a "voluntary informant" residing outside the United States to argue that he was equally unavailable to them, when in fact the imbalance in the ability to communicate with and obtain information from Muboriz was clear.

2. But even if Muboriz were no longer "peculiarly within the control of [the government]" at the time of trial, he was certainly not *equally* unavailable to both sides. As discussed above and in the Statement of Facts, Muboriz had acted as a government informant in this case for many months, providing the information that led to the investigation beginning in the first place and taking part in government-controlled communications and meetings. He was a background source whose disclosures informed the way the government conducted the investigation and how it questioned witnesses such as the investigating agents or Max Buchinsky. The government was in continuing communication with him until at least a week before trial, whereas defense counsel could not contact him directly and was refused contact via government agents. Under those circumstances, for the district judge to tell the jury that defendant had an equal opportunity to contact and call Muboriz, and that it should draw no inference at all from the government's failure to call him, was simply misleading.

What the district court should have done instead - assuming, of course, that this Court rules out a missing witness charge, which it should not do - was to exercise the first of the three options set forth in Caccia, namely to give no charge at all and let both sides argue on summation regarding the inference (if any) to be drawn from Muboriz' nonappearance. The Second Circuithas suggested several times that not giving an instruction is the favored alternative. See United States v. Sorrentino, 72 F.3d 294, 298 (2d Cir. 1995) (better practice is to give no instruction and allow comment on summation), overruled on other grounds, United States v. Abad, 514 F.3d 271, 274 (2d

Cir. 2008). This alternative - no instruction either way - would have allowed both sides to make their arguments and would have permitted the jury to draw an inference against the Government if it accepted petitioner's argument, rather than forbidding the jury from drawing any inference at all as happened here. Certainly, in the situation at bar, the choice of what instruction to give should not have been, as the Second Circuit's decision in this case would have it, in the unbridled discretion of the district court.

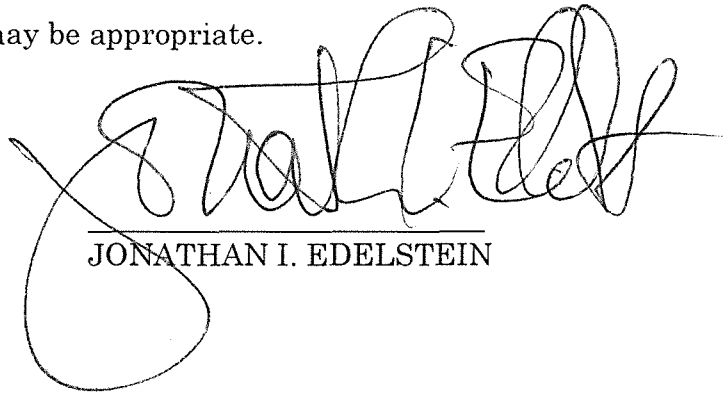
3. Finally, the Second Circuit's conclusion that Mr. Olangian could not point to any prejudice from the district court's instruction (App. 3) is simply untenable. Muboriz' information permeated the case, both because he was the one who alerted the DEA to Mr. Olangian in the first place and because he participated in the videotaped meetings. And, just as much to the point, much of his information was hidden from view. Not everything Muboriz said and did was documented: he had many ex parte conversations with government agents and with Mr. Buchinsky, and while the videos showed what he said during his actual meetings with Mr. Olangian, they do not show the discussions that went on between him, Mr. Buchinsky, and the agents during the overnight breaks between the meetings. He was an important, indeed key, witness whose information was largely veiled and who, thanks to the government's failure to call him, petitioner was unable to cross-examine. For the court to tell the jury that they could draw no inference from this and that petitioner had an equal opportunity to obtain information from him was prejudicial, not least because it foreclosed petitioner from making any argument on summation that the government's failure to

call Muboriz should weigh in his favor. Therefore, certiorari is warranted on this issue as well.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and remand for such remedies as may be appropriate.

Dated: New York, NY
July 10, 2020



JONATHAN I. EDELSTEIN

18-1123
United States v. Reza Olangian

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 5th day of May two thousand twenty.

Present: ROSEMARY S. POOLER,
ROBERT D. SACK,
PETER W. HALL,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 18-1123-cr

REZA OLANGIAN, AKA SEALED DEFENDANT 1,
AKA RAYMOND AVANCIAN, AKA RAY,

Defendant-Appellant.

Appearing for Appellant: Johnathan I. Edelstein, Edelstein & Grossman, New York, N.Y.

Appearing for Appellee: Jarrod Schaeffer, Assistant United States Attorney (Mollie Bracewell, Anne M. Skotko, *on the brief*), *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Preska, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the matter be and it hereby is **AFFIRMED**.

