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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

NO. \_\_\_\_\_

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CALMER COTTIER, PETITIONER,

-vs.-

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

When the only evidence offered to support a murder conviction is the testimony of the government's cooperating witnesses, does it violate the Constitutional guarantees of a fair trial, due process, and an impartial jury when the jury is permitted to take an official court document into its deliberations wherein the prosecutor stipulates the government's star witness is testifying truthfully?

## **PARTIES TO THE PROCEEDING**

Petitioner is Calmer Cottier, the defendant-appellant below. Respondent is the United States of America, the plaintiff-appellee below.

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CALMER COTTIER,

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-vs.-

UNITED STATES OF AMERICA,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

Petitioner, Calmer Cottier, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## **OPINION BELOW**

The opinion of the court of appeals (App.1a-13a) is reported at 908 F.3d 1141 and is reprinted in Appendix A to this Petition.

## **JURISDICTION**

The court of appeals entered judgment on November 16, 2018. A petition for rehearing en banc was filed on January 11, 2019 and denied on February 12, 2019. (App.1c). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

The Fifth Amendment to the United States Constitution provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . U.S. Const. 5th Amend.

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const. 6th Amend.



## STATEMENT OF THE CASE

In the early morning hours of July 12, 2015, Ferris Brings Plenty was murdered during a group beating on the Pine Ridge Indian Reservation in South Dakota. Six people were indicted on charges of Second-degree Murder (or aiding and abetting the same), Conspiracy to Commit Assault, and Solicitation of a Crime of Violence, including Petitioner, Mr. Calmer Cottier.

Each of Mr. Cottier's co-defendants pled guilty pursuant to cooperation agreements with the government. Mr. Cottier proclaimed his innocence and went to trial. The government had no physical evidence to suggest Mr. Cottier played any role in causing Mr. Brings Plenty's death. The only witnesses to the murder were Mr. Cottier's codefendants and several others who were present but uncharged. Accordingly, a conviction could be secured solely on the testimony of the government's cooperating witnesses.

At trial, two of Mr. Cottier's co-defendants testified for the government. One witness, Billy Bob Bluebird, was heavily intoxicated at the time Mr. Brings Plenty was killed. Mr. Bluebird testified he may have seen Mr. Cottier kick Mr. Brings Plenty, but he was not certain. It was dark out, and Mr. Bluebird had been so drunk on the night in question he had already passed out once, had been awoken, and then drank more alcohol just before the attack.

The government's second cooperating witness, Terry Goings, was the government's star witness. Mr. Goings' testimony comprises nearly 100 pages of the trial transcript, wherein he implicates Mr. Cottier in Mr. Brings Plenty's murder.

However, Mr. Goings also testified he had memory problems, had helped consume two cases of beer and a jug of vodka on the day of the attack, and was black-out drunk on the night of Brings' Plenty's death, which was the third day of Mr. Goings' "three-day-drunk." Mr. Goings testified that he could only remember parts of what happened on the night Mr.

Brings Plenty was killed. Mr. Goings also testified he had lied about the case so many times he was having a really difficult time keeping his story straight.

These two witnesses comprised the entirety of the government's case-in-chief that Mr. Cottier either murdered or aided and abetted the murder of Ferris Brings Plenty. Mr. Cottier took the stand in his own defense. Mr. Cottier admitted to striking Mr. Brings Plenty but claimed it was in self-defense. There was no physical evidence to implicate Mr. Cottier, so the jury was left with a credibility determination: was the jury to believe Mr. Goings' version of events or Mr. Cottier's?

During the trial, the factual basis statement of a third co-defendant, Steven Steele, was admitted into evidence. (App.1d-3d). Mr. Steele's factual basis statement was identical to Mr. Goings' factual basis statement in all material aspects and stated "[t]he undersigned parties stipulate that the following facts are true . . . :” “[Mr. Cottier] threw a cinder block at [Mr. Brings Plenty], striking him in the face and causing him to stumble.” “[Mr. Cottier] . . . kicked [Mr. Brings Plenty] in the head and face.” (App.1d-3d). “The undersigned parties” to the factual basis statement were Mr. Steele and the United States Attorney, signed by the

Assistant United States Attorney prosecuting Mr. Cottier before the very jury she was asking to convict him. Mr. Cottier's jurors had this document with them during their deliberations. The jury convicted Mr. Cottier of the murder and conspiracy counts and acquitted him of the solicitation count.

