IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

No. _____

YUDITH REYNOSO-HICIANO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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April 22, 2024

QUESTIONS PRESENTED

Whether repeatedly arguing in closing that the defendant 'needed the jury to believe' certain things impermissibly shifted the burden of proof and eviscerated the presumption of innocence.

Whether answering "Yes" to the jury question "If we believe she aided and abetted in the kidnapping, does that automatically make her guilty of Count Two (kidnapping)?" undercut the reasonable doubt standard and the government's burden of proof.

List of All Proceedings

1. United States District Court, S.D.N.Y., Docket No. 20-cr-388-4; judgment entered 5/3/2022.

2. United States Court of Appeals for the Second Circuit, Docket No. 22-1044-cr; judgment entered 2/7/2024.

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TABLE OF AUTHORITIES

Petitioner, Yudith Reynoso-Hiciano ["Reynoso"], respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit entered in this proceeding on February 7, 2024.

OPINION BELOW

The decision of the Second Circuit, United States v. Reynoso-Hiciano, 2024 WL 461706 (2d Cir. 2024), appears in the Appendix hereto.

JURISDICTION

The judgment of the Second Circuit was entered on February 7, 2024. This petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constit., Amend. V: No person shall be … deprived of life, liberty, or property, without due process of law…

STATEMENT OF THE CASE

Reynoso was convicted of kidnapping in violation of 18 U.S.C. §§1201(a)(1), 1201(d), and 2, and conspiring to kidnap in violation of 18 U.S.C. §1201(c). The government's evidence presented at trial was that Reynoso, along with her brother and son, kidnapped Estalyn Rosario ["Rosario"] because they believed Rosario had defrauded the brother in a drug transaction. Reynoso testified at trial disputing this, and she continues to maintain her innocence. The court sentenced Reynoso to 72 months' imprisonment, followed by a five-year term of supervised release.

REASONS FOR GRANTING THE PETITION

This case presents important questions of federal law that have not been, but should be, settled by this Court:

I. Whether the government's repeatedly incantation to the jury in closing that Reynoso 'needed it to believe' certain facts constituted impermissible burden-shifting violating Reynoso's constitutional right to due process of law.

A prosecutor's improper remarks in closing result in a denial of the due process right to a fair trial when the remarks cause substantial prejudice to the defendant. United States v. Feliciano, 223 F.3d 102, 123 (2d Cir. 2000), *cert. denied*, 532 U.S. 943 (2001)(citations omitted). The defendant bears the burden of showing that the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChirstoforo, 416 U.S. 637, 643 (1974). Where, as here, the government makes arguments that implicate a constitutional right of the accused, there is reversible error unless the government persuades the reviewing court that the error was harmless – that is, that it did not affect the outcome. United States v. Hasting, 461 U.S. 499, 507-09 (1982); Chapman v. California, 386 U.S. 18, 26 (1967).

In the government's initial closing argument, it argued:

> I'm going to sit down very shortly. I've touched on a few of the arguments that I expect you're going to hear from defense counsel. I'm sure there will be others, and I want you to listen to those arguments and pay attention to them, scrutinize them just as you would any other argument as you hear them, though I'm going to ask you to ask yourselves two questions.

> First, was this really just a misunderstanding among the defendant and Estalyn?
>
> Second, are we all simply misinterpreting the defendant's text messages and voice recording, the one she sent when all she had on her mind was getting that kilo back?
>
> **Because that's what the defendant need** [sic] **you to believe. They need you to believe** that at no point did the defendant agree with her brother and others to kidnap Estalyn, **and they need you to believe** that at no point that the defendant intended to keep Estalyn in her apartment against his will.
>
> **They need you to believe** that when the defendant agreed over text messages with her brother to keep Estalyn in the apartment, she really meant that she was disagreeing with her brother to keep him in the apartment. **They need you to believe - - she needs you to believe** that when she told someone during the kidnapping that those that she was with in the apartment plan to take the guy tied up and put him in the SUV, she was speaking figuratively rather than literally.
>
> **She needs you to believe** that when her brother was explaining right in front of her that they had, in fact, tied up Estalyn, that her brother was just kidding. **They need you to believe** that two plus two is five.

(emphasis provided).

The government's repeated incantation to the jury of what Reynoso needed them to believe shifted the burden of proof onto Reynoso, and minimized the presumption of innocence. In point of fact, it was the government which needed the jury to believe certain things, and believe those things beyond a reasonable doubt.

It was the government which needed the jury to find beyond a reasonable doubt that Reynoso agreed with her brother and others to kidnap Rosario. It was the government which needed the jury to find beyond a

reasonable doubt that Reynoso intended to keep Rosario in her apartment against his will. It was the government which needed the jury to find beyond a reasonable doubt that Reynoso knew of a plan to take Rosario tied up and put him into an SUV.

