NO. __________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

SANTOS RUIZ

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

Joseph Virgilio, Esquire
1629 K Street NW
Suite 300
Washington DC 20006
(202) 256-0652
virgilio@usa.com

Counsel for Petitioner
(Appointed by the Court)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the DCCA erred in affirming the trial court's admission of details of the charged incident as substantive evidence under the hearsay exception to the hearsay rule.

2. Whether the DCCA, ignoring the record below, erred in affirming the trial court's ruling that the government could call the complainant, J.R., to the stand at trial, even though there was clear evidence that the government knew before trial that she had recanted her complaint and would do so at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Santos Ruiz respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

CITATION TO OPINIONS BELOW

The District of Columbia Court of Appeals ("DCCA") issued an unpublished *Memorandum Opinion and Judgment* ("*MOJ*") in Record No. 16-CM-1238 on May 16, 2018. **Appendix A.**

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254. The District of Columbia Court of Appeals issued an unpublished opinion May 16, 2018. Pursuant to Supreme Court Rule 13.3, this petition has been timely filed within 90 days of May 16, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted following a jury trial of two counts of Misdemeanor Sexual Abuse of a Child (Petitioner's daughter, J.R.), all occurring on or about November 1, 2012, in violation of D.C. Code § 22-3010.01. In June 2015 Petitioner's daughter, J.R., reported to police that three years earlier, in November 2012, when she was 12 years old, her father touched her inappropriately. J.R. told a detective that "he tried to rape me," "tried to have sex with me," and that he "touched" her "on the breast and on the vagina." J.R. gave an unsworn statement to the Child Advocacy Center ("CAC") and described the incident. She also told her brother that "she was sexually abused by my dad" and she told her mother that her dad touched her inner thighs.

Prior to trial, J.R. recanted. The government gave her an immunity letter so that it could still require her to testify at trial. J.R. testified at trial that she had lied when she accused her father of inappropriate behavior because she wanted him to stop drinking.

Defense counsel posed numerous objections to the government calling J.R. and to the testimony the prosecutor elicited from J.R., her family, and the Detective, as well as admission of the CAC recorded interview. First, counsel asserted that because J.R. had recanted, the government was merely calling J.R. as a subterfuge to introduce inadmissible hearsay; that any statement made by J.R. beyond the basic fact that she had identified her father as the person she claimed sexually abused her was inadmissible as substantive evidence under the identification exception to the hearsay rule; that testimony of her brother, mother and the detective was inadmissible under the "report of rape" exception to the hearsay rule because J.R. had recanted.

Petitioner appealed the trial court's rulings and also asserted that there was insufficient evidence to convict him because the only evidence of his guilt was based on improperly introduced details of the incident. The DC Court of Appeals affirmed Petitioner's convictions. It found that "[t]he combined weight of the correctly admitted identification evidence from three witnesses. .. persuades us that any improperly admitted statements were not so prejudicial to Petitioner as to require reversal," *MOJ* at 6; that the government properly called J.R. to testify even though it knew she would recant, *MOJ* at 6-7; and that there was sufficient evidence to support Petitioner's convictions. *MOJ* at 6 n.5. It cautioned the government, however: "[W]e admonish the government against overplaying its hand regarding the substantive use of prior statements of identification. Treading as close to the line as it did her reflects insensitivity to the limits we have placed on the admission of [identification] evidence." *MOJ* at 6.

REASONS FOR GRANTING THIS WRIT

I THE DCCA ERRED IN FINDING THAT TESTIMONY WAS ADMISSIBLE UNDER THE IDENTIFICATION EXCEPTION TO THE HEARSAY RULE.

The D.C. Code provides that "an identification of a person made after perceiving the person," is not hearsay. D.C. Code § 14-102(b)(3) ("A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . an identification of a person made after perceiving the person."). Section 14-102 "applies to statements of identification, but not to detailed accounts of the actual crime." *Brown v. United States*, 840 A.2d 82, 89 (D.C.2004). In *Porter v. United States*, 826 A.2d 398 (D.C. 2003), the court stated that under the common law exception to the hearsay rule "some limited reference in the identification to the criminal act is permissible," but "only to the extent necessary to make the identification understandable to the jury." *Id.* at 410 (emphasis added); *Warren v. United States*, 436 A.2d 821, 837 (D.C. 1981) ("testimony consisting solely of descriptions or identifications of the complaining witness' assailants are admissible as substantive evidence under the hearsay exception for prior description testimony," and rejecting the government's arguments that other statements in the broader narrative were similarly admissible).

