
IN THE SUPREME COURT OF THE UNITED STATES

NO. 18-9261

CALMER COTTIER, PETITIONER,

-vs.-

UNITED STATES OF AMERICA

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

**PETITIONER'S REPLY TO BRIEF FOR
THE UNITED STATES IN OPPOSITION**

Nathaniel Forrest Nelson
Nelson Law
1209 Junction Ave.
Sturgis, SD 57785
Telephone: (605) 561-6283
Fax: (605) 561-2080
nate@nelsonlawsturgis.com
ATTORNEY FOR PETITIONER

REPLY TO BRIEF IN OPPOSITION

The Government argues it was not error for the prosecutor to vouch for the credibility of its witnesses to the jury. Brief in Opposition at 10. That argument is not supported by this Court's holding in *United States v. Young*, 470 U.S. 1, 16 (1985). 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." *Young*, 470 U.S. at 16. *See also, e.g.*, authorities from various Circuits applying *Young* (cited in Petition for Writ of Certiorari) at 8-9.

Because it was error for the government prosecutor to vouch for the truth of its witnesses to the jury, the remaining question is whether this prosecutorial witness vouching "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation and internal quotation marks omitted). That question is evaluated by looking at the statements "within the context of the trial" as a whole. *Young*, 470 U.S. at 18-19.

To support its claim that its vouching did not prejudice Mr. Cottier, the Government responds to his assertion that Mr. Cottier was convicted on the testimony of only a single unreliable witness by emphasizing the testimony of a second witness, Billy Bob Bluebird. Brief in Opposition at 12. Specifically, the Government highlights Mr. Bluebird's testimony "that [Mr. Cottier] was part of the group that 'attacked' Brings Plenty, and that he saw [Mr. Cottier] kick the victim." *Id.* (citing Tr. 190, Tr. 199, 204). That representation of Mr. Bluebird's testimony is

accurate, but incomplete. Mr. Bluebird later retracted (or at least qualified) that implication:

Q: So in the backyard when you saw [the victim], [Petitioner], and Steve, and Terry, what was [Petitioner] doing?

A: I don't know. I couldn't really see him."

Tr. 191-92. [. . .]

Q: When you first come around the side of the trailer and you're seeing what's going on in the backyard, what was [Petitioner] doing at that point?

A: I guess that I don't know because I didn't really see him. TR 198.

Tr. 198-99. [. . .]

Q: So as the events are occurring -- so first you couldn't tell what [Petitioner] was doing. As things are happening, could you see [Petitioner] do anything to [the victim]?

A: Yeah, he kicked him.

Q: Could you tell what part of [the victim's] body [Petitioner] kicked?

A: No, I just seen him kick him.

Q: Did you see anyone else kick [the victim]?

A: I think Jerome.

Q: Jerome Warrior?

A: Yes.

Tr. 191-92. [. . .]

Q: But Jerome and [Petitioner] are similar size?

A: Yes.

Q: So you also said that you saw somebody get kicked?

A: Yes.

Q: And that you weren't sure if it was Jerome or if it was [Petitioner]?

A: Yes.

Q: That yard was chaos that night, right?

A: Yes.

Q: So there was a lot going on and it happened real quick?

A: Yes.

Tr. 202-03. [. . .]

Q: Who all in the backyard kicked [the victim]?

A: There was [the Petitioner], Jerome.

Tr. 204.

During a chaotic fight under cover of darkness, Mr. Bluebird's supposed implication of Mr. Calmer— on which the Government places significant reliance— was equivocal at best. Mr. Bluebird thought he saw someone kick the victim, but he wasn't sure who. Mr. Bluebird's testimony and the testimony of Mr. Goings do not amount to "overwhelming evidence" of Mr. Cottier's guilt.

In this case, specifically because the evidence was so scant, 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 own testimony) undermined 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 20th day of September, 2019.

Respectfully submitted,

NELSON LAW

/s/ Nathaniel Forrest Nelson

Nathaniel Forrest Nelson
Attorney for Petitioner Calmer Cottier
Nelson Law
1209 Junction Ave.
Sturgis, SD 57785
Telephone: (605) 561-6283
Fax: (605) 561-2080
nate@nelsonlawsturgis.com