The defense had no obligation to disprove any of this, much less any need for the jury to believe an alternative narrative. The jury could reject the defense theory of the case and still acquit. The government's argument unconstitutionally misled the jury in that regard.

The drumbeat of 'she needs you to believe' and 'they need you to believe' undercut the axiomatic principle that the defendant is presumed innocent and need not prove anything to the jury. This is true even though Reynoso testified: the presumption of innocence still applied and the government's burden of proof beyond a reasonable doubt did not magically disappear or transfer to the defense. The government may not, in any circumstance, "suggest that the defendant has any burden of proof." United States v. Parker, 903 F.2d 91, 98 (2d Cir.), *cert. denied*, 498 U.S. 872 (1990). Accord, e.g., United States v. Harris, 7 F.4th 1276, 1297 (11th Cir. 2021); United States v. Velazquez, 1 F.4th 1132, 1137-38 (9th Cir. 2021); United States v. Saint Louis, 889 F.3d 145, 156 (4th Cir.), *cert. denied*, 139 S.Ct. 269 (2018); United States v. Berroa, 856 F.3d 141, 161 (1st Cir.), *cert. denied sub*

nom Davila v. United States, 583 U.S. 1003 (2017); United States v. Common, 818 F.3d 323, 331 (7th Cir.), *cert. denied*, 580 U.S. 928 (2016).

The fact that these statements were made during the initial summation show that they were deliberate, and not simply slips of the tongue. Unlike a rebuttal closing, this summation was likely not off the cuff but rather scripted in advance. As a result, while the court "will not likely infer that every remark is intended to carry its most dangerous meaning," United States v. Hicks, 5 F.4th 270, 277 (2d Cir. 2021), *cert. denied*, 142 S.Ct. 1157 (2022) where the remarks are improvised, the government is not entitled to the benefit of the doubt here.

In United States v. Cruz, 797 F.2d 90, 93 n.1 (2d Cir. 1986), the prosecutor in closing used the phrase "the defense… has to convince you." The appellate court found that "indefensible." However, it was not reversible error in the context of that case. The Second Circuit relied on the fact that the improper phrase was "surrounded by statements to the jury, both by the government and by the court, that the burden at all times remained on the government to prove its case." And in Cruz, the offending language was immediately followed by a curative instruction "directed specifically at this misstatement." The court found that, in these circumstances, the misstatement, viewed against the entire argument to the jury, did not deprive the defendant of a fair trial.

Here, in contrast, there was not just a single offensive phrase, but repetitive invocations of the offensive language. Unlike in Cruz, the objectionable phrasing here was not 'surrounded' by statements reminding the jury of the government's burden of proof and the presumption of innocence. While the court instructed the jury as to the government's burden of proof and the presumption of innocence after all the closing arguments were complete, these instructions did not immediately follow the offending remarks, and were not directly specifically at them. And although the evidence against Reynoso was sufficient, instead of asking whether the government had proven its case beyond a reasonable doubt, the jury may well have thought that unless they were convinced by Reynoso's testimony, they should convict.

As the Ninth Circuit noted:

> In the final moments of a trial, the government's principal purpose is to persuade the jury it has met its burden to show guilt beyond a reasonable doubt. Even against this high burden, however, a prosecutor, as a representative of the government, wields considerable influence over a jury. With this power, the prosecutor can easily mislead the average juror into adopting his or her personal view of the law, even when that view diverges from the court's own instruction. Because jurors can be swayed by such mischaracterizations, a prosecutor must be especially wary of making any comments that could, in effect, reduce its burden of proof.

Velazquez, 1 F.4th at 1137 (internal citations and quotations omitted).

The Second Circuit, in affirming Reynoso's convictions, interpreted this repetition of 'she needs you to believe' as simply a way of arguing "that the

defendant's testimony was contradicted by other overwhelming evidence in the trial record…" Reynoso-Hiciano, 2024 WL 462706 at *2. The court found that "even though it may have been unwise to use the phrase '*needs* you to believe' in attacking the credibility of a defendant's version of events in a criminal trial, the jury would have reasonably understood that formulation in this particular context to be a rhetorical device employed by the prosecutor to respond to the evidence, issues, and hypotheses propounded by the defense, by emphasizing the improbability of the defendant's testimony and theory of the case in light of the other trial evidence, rather than an attempt at impermissible burden-shifting." Id. (internal quotation marks and citation omitted). The Second Circuit was wrong.