On appeal to the Eight Circuit, during oral arguments, the Eight Circuit panel called the submission of Steven Steele's factual basis statement to the jury without redacting the stipulation to the truth of its facts "unusual," "baffling," "fraught with danger," and "not seen anywhere." However, the panel nevertheless concluded Mr. Cottier was not prejudiced based upon a passing reference to the "overwhelming evidence of [Mr. Cottier's] guilt." However, the only witness to implicate Mr. Cottier in Mr. Brings Plenty's death was the government's star witness, Terry Goings, who had outrageous credibility issues. Presumably, Mr. Goings' testimony provided this "overwhelming evidence" of Mr. Cottier's guilt. The Eighth Circuit declined to invade the province of the jury as to the jury's determination that Mr. Goings' and the government's version of events was credible and Mr. Cottier's was not.

Mr. Cottier was sentenced to 210 months in prison.

#### **REASONS FOR GRANTING THE PETITION**

- A. The Eighth Circuit's conclusion that the government's vouching for the credibility of its star witness did not prejudice Mr. Cottier, even when his conviction rested entirely on the credibility of that witness, goes far beyond the reach of *Lawn, Young, and Darden* and is incorrect on the merits.**

“A fundamental premise of our criminal trial system is that ‘the jury is the lie detector[,]’ not the government. *See United States v. Scheffer*, 523 U.S. 303, 313 (1998) (quoting *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis omitted)).

When an official court document was presented to Mr. Cottier’s jury wherein the United States Attorney stipulated to the truth of the government’s witness’ testimony, it committed impermissible witness vouching. As this Court recognized in *United States v. Young*, 470 U.S. 1 (1985), “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government rather than its own view of the evidence.” *Id.* 18–19.

This Court has set forth a series of factors to determine whether impermissible prosecutorial witness vouching may amount to a due process violation: (1) the degree to which the remarks would tend to mislead the jury and prejudice the defendant (*see Darden v. Wainwright*, 477 U.S. 168, 182 (1986) and *Young*, 470 U.S. at 12); (2) whether the prosecutor misstated the evidence (*see Darden*, 477 U.S. at 182 and *Berger v. United States*, 295 U.S. 78, 84-85 (1935)); (3) the strength of the overall proof establishing guilt (*see Darden*, 477 U.S. at 182); (4) whether defense counsel objected to the vouching (*see Darden*, 477 U.S. at 182-83 and *Young*, 470 U.S. at 13); and (5) whether the jury received a curative instruction (*see Darden*, 477 U.S. at 182 and *Caldwell v. Mississippi*, 472 U.S. 320, 339 (1985)).

In *Lawn v. United States*, 355 U.S. 339 (1958), the petitioners sought reversal of criminal convictions for income tax evasion based, in part, on an argument the

government prosecutor's closing argument deprived the petitioners of a fair trial. *Lawn*, 355 U.S. 339 at 359 n. 15. In his closing argument at trial, defense counsel attacked the government for "persecuting" the defendants, alleged the government's prosecution was instituted in bad faith, and argued the government's key witnesses were perjurers. *Young*, 470 U.S. at 11–13. "The prosecutor in response vouched for the credibility of the challenged witnesses, telling the jury that the Government thought those witnesses testified truthfully." *Id.* at 11. In *Lawn*, this Court concluded the prosecutor's remarks, when viewed within the context of the entire trial, did not deprive petitioners of a fair trial. Further, this Court noted defense counsel's "comments clearly invited the reply." *Id.*

Later, in *United States v. Young, supra*, this Court reiterated that prosecutorial witness vouching "must be examined *within the context of the trial* to determine whether the prosecutor's behavior amounted to prejudicial error." *Id.* at 12. In other words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly." *Young*, 470 U.S. at 11–12. (citations omitted). Ultimately, in *Young*, this Court held a government prosecutor's expression to the jury of his personal view of the defendant's guilt was "inappropriate and amounting to error." *Id.* at 16. However, when the Court assessed the prosecutor's remarks within the context of *Young's* entire trial, this Court found the vouching was "not such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice[.]" in part because the prosecutor had not implied that he had evidence of the defendant's

guilt unknown to the jury, and because the jury had acquitted the defendant of the most serious charge. *Id.* at 16–20. Further, Young’s defense counsel had invited the remarks by telling the jury not even the prosecutor believed Young was guilty. *Id.* 13-14. This Court concluded a prosecutor should be given more leeway when a response is “invited” by defense counsel’s remark and goes no further than is necessary to “right the scale.” *Id.* at 12-13. Still further, and arguably most importantly, the Court noted Young’s guilt was established by “substantial and virtually uncontradicted evidence.” *Id.* at 20.

