

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

NO. _____

ROSS COLBY,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

- 1) Whether the statements of a prosecutor invoking juror sympathy and telling the jury that it has a duty to convict violate the defendant's Sixth Amendment Right to a Fair Trial?

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United States v. Colby No. 19-10224
(February 25, 2021)

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The petitioner, ROSS COLBY, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered February 25, 2021.

OPINION BELOW

The Ninth Circuit Court of Appeals entered a memorandum opinion in *United States v. Colby*, No. 19-10224, on February 25, 2021. A copy of the Opinion is attached as Appendix A.¹

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This appeal in a criminal case is from a district court judgment and sentence following a conviction after jury trial.

On April 6, 2017, in the Northern District of California, ROSS COLBY (COLBY) was charged in a five-count Indictment with Intentional Damage to a Protected Computer in violation of 18 U.S.C. §§1030(a)(5)(A) and (c)(4)(B)(i) [COUNT ONE]; Attempted Damage to a Protected Computer in violation of 18 U.S.C. §§1030(a)(5)(A) and (c)(4)(B)(ii) [COUNT TWO]; and three counts of Misdemeanor Computer Intrusion in violation of 18 U.S.C. §1030(a)(2)(C)

¹ The caption of this Opinion contains the name of the parties to the proceedings.

[COUNTS THREE, FOUR AND FIVE]. The charged conduct took place in July and September of 2015.

Jury trial commenced on May 29, 2018.

On June 6, 2018, following a four-day jury trial, the jury returned a verdict of guilty on all counts.

On June 29, 2018, COLBY filed a Motion for New Trial. This motion was denied in a written Order on July 26, 2018.

On June 12, 2019, the district court sentenced COLBY to time served (approximately 5 and a half months) and three years of supervised release, of which one would be served on house arrest. October 8, 2015.²

The matter was submitted to the Ninth Circuit panel without oral argument on February 12, 2021.

On February 25, 2021, the Court of Appeals issued a Memorandum Opinion, affirming the judgment of the District Court.

² Sentencing proceedings were delayed while COLBY was referred for psychological evaluations to determine competency for sentencing only. He was subsequently found competent following a hearing which took place on April 5; May 7, and May 10, 2019.

STATEMENT OF FACTS

Embarcadero Media in Palo Alto, California, is a media company which owns several newspapers and community websites. Sometime after 11:00 p.m. on September 17, 2015, Director of Information Technology, Frank Bravo, was awakened by the company's President, Bill Johnson, who told him about a problem with the website. Bravo attempted to access one of the company's websites. Instead of the website, he found an image of Guy Fawkes along with writing indicating the site had been hacked.

Bravo then logged into the company's servers. He discovered that not websites had not only been altered but removed from the host and replaced with the Guy Fawkes masks. Bravo removed the websites altogether to prevent others from seeing the damage. During the process, he also discovered that the company's email was not working properly.

Bravo tried unsuccessfully to access their mail servers through GoDaddy.com and determined that the company's MX records had been deleted. MX records are unique records to allow mail to be routed to specific places on the internet. The domains for Embarcadero Media's websites had been unregistered (essentially deleted) so that someone else could theoretically now use them but Embarcadero Media could not. Bravo tried to get the system to send

him a password reset email but did not recognize the email to which it indicated it would send the new password.

Bravo learned that the changes to the account had been made using his username and password without his permission. Due to the way the computers were set up, the change requests had to have come through the computer at the Palo Alto office. Bravo, Bill Johnson, and co-workers Chris Planessi and Cesar Torres called the police and met them at the company's office. The police swept the office building but found no intruder. Two servers had been compromised and data had been removed.

With the assistance of GoDaddy employees, Bravo was able to restore the registration of the domains. He re-set the password to something only he knew and checked all the other domains in the Embarcadero account to make sure nothing else had changed. He re-locked the domain names, reset the contact information, and corrected the MX record. He went back into his email and found previously undelivered emails including notifications that had been sent at the same time as the intrusion, and that changes had been made to the account.

Chris Planessi was the company's senior web developer. His investigation found problems with the customer management software server; data was missing, and software had been installed on that computer. All of the data used

by their advertising clients and for the accounts receivable software had been deleted. He also discovered that a new file transfer protocol, aka FTP, client had been installed on one of these servers and had been used to connect to a remote computer. The next day Planessi collected new passwords for the entire staff so he could update all the passwords in their multiple systems.

The financial losses which resulted from the September 17, 2015, intrusion consisted of two main categories. First, the intrusion caused about 50 employees to miss a full day's work - approximately 360 lost work hours at a cost of approximately \$10,000. Second, employees spent approximately 360 hours exploring the extent of the security breach and repairing the damage at an estimated cost of \$25,000.