The government's "machine-gun repetition," Chapman at 26, that the defense needed the jury to believe certain things came before the defense made its closing. Therefore, it cannot be said that these remarks would be interpreted as a response to the 'issues and hypotheses propounded by the defense,' as found by the Second Circuit. The defense had not yet told the jury its version of the 'issues and hypotheses."

And while the drum beat of 'she needs you to believe' may well have been a 'rhetorical device,' this rhetorical device essentially told the jury that it could not acquit unless it believed the defendant. That turned the burden of proof and the presumption of innocence on its head, and accordingly

violated due process. The bottom line is that the defense does not need the jury to believe anything whatsoever – the government has that burden, regardless of whether the defendant testifies.

To add insult to injury, the government, in its rebuttal, misstated what the defense had argued and then used that misstatement to undermine the defense. The government argued:

> You heard it again and again from Mr. Brackley that Mr. Rosario lied about being tied up **because he told the police he wasn't tied up. That's what Mr. Brackley said. It's not true. It's just not true.**

In actuality, what defense counsel argued was that Rosario never told the police he was tied up – not that he told the police he wasn't tied up. Even though not done deliberately, it is misconduct for a prosecutor to make an assertion to the jury that is mistaken or unsupported in the record. United States v. Azubike, 504 F.3d 30, 38 (1st Cir. 2007); see also United States v. Truman, 688 F.3d 129, 144 (2d Cir. 2012)(government may not make material misstatements of fact).

"[T]he Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly." United States v. Young, 470 U.S. 1, 12 (1985). Here, the prosecutor told the jury – inaccurately – that defense counsel was misstating the evidence. If the jury accepted that (and it was likely to, as there was no objection), it would have been hard pressed to evaluate the defense arguments fairly.

The improper remarks in the government's closing and rebuttal, both individually and cumulatively, so prejudiced Reynoso as to undermine the fundamental fairness of the trial. "While [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). That is what occurred in this case, to the substantial prejudice of Reynoso. Accordingly, this Court should grant this Petition to make clear that the government cannot suggest to the jury, much less tell the jury point blank, that a defendant has anything to prove, or that defense counsel mislead the jury.

II. Whether answering "Yes" to the jury question "If we believe she aided and abetted in the kidnapping, does that automatically make her guilty of Count Two (kidnapping)?" undercut the reasonable doubt standard and the government's burden of proof.

During deliberations, the jury sent out a note that read:

> If we believe she aided and abetted in the kidnapping, does that automatically make her guilty of Count Two (kidnapping)?

The court informed counsel that it proposed to answer yes, and then to read the part of the jury instructions dealing with aiding and abetting. Defense counsel objected: "I would object to giving them the conclusion. I would just reread the charge to them." The court overruled the objection. Id.

The court responded to the jury's question as follows:

> The short answer is yes.
>
> Let me direct your attention to a page in the jury charge. I know each of you have brought your copy with you. It's page 17. I am going to just read that paragraph to you.

It's headed aiding and abetting.

> Count Two charges the defendant not only with committing the charged crime, but also with aiding and abetting the commission of the charged crime. You may find the defendant guilty of the crime charged in Count Two, if you find that the government has proven beyond a reasonable doubt that another person actually committed the crime charged in that count and that the defendant aided, abetted, counseled, commanded, induced or procured him to do so.

I hope that answers your question.

Particular care that must be taken with supplemental instructions given during deliberations:

> A supplemental instruction can be a potent influence. A jury's interruption of its deliberations to seek further explanation of the law is a critical moment in a criminal trial; and we therefore ascribe crucial importance to a completely accurate statement by the judge at that moment. [T]he district court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial. This is especially true since the judge's last word is apt to be the decisive word.

United States v. Kopstein, 759 F.3d 168, 172-73 (2d Cir. 2014)(citations and internal quotation marks omitted)(reversal where supplemental instructions on entrapment were inconsistent and problematic).

Here, the court's response – "The short answer is yes" – was wrong. "[T]he trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. But [she] was not even 'cursorily' accurate. [She] was simply wrong." Bollenbach v. United States, 326 U.S. 607, 613 (1946).

'Believing' is not the threshold for conviction – it is believing beyond a reasonable doubt. And there is no 'automatically' when a jury is considering whether to convict a defendant. Finally, by rereading part but not all of the aiding and abetting instructions, the court undercut the importance of the unread portion – that is, the part dealing with intentionality and effect on the success of the crime.

The Second Circuit rejected these arguments, finding that the district court properly answered the "narrow" question posed by the jury, and that "yes" was a "legally correct answer." Reynoso-Hiciano, 2024 WL 462706 at *5. The court was wrong.

