Case No. 21-7119

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR CARLOS CASTANO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether the government was impermissibly relieved of its burden to prove each element of RICO Conspiracy when the court instructed the jury that an agreement to create an enterprise at some undefined point in the future was sufficient to prove the element of an enterprise.

B. Whether the Sixth Circuit broke with Circuit Court precedent and sanctioned the unjust increase in Castano's term of imprisonment when the sentencing court attributed to Castano all drugs distributed by all members of the conspiracy without first determining that the conduct was within the scope of Castano's agreement in the conspiracy.

C. Whether the government's use of Castano's self incriminating statements against Castano during grand jury proceedings and trial violated the written proffer agreement and Castano's Fifth Amendment rights.

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A. The government was impermissibly relieved of its burden to prove each element of RICO Conspiracy when the court instructed the jury that an agreement to create an enterprise at some undefined point in the future was sufficient to prove the element of an enterprise.

The government argues that writ of certiorari should be denied because "[t]his Court has previously denied petitions for writs of certiorari raising this issue, and the same result is warranted here. See Thomas v. United States, 565 U.S. 1087 (2011) (No. 11-6514); Jones v. United States, 565 U.S. 1087 (2011) (No. 11-5975); Robinson v. United States, 565 U.S. 1087 (2011) (No. 11-5342)." Response, p 16. The government states the Sixth Circuit's decision is correctly decided and that the agreement to create an enterprise in the future is sufficient to satisfy the enterprise element of RICO Conspiracy. Response, p 17-28. The government also claims that no circuit split exists on the issue, and in any event, the deficient instructions would be considered harmless error. Id.

Each of the government's contentions are without merit. There can be no doubt that a circuit split exists as to whether the government must prove the existence of an enterprise, or whether the existence of an agreement to create an enterprise at some point in the future must be proved. See; United States v. Velazquez-Fontanez, 6 F.4th 205, 212 (1st Cir. 2021)(elements of RICO conspiracy are (1) the existence of an enterprise, (2) each defendant knowingly joined the enterprise, and (3) that each defendant agreed to commit a pattern of racketeering activity); Feinstein v. Resolution Trust Corp., 941 F.2d 34, 41 (1st Cir. 1991); United States v. Starrett, 55 F.3d 1525 1541 (11th Cir. 1995)("the government must prove: (1) the existence of an enterprise..."); United States v. Neopolitan, 791 F.2d 489, 499 (7th Cir. 1986)("The second distinctive aspect of a RICO conspiracy is the need to establish the existence of an enterprise."); United States v. Cornell, 780 F.3d 616, 621

(4th Cir. 2015) ("the government must prove that an enterprise affecting commerce existed"); United States v. Ramirez-Rivera, 800 F.3d 1, 18 (1st Cir. 2015)(the government must prove "the existence of an enterprise"); see also, Eighth Circuit Model Jury Instruction, 6.18.1962B, RICO conspiracy. The Sixth Circuit's conclusion that an agreement to create an enterprise at some point in the future is sufficient to convict for RICO conspiracy directly conflicts with the above precedent. The government's contention otherwise cannot be taken seriously.

The government makes it appear that this Court considered a similar claim and in three separate cases and denied certiorari. See Response, p 16, citing Thomas v. United States, 565 U.S. 1087 (2011); Jones v. United States, 565 U.S. 1087 (2011); Robinson v. United States, 565 U.S. 1087 (2011). This is simply not true. In reality, the defendants in these cases were all codefendants and all three of the certiorari denials cited came in one decision issued by the Second Circuit in 2010, United States v. Applins, 637 F.3d 59 (2nd Cir. 2010). And, the issue decided by the Second Circuit in Applins was not, as it is here, "whether the existence of an enterprise was an element of RICO conspiracy or whether the government need only prove an agreement create an enterprise in the future in order to convict." Instead, the Applins case dealt with whether the Double Jeopardy Clause when the jury instructions were conflicting as the elements of RICO Conspiracy. Id. Further, even if the issue in Applins was the same issue raised in this case, the fact certiorari was denied in Applins does not mean that certiorari should be denied in the instant case. If that were the standard, this Court would have never issued decisions such as United States v. Booker, 543 U.S. 220 (2005)(finding the mandatory application of Sentencing Guidelines violated rights to due process and a jury trial); or Johnson v. United States, 576 U.S. 591 (2015)(finding the residual clause in the ACCA unconstitutionally vague and striking the clause).

In any event, the fact that certiorari was denied in Applins is not relevant given the expanding circuit split on concerning the elements of RICO Conspiracy following that decision. See United States v. Cornell, 780 F.3d 616, 621 (4th Cir. 2015); United States v. Ramirez-Rivera, 800 F.3d 1, 18 (1st Cir. 2015)(the government must prove "the existence of an enterprise"). The circuit split continues to exist, the claim has ripened and certiorari should now be granted.

Finally, the error in not requiring the jury to find an essential element of RICO Conspiracy cannot be considered harmless error. As noted by Judge Donald in dissent,

> "This error eliminated the government's burden of proving a key element of the RICO conspiracy offense and allowed the government to convict multiple defendants based on potentially insufficient evidence. It is a grave error that cannot be remedied other than by reversing each of the defendants' convictions and sentences and remanding for a new trial."

United States v. Rich, 14 F.4th 489, 500 (6th Cir. 2021).

In sum, the elements of RICO Conspiracy require the jury to find that an enterprise existed. Without an enterprise, a general conspiracy may exist, but a RICO conspiracy does not exists. Id. The district court's refusal to require the jury to make this finding permitted a conviction without the jury being required to make a finding as to this essential element of a RICO conspiracy. Holding otherwise conflicts with decisions from other Circuit Courts which require a jury finding that the association or enterprise must exist in order to secure a RICO Conspiracy conviction. Thus, this Court should grant writ of certiorari to resolve this circuit conflict pursuant to S.Ct. R. 10.

B. The Sixth Circuit broke with Circuit Court precedent and sanctioned the unjust increase in Castano's term of imprisonment when the sentencing court attributed to Castano all drugs distributed by all members of the conspiracy without first determining that the conduct was within the scope of Castano's agreement in the conspiracy.

The government argues that it was correct for Castano to be sentenced based on all drug

related conduct during Castano's membership in the DDMC under the Sentencing Guidelines because "other DDMC members' purchases of ephedrine were within the scope of the conspiracy that Castano joined and was reasonably foreseeable to him." Response, p 31.

Finding that all methamphetamine precursor chemicals purchased by DDMC members during Castano's membership in the DDMC were reasonably foreseeable to Castano, and therefore, attributable to him as relevant conduct conflicts with well established precedent. This is not an individualized assessment of the scope of Castano's agreement within the conspiracy. Instead, it is an assessment of the "scope of the conspiracy" and finding the acts of all others in the conspiracy are attributable to Castano. The reasoning conflates Pinkerton liability with relevant conduct under U.S.S.G. § 1B1.3, and has been widely refuted by the courts. See, United States v. Willis, 476 F.3d 1121, 1129 (10th Cir. 2007)("scope of the agreement, furtherance, and reasonable foreseeability are 'independent and necessary elements of relevant conduct.'"); United States v. McReynolds, 964 F.3d 555, 562 (6th Cir. 2020); United States v. Spotted Elk, 548 F.3d 641, 674 (8th Cir. 2008); United States v. Patton, 927 F.3d 1087, 1094 (10th Cir. 2019); United States v. Studley, 47 F.3d 569, 575 (2nd Cir. 2005); see also § 1B1.3 cmt. 3(A).

Requiring a sentencing court to make an individualized assessment that the conduct of others was "within the scope of a defendant's agreement" before the conduct can be attributed to him to increase his punishment under the Guidelines. RE 2429; PageID#36002, 36008, 36121. No attempt was made to determine the scope of the specific conduct and objectives embraced by Castano's agreement, which is particularly troublesome given the fact Castano was acquitted of possession of methamphetamine precursor chemicals. RE 1940 Verdict; PageID#29455.

In sum, the Sixth Circuit decision to affirm the sentencing court's relevant conduct finding

boldly conflicts with well settled case precedent that requiring a court to conduct an individualized determination that a particular drug quantity was within the scope of a defendant's agreement within a conspiracy before the conduct can be attributed as relevant conduct in determining punishment under the Sentencing Guidelines. The Sixth Circuit's decision to affirm Castano's sentence sponsors a break from precedent and an unjust increase Castano's term of imprisonment. Because the Sixth Circuit's decision affirming Castano's sentence conflicts with Circuit Court precedent concerning this matter of exceptional importance, petition for writ of certiorari should be granted.

C. The government's use of Castano's self incriminating statements against Castano during grand jury proceedings and at trial violated the written proffer agreement and Castano's Fifth Amendment rights.

The government does not dispute the facts but argues that the proffer agreement merely prohibited the use of proffered statements against Castano in it's "case in chief" at trial and no court has found the term "case in chief" to be ambiguous; therefore, the proffer agreement permitted the use Castano's proffered statements against him during Grand Jury proceedings. Response, p 29-31. The government's argument misses the mark.

A proffer agreement is "ambiguous if it is capable of more than one reasonable interpretation." United States v. Gebbie, 294 F.3d 540, 551 (3rd Cir. 2002) (quotation omitted); Collins v. Harrison-Bode, 303 F.3d 429, 433 (2d Cir. 2002)("[c]ontract language is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire agreement"). "In deciding whether an agreement is ambiguous, particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought." Harrison-Bode, 303 F.3d

at 433 (internal quotations and citations omitted).

