

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2020

JOSEPH ATTAWAY II,

Petitioner,

- VS -

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 FOR REVIEW

Whether Petitioner was denied his due process right to a fair trial when the background testimony of multiple law enforcement witnesses about their anti-gang designations and assignments created the clear and inflammatory inference that the instant case was related to street gangs?

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 17, 2021.

JURISDICTION AND CITATION OF OPINION BELOW

On May 17, 2021, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on June 30, 2021. [Ex. "B"]. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AT ISSUE

U.S. Constitution, Fifth Amendment:

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 offence 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.

INTRODUCTION

Petitioner asks this Court to grant review in the instant case to decide a question concerning the due process implications of the government using the testimony of its law enforcement witnesses about their professional assignments to create an inflammatory inference against a criminal defendant. Although the instant case had nothing to do with gangs or Petitioner’s alleged gang affiliation, five government witnesses specifically referred to gangs or gang violence when outlining their professional designations or duties. This detailed testimony was unnecessary to establish these witnesses’ capacities to investigate or testify since their qualifications were never questioned at trial; however, this repeated testimony created the inflammatory inference that Petitioner was a gang member, and that this investigation and case were connected to the government’s efforts to combat street gangs and gang violence. The Ninth Circuit’s conclusion that this testimony was admissible as “relevant to the [officials’] background and qualifications,” [Ex. “A” at 2], completely ignored the due process implications of this inflammatory evidence, and Petitioner asks the Court to review this case in order to correct the Ninth Circuit’s ruling and also to provide guidance to lower courts about the constitutional implications of such background testimony.

STATEMENT OF FACTS AND CASE

In July 2015, the government initiated a drug trafficking investigation in the area of Ceres, California after a confidential source (“CS”) who was working with the FBI identified Kasper Kasperian as a drug trafficker who was selling pills.¹ Kasperian was the owner of a used car sales lot in Ceres. Under the direction of FBI Special Agent Brian Huberty, the government had the CS contact Kasperian to set up a drug buy. In December 2014, the CS met with Kasperian and was provided with a small sample of methamphetamine.

Subsequently, the government directed the CS to attempt to purchase two pounds of methamphetamine from Kasperian. This purchase occurred in January 2015. The CS went to the auto lot and paid Kasperian \$12,000 for two pounds of methamphetamine. The CS wore a recording device during the transaction, and numerous law enforcement agents provided surveillance of the area. Prior to the arrival of the CS, Petitioner and co-defendant Hormozi walked away from Kasperian’s business to a nearby restaurant. After Kasperian sold the methamphetamine to the CS, Petitioner and Hormozi returned to Kasperian’s business on foot, and then drove away in Petitioner’s vehicle.

¹ These facts are taken from the pre-sentence investigation report and the reporter’s transcript of trial. [RT 215-445].

Another methamphetamine transaction occurred in April 2015. This transaction was not recorded, but Special Agent Huberty was able to monitor the event through an open phone line. On this occasion, the CS again purchased two pounds of methamphetamine from Kasperian. Prior to the transaction, government agents saw Petitioner and Hormozi arrive at the car lot. They left after Hormozi met with Kasperian, and then both returned soon after the CS purchased the drugs from Kasperian. In July 2015, the government obtained a wiretap on Hormozi's telephone and the interception lasted until early September.

In October 2015, the government obtained a four-count indictment charging drug crimes. [ER 76-79].² Count one charged Kasperian, Hormozi, and Petitioner with conspiring to distribute and to possess with the intent to distribute a controlled substance, (21 U.S.C. §§ 841(a)(1), 846), count two charged all three individuals with distribution of methamphetamine on January 16, 2015, and count three charged all three individuals with distribution of methamphetamine on April 2, 2015 (21 U.S.C. § 841(a)(1)). Id. Count four charged Hormozi and Kasperian only with attempting to distribute oxycodone. Id. Kasperian pled guilty prior to trial and became a cooperating witness for the government.

² "ER" refers to Appellant's Excerpts of Record filed in the Ninth Circuit Court of Appeals.

Petitioner and Hormozi stood trial in October 2019. Relevant to this petition, the government, through the testimony of five different law enforcement witnesses, presented the recurring theme that this case involved street gangs. When Special Agent Huberty was asked about his employment, he responded:

A. I'm employed with the Federal Bureau of Investigation. I'm assigned to the Sacramento Division, and I'm assigned to the Stockton resident agency. We have responsibility over San Joaquin and Stanislaus County and outlying areas in the Central Valley.