Petitioner did not deny that he was the person whom J.R. initially claimed had touched her inappropriately. He did not deny that he was J.R.'s father. There was no issue that would have necessitated that the complainant describe the perpetrator by the details of what he was doing during the crime. Rather, the identification could and should have been as simple as: the complainant identified her father, Santos Ruiz, as the person who sexually abused her.

While the DCCA chastised the government for "overplaying its hand" and "[t]reading. . .close to the line," showing "insensitivity to the limits we have placed on admission of §14-102(b)(3) evidence," it nevertheless sanctioned exactly what it said was improper and what numerous cases previously decided in that court also said was improper. The DCCA erred.

II THE DCCA ERRED IN AFFIRMING THE TRIAL COURT'S REJECTION OF PETITIONER'S ASSERTION THAT THE GOVERNMENT WAS CALLING J.R. MERELY AS A SUBTERFUGE TO INTRODUCE OTHERWISE INADMISSIBLE EVIDENCE.

In the present case the government claimed on appeal that the prosecutor "reasonably believed that J.R. herself would confirm the. . .details" that the prosecutor told jurors in her opening they "will hear." The record establishes, however, that the prosecutor could not possibly have and in fact, did not reasonably believe, that J.R. would confirm the facts the prosecutor improperly proffered to the jury. First, the prosecutor informed the court that J.R.'s attorney had notified her that J.R. had *recanted*. Clearly, the prosecutor understood the term "recanted." Second, there was clear evidence that the government knew prior to trial exactly what J.R. would testify to. The prosecutor told the court that after J.R.'s attorney reviewed J.R.'s CAC statement, he and the prosecutor were going to discuss immunity for J.R.. Shortly thereafter J.R. was granted use immunity. Surely, if the government discussed and granted use immunity for J.R., by logic and necessity it must have been apprised in advance of trial that J.R. would testify that the alleged sexual conduct did not occur.

In fact, the government has previously explained to courts what is necessary before granting use immunity. In *Butler v. United States*, 890 A.2d 181 (D.C. 2006), when the court asked the prosecutor why he could not immunize a witness who had not yet been debriefed, the prosecutor responded:

> The government really doesn't have any information by which to evaluate the request for granting immunity. I mean, without talking to him . . . the government certainly is not prepared to grant use

> immunity for testimony that it thinks is going to be perjured, for example. . . . I would say in almost any other circumstance, aside from this case, the government would want some kind of debriefing before it considered any kind of immunity.

Id. at 185. *Also see, Carter v. United States*, 684 A.2d 331 (D.C. 1996) (prosecutor tells trial court that "we will not immunize [Craig Carter] in advance . . . without [eliciting] from the witness all the facts underlying the witness' alleged criminal activity"). Therefore, the government's assertions on appeal that the it did not call J.R. as a subterfuge to impeach her because it did not know what she would say on the stand and that the prosecutor "reasonably believed" that J.R. "would confirm" all of the details of the incident were baseless. No immunity letter could have been forthcoming had the prosecutor not been told in advance what J.R. would say on the stand at trial.

The DCCA ignored the record, however, in concluding that because the letter immunity "offered no promise of immunity to J.R. for other than her truthful testimony on the stand," that the government called her in good faith. The record does not support that finding in the least. In *United States v. O'Malley*, 796 F.2d 891 (7th Cir. 1986), the court recounted cases that "condemned the practice of the government calling a witness, knowing in advance that he would give unfavorable testimony, in order to impeach his testimony . . . since the `purpose [of introducing the hearsay evidence] would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant' that would otherwise be inadmissible." *O'Malley*, 796 F.2d at 899 (citing *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984)). That is exactly what the government did in the present case. *Also see, Void v. United States*, 631 A.2d 374, 383-85 (D.C. 1993)("the prosecutor should not have blurted out in his opening statement assertions of forthcoming proof to which defense counsel had objected during prior discussions with the motions judge"). "It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted into evidence." *ABA Standards for Criminal Justice*, 5.5 (The Prosecution Function) and 7.4 (The Defense Function); *compare Frazier v. Cupp*, 394 U.S. 731, 733-37 (1969)(mistrial properly denied where prosecutor's opening summarized a co-conspirator's testimony that the prosecutor expected, but the co-conspirator then refused to testify when called to the stand). The DCCA erred when it ignored clear proof that the government had acted improperly in calling J.R.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant this petition.

Respectfully submitted,

/s/

Joseph Virgilio, Esquire
1629 K Street NW
Suite 300
Washington DC 20006
(202) 256-0652
virgilio@usa.com
COUNSEL FOR SANTOS RUIZ
Appointed by the Court