In determining whether the government has violated an ambiguous agreement, a court must determine whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement. United States v. Huddleston, 929 F.2d 1030, 1032 (5th Cir. 1991); United States v. Valencia, 985 F.2d 758, 761 (5th Cir. 1993); United States v. Boatner, 966 F.2d 1575, 1578 (11th Cir. 1992). And in determining a defendant's reasonable understanding of a proffer agreement, ambiguities must be strictly against the government and resolved to the benefit of the defendant. Valencia, 985 F.2d at 761; Margalli-Olvera v. INS, 43 F.3d 345, 353 (8th Cir. 1994) ("Where a plea agreement is ambiguous, the ambiguities are construed against the government.").

Castano has never claimed that the term "case in chief," standing on its own, is ambiguous. Instead, the term "case-in-chief," in the context of the surrounding language, makes the proffer agreement ambiguous. The Sixth Circuit, and the government in its response, ignores this context and focuses on the term "case-in-chief" to the exclusion of the remainder of terms found in the proffer letter. Had the government meant to limit the protections to the "case-in-chief at trial" it could have easily stated as much in the agreement. Instead, the proffer letter promised that no statement made by Castano would be used "in the government's case-in-chief in any criminal prosecution of [Castano]." Apx at 36. Thus, Castano's "reasonable understanding of the agreement" was that his truthful admissions could not be used against him in any criminal prosecution. Valencia, 985 F.2d at 761. If the government meant otherwise, then the terms of the proffer are ambiguous. Any decision otherwise weakens society's faith in the justice system by sanctioning prosecutorial misconduct and the violation of Castano's right not to be compelled to make self incriminating statements. See, United States v. Goldfaden, 959 F.2d 1324, 1328 (5th Cir. 1992).

Further, the term "criminal prosecution" must include grand jury proceedings. To find otherwise defies common sense and works absurd results. Castano had not been charged with a crime when he agreed to a proffer. It would be unreasonable for Castano, or any defendant, to agree to directly incriminate himself and guarantee that he would be charged with a crime. It would be unreasonable for counsel to advise a client to provide self-incriminating information to authorities so that the client could be charged with a crime. Further, if the proffer agreement did not preclude the use of self-incriminating information in a prosecution, the protections of the letter were illusory and the agreement was unconscionable. The government fails to respond to any of these concerns.

In sum, the agreement is ambiguous to the scope of its protection, which is to be construed in favor of Castano. A reasonable understanding of the proffer letter was that Castano's self-incriminating statements would not be used by the government during any criminal prosecution of Castano. Accordingly, the use of self-incriminating statements to prosecute Castano violated the proffer agreement and Castano's Fifth Amendment rights. The decision otherwise conflicts with Supreme Court and other circuit precedent and works absurd results. Therefore, petition for writ of certiorari should be granted.

The government also argues Castano violated the terms of the proffer agreement, which release it from the protection of the proffer agreement. See, Apx at 35-38. This is plainly incorrect. "[A] breach is not material unless the non-breaching party is deprived of the benefit of the bargain." United States v. Castaneda, 162 F.3d 832, 837 (5th Cir. 1998)). "[I]n evaluating the Government's effort to rescind an immunity agreement on the basis of breach of contract, the most important factor is the incriminating nature of the information provided by the defendant. United States v. Fitch, 964 F.2d 571, 575 (6th Cir. 1992) (citing United States v. Johnson, 861 F.2d 510, 513 (8th Cir. 1988));

United States v. Mark, 795 F3d 1102 (9th Cir. 2015)("When it comes to proving breach of an immunity agreement, the government should do better than 'he said, she said.'").

It is true that Castano did not provide a complete rendition of the workings of the DDMC and all of the illegal activities of all participants involved in the conspiracy. But it was impossible for Castano to provide that degree of information in one interview lasting less than two hours and it is unreasonable to apply such a standard. Castano provided reliable and significant information that was substantially and materially relied upon by the government in its investigation and prosecution. APX at 34. Castano supplied the government with enough information to allow it to secure a multi-count indictment against numerous individuals, including Castano. Id.

The government received significant benefit from Castano's proffer and "[i]n light of all the incriminating information supplied by [Castano]," any omission, even if intentional was insufficient to constitute a substantial material breach. Fitch, 964 2d at 574-75. Undoubtedly, "the government received the benefit of its bargain" and despite any omissions, Castano's statements should not have been admitted at trial. Fitch at 575; Castaneda, 162 F.3d at 838. Tellingly, the government ignores this aspect of Castano's claim, but it does not deny that it received the benefit of the bargain. Because Castano lived up to his end of the bargain, the government was not permitted to use Castano's statements against him. United States v. Tilley, 964 F.2d 66, 70 (1st Cir. 1992).

Accordingly, the use of self-incriminating statements to prosecute Castano violated the proffer agreement and Castano's Fifth Amendment rights. In affirming Castano's convictions, the Sixth Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

X. CONCLUSION

Castano respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a on May 12, 2022, a true and accurate copy of the petition for writ of certiorari was sent via U.S. Mail with sufficient postage affixed to the Office of the Assistant U.S. Attorney for the Eastern District of Michigan, 211 W. Fort Street, Suite 2001, Detroit, MI 48226 and to the Office of the Solicitor General, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001. Further a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

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