Q. How long have you worked for the FBI?

A. Almost 16 years.

Q. Where did you work before being assigned to the Modesto area?

A. I was assigned to the New York office on the Joint Terrorism Task Force from 2004 to 2008.

Q. As part of that task force, did you conduct surveillance operations?

A. Yes.

Q. And is that a regular part of your job, is doing surveillance as a special agent?

A. Yes.

Q. When you transitioned to the Sacramento RA, did you take on a different role?

A. I did. I was appointed the coordinator for the Central Valley Gang Impact Task Force, which is an FBI Safe Streets Task Force. We have responsibility for investigating gang, drug, violent crime, and other -- any crime related to what may be connected to gang activity in Stanislaus County.

[ER 2] (emphasis added).

CHP officer Walton described his employment as follows:

Q. In 2015, 2016, were you assigned to work with the FBI?

A. Yes, I was.

Q. What was the nature of that assignment?

A. I was assigned as a task force officer for four years with FBI Safe Streets Task Force.

Q. What was that four-year time period?

A. It was June 2014 to June 2018.

Q. And what was the purpose of your assignment with this task force?

A. My purpose of this assignment was to assist with the FBI in investigating gangs in our geographical area, to disrupt and dismantle gang violence.

Q. Now, you've previously testified that -- your position with CHP as a patrol officer. As a task force officer, did you have duties in addition to patrol?

A. Yes.

Q. What would those job duties be?

A. In addition to patrol during that time period, I worked very closely with the FBI in investigating crimes related to gangs and drug trafficking.

[ER 3] (emphasis added).

Merced Police Department Officer Bowen said this about his position at the time of the offense:

Q. Officer, where do you work?

A. I work for City of Merced, Merced Police Department.

Q. How long have you been there?

A. Almost 13 years.

Q. Okay. What's your current position?

A. I'm currently assigned to the Merced area Gang Narcotic Enforcement Team, which is a county-wide task force.

Q. Did you have the same assignment in May 2015?

A. I -- no.

Q. What were you doing at that time?

A. At that time, I was with my department's Gang Violence Suppression Unit, "GVSU" for short.

Q. What were your job responsibilities with that particular assignment?

A. We're a street-level proactive enforcement team. So we pretty much patrol the city, follow up on tips. We make a lot of traffic stops. We assist detectives, other agencies --

Q. Okay.

A. -- for activity.

[ER 4] (emphasis added).

FBI Special Agent Jackson provided this background:

Q. Are you employed as a special agent with the FBI?

A. Yes, ma'am.

Q. How long have you been so employed?

A. Over 20 years.

Q. And what sort of jobs/job assignments have you had in that 20-year period?

A. A majority of my time was working gang/drugs investigations. I also served in various management roles in the FBI along with surveillance, white-collar, civil rights, a myriad of different investigative roles in the Bureau.

[ER 5] (emphasis added).

Detective Pinnegar of the Merced Police Department described his position during the relevant time period as follows:

Q. Where are you employed, sir?

A. I am a detective with the City of Merced Police Department.

Q. How long have you been a detective?

A. Approximately two years.

Q. What did you do before that?

A. I worked in the gang unit. I worked patrol.

[ER 6] (emphasis added).

The jury convicted Petitioner of all charged counts. The district court imposed a sentence of 204 months in custody as to each count, to run concurrently, and five years of supervised release as to each count, also to run concurrently. [ER 80].

Among other issues presented in his direct appeal, Petitioner argued that reversal was required due to the repeated testimony from the government's law enforcement witnesses where they specifically described their anti-gang designations at the time of this case. The panel found no problem with this testimony, writing that the district court properly admitted "the testimony of law enforcement officials regarding their gang-related assignments as relevant to their background and qualifications." [Mem. at 2]. The Ninth Circuit denied Petitioner's petition for rehearing and suggestion for rehearing en banc without further comment.

ARGUMENT

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE GOVERNMENT'S REPEATED PRESENTATION OF LAW ENFORCEMENT WITNESS BACKGROUND TESTIMONY WHICH UNMISTAKABLY LINKED PETITIONER, AND THE CASE, TO STREET GANGS

Testimony regarding gang membership “creates a risk that the jury will equate gang membership with the charged crimes.” United States v. Hankey, 203 F.3d 1160, 1173 (9th Cir. 2000). In the Ninth Circuit, its “cases make it clear that evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error.” Kennedy v. Lockyer, 379 F.3d 1041, 1055 (9th Cir. 2004). “We have [] long recognized the substantial risk of unfair prejudice attached to gang affiliation evidence, noting such evidence ‘is likely to be damaging to a defendant in the eyes of the jury’ and that gangs suffer from ‘poor public relations.’”). United States v. Irvin, 87 F.3d 860, 864 (7th Cir. 1996) (quoting United States v. Lewis, 910 F.2d 1367, 1372 (7th Cir. 1990)).