FBI Special Agents Scott Hellman and Anthony Frazier conducted the cybercrime investigation. Using activity logs provided by Embarcadero Media, they identified a list of IP (Internet Protocol) addresses they considered suspicious, i.e., that neither belonged to the company's internal computers nor were home IP addresses for employees. They used available look up tools to determine which internet service providers owned these addresses.

The agents found two of the suspicious IP addresses had been used on July 28th and 29th, 2015 to log in to Frank Bravo's and Cesar Torres's email accounts

illegitimately. Using a subpoena issued to Comcast, Hellman determined that they were leased to a subscriber named John Colby, at an address in Phillipston, Massachusetts. A computer or any other computing device physically located at this address had been used to connect to the Embarcadero Media email accounts. Whoever was accessing the IP address could be doing so remotely and be located anywhere.

The agents determined that John Colby was COLBY's father. Since COLBY was located in the Bay Area and the fact that Embarcadero Media focused heavily on Bay Area topics, COLBY became a person of interest. A review of additional IP addresses that had logged into Bravo's and Torres's accounts at roughly the same time, showed they resolved back to COLBY's San Francisco address. Some others resolved back to a café called the Flying Pig Bistro, which was almost exactly across the street from COLBY's apartment.

Agent Frazier conducted further research to view all of the IP addresses that had logged into Embarcadero Media IT staff's email addresses and found that 100 of them resolved back to a VPN service provider called Private Internet Access (PIA), which was provided by London Trust Media. A VPN is a virtual private network which allows a customer to connect to the internet anonymously. IP Addresses connected to PIA had logged into Bravo and Torres' accounts on

numerous occasions in July and August of 2015. PIA had no records of an account registered to COLBY.

Frazier and Hellman found that COLBY had an association with both the San Francisco and Phillipston addresses. Frazier subpoenaed records for COLBY's Facebook account to compare login activity to a personal account to login activity to a possibly compromised account. He found some consistencies in login activity, mainly involving a certain IP address that resolved to COLBY's San Francisco address.

During a search of COLBY's home, Frazier located a piece of paper with an email address written on it (ross.colby@gmail.com). He issued a subpoena for this email account as well as for siffer@gmail.com, which was the email connected to COLBY's Facebook account. The ross.colby@gmail.com account was set up in COLBY's name. By reviewing the numerous logins to this email account, Frazier was able to associate activity on this account with various IP addresses including IP addresses associated with John Colby's Phillipston address, IP addresses associated with PIA, and IP addresses associated with another VPN provider F-Secure Freedomes.

COLBY's former roommate Zephyr Pellerin, testified that COLBY frequently ate at the Flying Pig Café. Pellerin discussed computer related topics

with COLBY. Pellerin had helped COLBY set up the Private Internet Access (PIA) account. Pellerin had observed COLBY evaluate his friend's website by locating vulnerabilities in the software. He also stated that COLBY told him that he had been paid to modify information on a newspaper website.

Special Agent Frazier also testified as an expert witness. Frazier explained that IP addresses were assigned to customers by their service providers so that they could access the internet, and so they can be located and identified. Each computer connected to the internet has its own address. Companies which provide services such as VPNs typically have blocks of numbers assigned to them. The use of IP addresses allows a customer's internet activity to be tracked.

Frazier summarized the activities in the various accounts which had been obtained through subpoena. He opined, based on associations between activities in accounts known to be associated with COLBY, and the activities associated with the PIA IP addresses, that COLBY was, in fact, the user of the PIA account.

BAIL STATUS

COLBY is currently serving a 3-year term of supervised release pursuant to the district court's order.

REASON FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Determine Whether the Ninth Circuit Court of Appeals Erred in Deciding That the Statements of the Prosecutor Invoking Juror Sympathy and Telling the Jury That It Had A Duty to Convict Did not Violate the Defendant's Right to a Fair and Impartial Jury

A. Importance of the Issues:

The question of whether the improper statements of a prosecutor invoking juror sympathy and telling the jury that it has a duty to convict violate a criminal defendant's Sixth Amendment Right to a Fair and Impartial Jury is an issue of national importance. The need to evaluate the impact of improper statements by prosecutors in closing arguments on the defendant's right to an impartial jury is an issue which arises repeatedly in the criminal justice system, and an issue for which there is no clear guidance.

B. Application to This Case:

“[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* 455 U.S. 209, 219 (1982). Yet ‘harmless-error’ rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds

its way into a trial in which the question of guilt or innocence is a close one.” *Chapman v. California*, 368 U.S. 18 22-23 (1967). In considering a claim of prosecutorial misconduct, the reviewing court must consider first whether the statements were improper and, if so, whether it is more probable than not that the prosecutor's conduct affected the defendant's substantial rights. Fed.R.Crim.P 52(b). When no objection was made at trial, plain error review applies. Fed.R.Crim.P 52(b).

In this case, the government committed prosecutorial misconduct when it invited jurors to speculate about possible harm the victim's reputation. As part of its closing argument, the government discussed financial losses to the corporate victim on which the jury was required to make findings. However, the government reached beyond that when it urged the jury to consider the damage to Embarcadero Media Group's reputation:

And perhaps most importantly, let's not forget about the damage to the reputation of Embarcadero Media Group. You heard from Mr. Johnson, this was the first newspaper in the United States, perhaps the world, to publish the news online. That's a pretty significant thing.

In a blatant appeal to the jurors' sympathies, the government continued:

What do you think their subscribers thought of this attack? What do you think their advertisers thought of this attack? What do you think the people who might be sources, confidential sources for the journalists who work at Embarcadero's various papers thought of

this attack? Put yourself in their shoes. If you were considering going to the news - - -

Arguments which ask the jurors to put themselves in the shoes of the victims invite the jurors to decide the case based on personal interest and bias rather than on an unbiased review of the evidence. *Government of the Virgin Islands v. Mills*, 821 F.3d 448, 458 (3rd Cir. 2016), citations omitted. It is misconduct for prosecutors to inject statements of personal interest into arguments or to ask jurors to identify individually with the victims. *Johnson v. Bell*, 525 F. 3d 466, 484 (6th Cir. 2008) – [“it could have been you . . . ”]. It is also misconduct to appeal to the jurors’ emotions and fears. *Ibid.*

In the present case, the prosecutor asks the jurors to consider hypothetical impacts to the reputation of the corporate victim. This is not an evidence-based argument. No evidence was presented that the reputation of the business had suffered or that it had lost customers or confidential sources. Not only is the argument pure speculation, but it is also designed for the sole purpose of eliciting sympathy for the corporation.

The government also committed prosecutorial misconduct when it advised the jurors that their role was to find guilt. The government opened its rebuttal closing as follows by advising the jury that their role was to find that the government had proven its case beyond a reasonable doubt:

The first thing is your role is to find beyond a reasonable doubt that the defendant, Ross Colby, accessed Cesar Torres' email account, corporate email account on July 23rd, 24th, and 25th.

Your role is also to find that the government has proven beyond a reasonable doubt that Mr. Colby accessed Embarcadero Media's GoDaddy account on September 17, 2015, and redirected the mail exchange and cancelled their domains, and we submit that the government has proven its case beyond a reasonable doubt.

It is improper for the prosecutor to state that the duty of the jury is to find the defendant guilty. *United States v. Sanchez*, 176 F.3d 1214, 1224 - 1225 (9th Cir. 1999). In fact, it is improper for the prosecutor to tell the jury that it has any obligation other than weighing the evidence. *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986); see e.g., *Romano v. Oklahoma*, 512 U.S. 1, 8 (2004) [“the jury must not be misled regarding the role it plays in the sentencing decision”].

In *Sanchez*, the government argued as follows:

And I would ask your consideration, as every jury has done, and that is that after the marshal's service has done their duty and the court has done its duty and lawyers on both sides have done their duty, that you as jurors do your duty and well consider this matter and find these defendants guilty.

United States v. Sanchez, supra, 176 F.3d at 1224. The court found this argument to be improper because it was not tethered to the law or to the

evidence.³ *Id.* at 1225. The prosecutor in *Sanchez* did not tell the jurors that they only had a duty to convict if every element of the crime was proved beyond a reasonable doubt, nor did the prosecutor remind the jurors that they had a duty to acquit if they had a reasonable doubt as to guilt. *Ibid.*

In this case, the prosecutor told the jurors it was their role to find that COLBY was guilty beyond a reasonable doubt. The statement was not tied to the burden of proof that the prosecution must bear. The prosecutor made no effort to remind them of their corresponding duty to acquit if they had a reasonable doubt. Instead, the prosecutor told them it was their duty to find that there was no reasonable doubt. Such an advisement serves to lighten the government's burden of proof.

The Ninth Circuit Court of Appeals found that any error which may have resulted from these arguments was harmless. (Appendix A, p. 4). However, the cumulative effect of these errors was to deny COLBY a fair trial. The Sixth Amendment grants criminal defendants the right to trial before an impartial jury. Where, as here, the prosecutor's arguments invite the jurors to decide based on

³ But see *United States v. Gomez*, 725 F.3d 1121, 1131 (9th Cir. 2013) – [“duty to say defendant is guilty” was not error where it was clearly tied to the existence of proof beyond a reasonable doubt consistent with the reasonable doubt instruction.]

speculation and emotion, then tell them their duty is to convict, no defendant can receive a fair trial, nor can such error be deemed harmless.

CONCLUSION

For the foregoing reasons, petitioner ROSS COLBY, respectfully suggests that a writ of certiorari should issue in this case.

Dated: May 25, 2021

Respectfully submitted,



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