Defendant-Appellant Reza Olangian appeals from the March 14, 2018 judgment in the United States District Court for the Southern District of New York (Preska, *J.*) sentencing him principally to 25 years' imprisonment. Following a jury trial, Olangian was convicted of one count of conspiracy to acquire and transfer anti-aircraft missiles, in violation of 18 U.S.C. §§ 2332g(a)(1), (b)(2), (c)(1), and 3238; one count of attempt to acquire and transfer anti-aircraft missiles, in violation of 18 U.S.C. §§ 2332g(a)(1), (b)(2), (c)(1), 3238 and 2; and one count of conspiracy to violate the International Emergency Economic Powers Act ("IEEPA"), in violation of 50 U.S.C. §§ 3238 and 2. We assume the parties familiarity with the underlying facts, procedural history, and specification of issues for review.

Olangian challenges his conviction on the following grounds: (1) that there was prosecutorial misconduct during trial that warrants reversal because the government improperly elicited from its law enforcement witnesses their belief that Olangian was untruthful during six post-arrest interviews; (2) that Olangian was improperly asked during his cross-examination whether law enforcement agents made up part of their testimony; (3) that it was reversible error for the district court to have given an uncalled-witness charge in its jury instructions; (4) that his Sixth Amendment right to counsel was violated when the court did not permit him to briefly consult with counsel during his redirect examination; and (5) that it was reversible error for the court to have denied his motion for a mistrial after testimony was elicited about a purported previous arms deal not charged in the indictment.

On Olangian's challenges to the testimony of the two law enforcement officers, we do not find that the testimony deprived Olangian of a fair trial. "When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important as an initial matter to place the remark in context." *Greer v. Miller*, 483 U.S. 756, 765-66 (1987) (internal quotation marks and brackets omitted). Generally, the testimony of government witnesses "cannot be used to direct the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Aquart*, 912 F.3d 1, 33 (2d Cir. 2018) (internal quotation marks and brackets omitted). But here, unlike in *Aquart*, Olangian's attorney admitted in his opening statement that, during the post-arrest interviews, Olangian told the agents "a story which is not completely true." App'x at 68. In addition, the agents' testimony was limited to describing Olangian's demeanor and lack of candor during his participation in post-arrest interviews, which was separate from his testimony as a trial witness. *See Aquart*, 912 F.3d at 34; *see also Untied States v. Pujana-Mena*, 949 F.2d 24, 33 (2d Cir. 1991) (finding no improper vouching where an agent "testified as to a general DEA policy regarding an informant's veracity . . . after defense counsel had repeatedly suggested that [the agent] had not done enough to corroborate [the informant]'s information").

As to Olangian's second argument, while our precedent forecloses the government from compelling a testifying defendant from stating that a government witness is lying, *see United States v. Richter*, 826 F.2d 206, 209 (2d Cir. 1987), we again consider the question in context. Defense counsel objected to the question before it was answered, and the district court instructed the jury that "a question put to a witness is not itself [] evidence." App'x at 1427. The jury instruction

together with the fact that Olangian never answered the question are sufficient to cure "potential bias posed by the question []." *United States v. McCarthy*, 54 F.3d 51, 56 (2d Cir. 1995).

Third, Olangian argues that the district court erred by giving an uncalled witness charge. But we afford district court judges "considerable discretion" in deciding whether to give a missing witness instruction, *United States v. Gaskin*, 364 F.3d 438, 463 (2d Cir. 2004), and review a refusal to do so for abuse of discretion and actual prejudice, *see United States v. Ebbers*, 458 F.3d 110, 124 (2d Cir. 2006); *United States v. Adeniji*, 31 F.3d 58, 65 (2d Cir. 1994) ("The decision whether to give a missing witness instruction is within the discretion of the trial court, and its failure to give the instruction rarely warrants reversal."). Here, Olangian fails to show that the district court abused its discretion or that he otherwise suffered actual prejudice under these facts.

With respect to his fourth argument, Olangian's constitutional rights were not violated when the district court denied his request to consult briefly with his counsel in the middle of redirect examination. *See Perry v. Leeke*, 488 U.S. 272, 283-84 (1989) ("[A] trial judge has the unquestioned power to refuse or to declare a recess at the close of direct testimony—or at any other point in the examination of a witness . . . .").

Last, we disagree with Olangian that the district court erred when it denied his motion for a mistrial after certain testimony was elicited from a government witness regarding Olangian's uncharged conduct. We review the denial of a motion for a mistrial for abuse of discretion. *United States v. Deandrade*, 600 F.3d 115, 118 (2d Cir. 2010). Trial errors asserted as grounds for a mistrial "that do not affect the substantial rights of the defendant are harmless and do not compel the reversal of a criminal conviction." *United States v. Mussaleen*, 35 F.3d 692, 695 (2d Cir. 1994). Considered in the context of the entire trial record, along with the fact that the testimony was ultimately stricken and the district court subsequently provided a curative instruction, we conclude that any error here was harmless.

We have considered the remainder of Olangian's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk