No. _____

In The
Supreme Court of the United States

ANGEL RIOS-EDEZA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Prosecutors are allowed to strike hard blows but not foul ones. Here, in closing and rebuttal argument, the prosecutor vouched for the evidence, improperly argued the jury need not deliberate to "make sense" of all the evidence, and repeatedly shifted the burden of proof. Did the Ninth Circuit error in finding that there was no prosecutorial misconduct?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINION BELOW

The unpublished memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is reproduced in the appendix. *See* Pet. App. 1a–6a.

JURISDICTION

The court of appeals denied Mr. Rio-Edeza's appeal on April 28, 2023 (Pet. App. 1a–6a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Mr. Rios was convicted of knowingly smuggling heroin on a circumstantial-evidence-only record. He is serving 120 months in custody on his first felony conviction, the lowest sentence the district court could give him. The conviction occurred because the prosecutor was permitted to vouch during both closing and rebuttal arguments, burden-shift, and tell the jury not to deliberate. These were serious errors, committed by a prosecutor who should have known better than to get close to the line of propriety. As this Court has repeatedly recognized, the arguments of prosecutors carry particular weight as representatives of the sovereign.

At no point did Mr. Rios confess to knowingly smuggling heroin into the United States. His phone was seized from him on the day of his arrest. There were no discussions of drug smuggling on the phone. The agents tried to interrogate Mr. Rios. He provided no confession. Mr. Rios was put in jail. His phone calls were recorded. Mr. Rios did not admit knowledge of the drugs while he was incarcerated. Nor were

there any cooperating witnesses who testified that Mr. Rios admitted to knowingly smuggling drugs. There were no allegations that Mr. Rios had previously smuggled drugs.

Moreover, the drugs were well hidden in a Jeep that Mr. Rios had only recently purchased. They were hidden in a specially designed compartment in the transmission. It took the government special tools to detect any indication of drugs; and many more tools, time, and effort to extract the drugs from the transmission. The government witnesses who heard and saw the vehicle running on the day of Mr. Rios's arrest were unanimous: there were no obvious mechanical issues with the Jeep. There was no evidence that the modifications to the transmission had been recently performed or that the heroin had been recently put in the transmission.

In argument, the government repeatedly crossed the line of impropriety in its attempts to buttress its infirm case. (The government all but admitted the thinness of its case by admitting that "the most devastating evidence" against Mr. Rios was its retail value.) The first words of the government's closing argument were vouching: "Ladies and gentlemen, at the start of this trial I told you that this would not be a difficult case, and it is not." Nearly the first words in the rebuttal argument were burden-shifting: "But how do you explain the raft of evidence in this case?" 1-ER-8. The prosecutor repeated this burden-shifting language so many times that the district court sua sponte admonished the prosecutor to correct himself, which the prosecutor then failed to do, and yet the district court provided no curative

instruction. Given this latitude from the district court, the prosecutor then repeatedly vouched for the evidence again, stating that the odds of Mr. Rios being innocent were less than lightening striking twice: "That is lightening striking twice on consecutive February 29th." 1-ER-13. And finally, the prosecutor told the jury not to deliberate: "if you are back there trying to find some way that this all can make sense, all this evidence tied together could somehow make sense, I submit to you that your job is done."

All of this prosecutorial misconduct during closing was prejudicial in this close case built on circumstantial evidence.

2. One evening in May 2019, Angel Rios drove to a United States port of entry from Mexico in a Jeep Liberty, which just some weeks beforehand he had purchased. He had purchased it from a dealership, which in turn had purchased the vehicle from an auction. The dealership inspected much of the Jeep Liberty before reselling it. But the dealership inspection of the transmission was limited to obvious mechanical issues. The dealership did no work on the transmission. This is to say no one removed and inspected the Jeep Liberty's transmission between the auction and the day of Mr. Rios's arrest.

When Mr. Rios arrived at the port, a trained border protection officer, using a specialized tool to inspect the undercarriage the Jeep Liberty, detected unusual markings on the outside of the transmission.

Mr. Rios and the Jeep Liberty were taken to secondary inspection. Despite being seen and heard by multiple trained border officers, the Jeep Liberty showed no signs of mechanical malfunctioning at primary or in transport to secondary inspection. The Jeep Liberty was put on a hydraulic jack and lifted in the air. A non-factory plate was removed below the transmission. Then a specialized tool was used to reach up into a small crevice too small to fit a human hand. In this crevice, a trained CBP officer found a substance that tested positive for heroin.

3. The government arrested Mr. Rios and charged him with knowingly importing heroin. Mr. Rios made no inculpatory statements. A jury convicted him—but only after the district court permitted the government to introduce evidence that improperly portrayed Mr. Rios as a drug dealer, and then allowed multiple instances of prosecutorial misconduct in closing and rebuttal argument.