Petitioner requests that the Court grant review in this case to decide whether Petitioner’s right to a fair trial was violated by the government’s presentation of law enforcement witness background testimony which unambiguously tied him, and the case, to street gangs. While the introduction of gang evidence in this context is a question of first impression in the Court, lower courts have noted the danger

presented by such background testimony.

In United States v. Dillard, 884 F.3d 758, 765-67 (7th Cir. 2018), the Seventh Circuit addressed “scattered references” of gangs which occurred during trial, most of which came from law enforcement officers describing their assignments or their units. Id. at 761. Defendant objected, and the district court advised the government to “be aware and ... caution whatever other witnesses they are going to have to stay away from the terminology.” Id. at 762. Although the Seventh Circuit declined to reverse because it found that no direct evidence of gang affiliation had been admitted, it noted that the district court properly instructed the prosecutor to inform future witnesses to avoid the terminology, and also wrote that “hindsight counsels that it might have been better to have placed this restriction on the Government prior to the presentation of its case.” Id. at 766.

In United States v. Liranzo, 385 F.3d 66, 70-71 (1st Cir. 2004), the district court denied a motion in limine to exclude the gang designations of the law enforcement witnesses because their assignments were relevant to respond to defendant’s defense attacking the police practices and procedures used in the case. Id. at 71. In its opening statement, however, the prosecutor told the jury that “this case is nothing about gangs” and “the only importance of what [the officers] were doing and where they were is for you to understand that this was not a [routine] car

stop.” In addition, the district court provided an instruction to the jurors advising them that the “testimony about what their assignment was at the time of the incident in question is given solely to provide to you background and context[,]” and that there was no claim that the defendant had any connection to a gang. Id. The First Circuit affirmed given the care with which the district court and government handled this evidence.

The instant case had no safeguards of any sort to prevent the jury from drawing damaging and unfair inferences from the witnesses’ background testimony. Although this was a relatively short trial, five of the government’s law enforcement witnesses raised the subject of street gangs during their testimony about their designations. The comments were not just generic statements about job assignments, they were specific comments in which the witnesses went out of their way to link their involvement in this particular case to gangs. Special Agent Huberty told the jury that his task force has the “responsibility for investigating gang, drug, violent crime, and other -- any crime related to what may be connected to gang activity in Stanislaus County.” [ER 3]. CHP Officer Walton stated that the “purpose of this assignment was to assist with the FBI in investigating gangs in our geographical area, to disrupt and dismantle gang violence,” and that he “worked very closely with the FBI in investigating crimes related to gangs and drug trafficking.” [ER 3]. Merced P.D.

Officer Bowen testified that at the time of the instant investigation, he was assigned to the department’s “Gang Violence Suppression Unit, “GVSU” for short.” [ER 4]. The inference which these witnesses and others created with their testimony – that this case involved street gangs – was clear and obvious. It was also incorrect - this case had nothing to do with gangs.

The idea that the jury might not have drawn this inference ignores the reality of what a layperson takes from a law enforcement officer’s designation or assignment. For instance, if police execute a search warrant at a house and they are all wearing jackets that say “Anti-Gang Task Force,” the neighbors surely will think the investigation involves a street gang. If the officers at the house wear jackets with “IRS” on the back, then the neighbors will think that the person has serious tax problems. It is no different in a trial. When the five government witnesses made sure to tell the jury that they were tasked with working exclusively on gang crimes at the time of this investigation, the jurors surely believed that this case involved gangs.

This is an issue which warrants the attention of the Court because law enforcement witness background testimony is present in virtually every criminal trial that occurs. Without guidance from the Court on this issue, prosecutors remain free to use a witness’ specific background and designation to create unfair and unduly prejudicial inferences against a criminal defendant. The government certainly has the

right to demonstrate to the jury that its law enforcement witnesses are experienced officers or agents who are qualified to conduct investigations and testify about them at trial, but aside from the unusual case where a specific designation is necessary to address a component of the case or rebut a defense to the charge, see Liranzo, 385 F.3d at 70-71 (designation necessary to explain stop), getting into the witnesses' specific designations is unnecessary for the government to present its evidence effectively. Here, Special Agent Huberty should have been limited to stating that he was a 16-year special agent of the FBI who was assigned to the Modesto area at the time of this offense. CHP Officer Walton should have said only that he had been assigned to a task force to work with the FBI in investigating crimes. Officer Bowen should have said only he was a 13-year veteran of the Merced PD who was working on a county-wide task force at the time of this case. In each instance, the jury would have been informed that the witness was an experienced and appropriately assigned officer or agent. And at the same time, Petitioner would not have faced a jury which unjustly believed that he was a gang member, and that the charges against him were related to a street gang.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: September 22, 2021

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