The short answer to the jury's question should have been 'no.' A belief is not sufficient unless it is a belief beyond a reasonable doubt. Although the court went on to read a part of its prior instruction on aiding and abetting that referenced reasonable doubt, the fact of the matter is that the court diluted the reasonable doubt instruction by answering 'yes' to the question as it was framed. The kicker is that if the jury believed that simple 'belief' was sufficient to convict Reynoso of aiding and abetting kidnapping, it would necessarily follow that simple 'belief' was sufficient to convict her of conspiracy as well. Any instruction suggesting an improperly low degree of certainty for conviction offends due process, and vitiates all the jury's findings. Sullivan v. Louisiana, 508 U.S. 275, 281 (1993).

Moreover, by reading only part of the aiding and abetting charge to the jury, the court prejudicially emphasized one aspect of the instructions and deemphasized others. The trial judge must "explicitly caution[] the jury that the supplemental instruction is an adjunct to, and not a substitute for, the original charge." United States v. Velez, 652 F.2d 258, 261-62 (2d Cir. 1981)(reversal where court failed to recharge jury on the willful membership element of a conspiracy charge). That was not done here.

The full aiding and abetting instruction – the part that the judge did not read back to the jury in response to its inquiry – continued as follows:

> To aid and abet another to commit a crime, a defendant must willfully and knowingly associate herself with the crime and commit some act to contribute to the success of the crime. To "counsel" means to give advice or recommend. To "command" means to direct authoritatively. To "induce" means to lead or move by persuasion or influence as to some action or state of mind. To "procure" means to bring about by unscrupulous or indirect means. When I refer to aiding and abetting, I am referring to each of these acts.
>
> Each of these acts requires you to find that the defendant intentionally and knowingly associated herself with the crime, acted to help make the crime succeed, and had an interest in furthering the crime. Mere presence at the scene of a crime or mere acquiescence in the criminal conduct of another is not enough to establish aiding and abetting, nor is after-the-fact approval of that conduct. An aider and abettor must take some conscious action that furthered the commission of the crime. In other words, the government must prove that another person committed the crime charged, that the defendant acted with a specific intent of advancing the commission of the crime, and that the defendant's effort contributed to the success of the criminal endeavor.
>
> In order to determine whether the defendant aided and abetted a crime, ask yourself, did she associate herself with the criminal venture knowingly and willfully? Did she seek by her actions to make the

> criminal venture succeed? If your answer to either of these questions is no, then the defendant did not aid and abet the crime charged.

The portion omitted from the readback was critical – it involved the mens rea necessary for aiding and abetting liability and explained the requirement of furthering the commission of the crime. It also gave examples of things that were not aiding and abetting – for instance, presence at the scene or acquiescence in the criminal conduct of another. These were all principles upon which the defense relied.

"A flawed supplemental instruction can undermine and even invalidate a charge that is otherwise correct if the supplemental instruction is sufficiently incomplete and misleading." United States v. Daugerdas, 837 F.3d 212, 228 (2d Cir. 2016), *cert. denied*, 138 S.Ct. 62 (2017). Particular care must be taken with supplemental instructions in response to jury questions "because they are often provided to the jury at crucial moments of deliberation." Id. (citation omitted).

Where, as here, the court provides a segment of jury instructions in response to a question during deliberation, a defendant's rights are protected only "by carefully reminding the jury of other aspects of the original charge and cautioning them that the segment of the charge which is amplified or explained should be considered in the light of the other instructions and is not to be given undue weight." Beardshall v. Minuteman Press Intern., Inc., 664 F.2d 23, 29 (3d Cir. 1981). For example, in United States v. Johnson, 192

Fed. Appx. 43 (2d Cir. 2006), the Second Circuit found that a supplemental charge reminding the jury of the instructions previously given was sufficient to counteract the risk that the jury would give undue weight to testimony it requested be read back to it.

No such reminder was given in this case, and as a result, there was a reasonable likelihood, even if less than a probability, that the jury misunderstood these principles of law. Because the error here went to the reasonable doubt standard and the government's burden of proof, harmless error analysis does not apply. Sullivan, 508 U.S. at 278-82. A constitutionally deficient reasonable doubt instruction can never be harmless error, because the defendant has been deprived of her constitutional right to have a jury decide whether she is guilty beyond a reasonable doubt. Id. at 279-280.

Accordingly, this Court should grant this Petition, and vacate Reynoso's convictions and sentence.

Conclusion

For the foregoing reasons, Petitioner Yudith Reynoso-Hiciano respectfully requests that this Petition for Writ of Certiorari be granted.

April 22, 2024

Yudith Reynoso-Hiciano
By her attorney:

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