The government had a "thin" circumstantial evidence case. Mr. Rios's theory of the innocence was that this was a "lost load" case—that the heroin had been in the Jeep Liberty when he recently bought it. Moreover, there was significant evidence that established that the heroin could have ended up in the Jeep Liberty without Mr. Rios's knowledge. Notably, the condition of the compartment containing the drugs strongly suggested that someone had created it, and designed it to withstand detection from the casual observer, including the driver. Most importantly, Mr. Rios had bought the Jeep Liberty just eight weeks beforehand. He had purchased it from a large, used car dealership that had sixty-three employees and 1,000 vehicles for

sale. This used car dealership had purchased the Jeep Liberty from an auction. After purchasing the Jeep Liberty, the dealership had performed no meaningful inspection of the transmission. This was because after test-driving the Jeep Liberty the transmission showed no signs of mechanical malfunctioning. Since purchasing the vehicle, Mr. Rios had driven the Jeep Liberty thousands of miles. No witness provided any testimony that the vehicle showed any signs of malfunctioning.

4. While significant evidence supported Mr. Rios's defense, it was substantially undermined by the prosecutor repeatedly committing misconduct during closing and rebuttal arguments. And the district court gave no jury instructions to cure these errors.

First, the prosecutor repeatedly vouched for how overwhelming the evidence was to the jury. The first thing the prosecutor told the jury in argument was that this was not a difficult case, implying it was an easy case. And the prosecutor told the jury that the odds Mr. Rios was innocent were less than the odds of lightening striking twice in the same spot.

Second, the prosecutor argued to the jury contrary to the court's instructions regarding the duty to deliberate. The judge told the jury to consider all the evidence and weigh it. But the prosecutor argued during rebuttal that the jury need not take the time to make sense of all the evidence.

Third, the prosecutor repeatedly shifted the burden of proof to Mr. Rios's by repeatedly stating, "how do you explain" in rebuttal argument. After repeating this

improper phrase four times, the district judge sua sponte interrupted the prosecutor's rebuttal argument and ordered a sidebar conference. The prosecutor was admonished by the judge for this improper argument. The judge ordered the prosecutor to clarify his comments by telling the jury that Mr. Rios did not have to prove "anything." Yet the prosecutor failed to comply with this simple order. Instead, the prosecutor told the jury that Mr. Rios did not have to explain "everything"; thereby implying that, in fact, Mr. Rios had the burden to explain some things.

All of these arguments by the prosecutor during closing and rebuttal were misconduct.

REASONS FOR GRANTING THE PETITION

This is the rare case in which this Court should grant review for purposes of error correction. This Court has explained that prosecutorial misconduct may rise to a due process violation in many circumstances, including when a prosecutor "vouche[s] for the credibility of witnesses," *United States v. Robinson*, 485 U. S. 25, 33, n. 5 (1988), "express[es] his personal opinion concerning the guilt of the accused," *United States v. Young*, 470 U. S. 1, 18 (1985), or "suggest[s] by his questions that statements had been made to him personally out of court," *Berger v. United States*, 295 U. S. 78, 84 (1935). The ultimate question has been whether a prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U. S. 637, 643 (1974).

The Court in *Young* identified at least "two dangers" to help determine whether misconduct rises to the level of a due process violation. 470 U.S. at 18. First, a

prosecutor may convey to the jury the impression that the prosecutor is aware of information, unknown to the jury, that suggests the defendant's guilt. *Id.* Second, the prosecutor's opinion may "carr[y] with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 18–19. When these dangers arise, they implicate due process because they "jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Id.* at 18.

Our criminal justice system holds prosecutors to a high standard. The prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty." *Berger*, 295 U.S. at 88. From that special role, "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id*. It is an inescapable truth that the "power and force of the government tend to impart an implicit stamp of believability what the prosecutor says." *Hall v. United States*, 419 F.2d 582, 583–584 (5th Cir. 1969).

In Mr. Rio's case, the Ninth Circuit failed to follow this Court's precedent despite the egregiously, improper arguments by the prosecutor to the jury.

First, the prosecutor violated *Young* by repeatedly vouching for how overwhelming the evidence was to the jury. The first thing the prosecutor told the jury in argument was that this was an easy case. And the prosecutor told the jury that the odds that Mr. Rios was innocent were less than the odds of lightening

striking twice in the same spot. In so doing, the prosecutor "induce[d] the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 18–19. A jury should never be told a case is easy, certainly never by a federal prosecutor. When the prosecutor here told the jury that this was not a difficult case, he injected his own (the government's) judgment into the trial. This is always improper and egregiously violated this Court's precedent.

Second, the prosecutor violated *Berger* when he contravened the district court's instructions on the duty to deliberate. 295 U.S. at 88. The judge told the jury to consider all the evidence and weigh it. But the prosecutor argued during rebuttal that the jury need not take the time to make sense of all the evidence. Thus, the representative of the sovereign made the "improper suggestion[] . . . [and] insinuation[]" that the jury need not deliberate on all of the evidence. *Id.* Yet the jury never should have been permitted to consider this weighty argument from the sovereign's representative.

Again, the prosecutor violated *Berger* when it repeatedly shifted the burden of proof to Mr. Rios's by repeatedly stating, "how do you explain" in rebuttal argument. This was improper burden-shifting. Again, it was a weighty argument from the sovereign's representative that the jury never should have been permitted to hear.

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CONCLUSION

The petition for a writ of certiorari should be granted.

July 25, 2023

Respectfully submitted,

James M. Chavez