The year after *Young*, in *Darden*, *supra*, this Court was again faced with a claim that improper prosecutorial statements during closing arguments violated the defendant’s right to a fair trial. *Darden*, 477 U.S. at 181. Again, the relevant question was whether the prosecutors’ comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* The prosecutor’s comments were an invited response, and the jury was instructed the prosecutor’s arguments were not evidence. *Id.* at 182. Further, the weight of the evidence was so heavy and overwhelming as to support a guilty conviction. *Id.* This Court ultimately held in a 5-4 opinion that overwhelming evidence reduced the likelihood that the jury’s decision was influenced by the prosecutor’s improper comments. *Id.* at 196.

If *Darden* was a close case, this one is not. The evidence against Mr. Cottier was neither “substantial,” “virtually uncontradicted,” “heavy,” nor “overwhelming.” If the government had more than a single witness who implicated Mr. Cottier—or if

there was even so much as a single witness present who was not testifying pursuant to a cooperation agreement—or if there was even a single witness who was not black-out drunk that night—or if there was even a single piece of physical evidence that could implicate Mr. Cottier, then perhaps *Berger*, *Darden*, and *Young* could be stretched far enough to sustain Mr. Cottier’s conviction. However, the government’s striking lack of evidence against Mr. Cottier is what makes this case stand so starkly in contrast with *Berger*, *Darden*, and *Young*. Mr. Cottier was convicted solely on the testimony of the government’s cooperating witnesses. The entire trial was a credibility test between Mr. Cottier and the others present when Mr. Brings Plenty was killed. In Mr. Cottier’s case, the submission to the jury of a statement signed by the prosecutor wherein the United States Attorney vouches for the truth of the government’s witnesses (and by implication the falsity of Mr. Cottier’s testimony) did not “right the scales.” It broke the scales.

Counsel’s research indicates that every circuit to confront the question has found reversible error when a criminal conviction depends upon the vouched-for credibility of a key government witness. *See, e.g., United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994) (ordering a new trial when the question of whether the defendant committed the crimes charged in the indictment turned entirely on whether the jury believed the governments’ vouched-for witnesses or the defense witnesses); *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 96 (2d Cir. 2014) (ordering a new trial when, among other errors, the government repeatedly bolstered the credibility of its key witnesses); *United States v. Dispoz-O-Plastics*,

*Inc.*, 172 F.3d 275, 287 (3d Cir. 1999) (ordering a new trial when a vouched-for witness's testimony was central to the government's securing a conviction); *United States v. Gracia*, 522 F.3d 597, 604 (5th Cir. 2008) (finding plain error when the jury's verdict was based solely on the testimony of a vouched-for witness); *Byrd v. Collins*, 227 F.3d 756, 757 (6th Cir. 2000) (holding "prosecutorial testimony on the credibility of a witness is undoubtedly unconstitutional, and in a case that turns on the veracity of a witness . . . the error is prejudicial." *Id.*); *United States v. Cotnam*, 88 F.3d 487, 500–01 (7th Cir. 1996) (reversing the conviction of a defendant as the result of the government's vouching-for its key witness); *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992) (finding plain error when the only direct evidence of a defendant's guilt was the vouched-for testimony of the government's cooperating witnesses and a guilty verdict was the result of a credibility test); *United States v. Smith*, 962 F.2d 923, 936 (9th Cir. 1992) (reversing a conviction for plain error and holding "[w]here the determination of a defendant's guilt or innocence hinges almost entirely on the credibility of a key prosecution witness, allowing a conviction to be obtained by a prosecutor's deliberately vouching for that witness on behalf of the court would pose a clear threat to the integrity of judicial proceedings." *Id.*); *United States v. Eyster*, 948 F.2d 1196, 1208 (11th Cir. 1991) (reversing a conviction that rested heavily on vouched-for testimony and no physical evidence was presented to support the conviction).

When a conviction is procured solely on the testimony of cooperating witnesses and is a credibility test between the government's witnesses and the



defense's witnesses, any amount of prosecutorial witness vouching amounts to a violation of the Constitutional guarantees of a fair trial, due process, and an impartial jury. In this case, the delivery of Mr. Steele's factual basis statement with an attestation as to the truth of its facts by the government prosecutor was an error serious enough to undermine the fundamental fairness of Mr. Cottier's trial and contributed to a miscarriage of justice.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 9th day of May, 2019.

Respectfully submitted,

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/s/ Nathaniel Forrest Nelson

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