No. 07-

IN THE

Supreme Court of the United States

VASILE VALY ROSCA,

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition presents the following important question as to which there is a conflict in the Circuits: Whether the Ninth Circuit's "slight connection" standard for upholding a criminal conspiracy conviction against a sufficiency-of-the-evidence challenge comports with the Due Process Clause of the Fifth Amendment, which requires that the government prove every element of a crime beyond a reasonable doubt and mandates that a jury verdict may be sustained on appeal only if supported by substantial evidence.

TABLE OF CONTENTS

Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Statutes

Law Review Articles

Constitutional Provisions

Blank Page

PETITION FOR A WRIT OF CERTIORARI

In affirming Petitioner's criminal conviction for knowing participation in a vast, international automobile smuggling conspiracy, the Ninth Circuit improperly held that a defendant may be inferred to have knowingly participated in a conspiracy if the government shows a mere "slight connection" between the defendant and the conspiracy. This lenient "slight connection" standard has been expressly rejected by the Seventh Circuit and presents the same constitutional infirmity as its predecessor, the traditional "slight evidence" rule, which has been widely repudiated but still persists in some Circuits. By upholding conspiracy convictions on the basis of a "slight connection," the Ninth Circuit allows a defendant with a personal relationship to a single conspirator to be improperly convicted of participation in a broad conspiracy even without evidence that he knowingly joined the conspiracy. The Ninth Circuit test is also inconsistent with the case law of other Circuits. The split between the Circuits on this issue thwarts consistent application of the federal criminal conspiracy statute and causes a disparity regarding the substantive rights of criminal defendants from one Circuit to another.

Petitioner, Vasile Valy Rosca ("Rosca"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a), is unreported. The judgment of the United States District Court for the District of Arizona (App., *infra*, 7a), is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on April 5, 2007. (App., *infra*, 1a) The Court of Appeals denied a timely petition for rehearing on June 26, 2007. (App., *infra*, 7a) The district court had jurisdiction under 18 U.S.C. § 3231. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V

STATEMENT OF THE CASE

Factual Background. The government claimed Rosca was part of an international smuggling conspiracy involving more than one hundred vehicles. Over the course of three years, participants in this conspiracy allegedly stole vehicles in Canada and the United States, forged false Vehicle Identification Number ("VIN") plates, created counterfeit titles and registration documents, and fraudulently processed paperwork for the vehicles through corrupt insiders at the Arizona Motor Vehicle Division ("MVD") in order to commit insurance fraud or sell the vehicles to third parties in the United States or overseas, primarily in the Middle East and Europe.

The initial indictment charged eighteen conspirators, listed four additional unnamed co-conspirators, and included 180 criminal counts. Most of those named in the original

indictment either pleaded guilty or absconded, leaving only seven defendants named in the final indictment. By the time of trial, following additional guilty pleas, only two defendants remained: Rosca, and Moustapha Lofti Eljammal ("Eljammal"), a Lebanese man living in the United States on asylum, who the government described as the "epicenter" of the international conspiracy. Before sending the case to the jury, the government dismissed all 52 substantive charges against Rosca, leaving in place just one charge alleging that Rosca knowingly joined the overall conspiracy, in violation of 18 U.S.C. § 371.

The Trial. The vast majority of the evidence at trial focused on the criminal acts of Eljammal. Evidence came primarily in the form of testimony from alleged conspirators who had pleaded guilty to joining with Eljammal in a variety of criminal endeavors. These witnesses implicated Eljammal in conspiratorial acts involving the procurement of fraudulent vehicle titles and registrations, VIN-switching, sales of stolen vehicles, and insurance fraud. Yet each of these witnesses testified that, so far as he or she knew, Rosca had played no part in the conspiracy.

The only evidence pertaining to Rosca related to three vehicles: a 2000 Harley Davidson motorcycle, a 2002 Lexus LX470, and a 2001 VW Jetta. Police seized a 2000 Harley Davidson with an altered VIN plate from Rosca's house. A corrupt MVD insider testified that she had falsified title and registration documents for the motorcycle, registering the vehicle in Rosca's name at the direction of Eljammal. But the government conceded that there was no evidence that Rosca had ever possessed the falsified documents, or been involved in any way with the fraudulent registration process. Another MVD insider testified that she fraudulently

prepared title and registration documents in Rosca's name for a 2002 Lexus, which Rosca insured. He later reported the vehicle stolen and filed an insurance claim. The government claimed that Rosca never in fact possessed the vehicle. Finally, Rosca was found driving a 2001 Volkswagen Jetta, owned by the girlfriend of one of Eljammal's co-conspirators. The government argued that the car was going to be falsely reported stolen, although the government conceded that it was unclear if the Jetta was intended for any unlawful scheme at the time Rosca was stopped while driving it.

The jury found Rosca guilty and the district court entered judgment on the verdict and sentenced Rosca to twenty-four months in prison. The Ninth Circuit affirmed in an unpublished Memorandum Decision.

The Ninth Circuit's Decision. In its decision, the Ninth Circuit cited precedent requiring the government to prove each element of a conspiracy beyond a reasonable doubt, but anomalously upheld Rosca's conviction under the lesser "slight connection" standard. The Ninth Circuit precedent requires the government to prove beyond a reasonable doubt, with respect to the *mens rea* element, that "each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that [his] own benefits were dependent upon the success of the entire venture." Pet. App. 1a at 3 (citing *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990)). However, after properly articulating this two-prong test, the Ninth Circuit side-stepped this standard in deference to the "slight connection" rule. *Id.* The Ninth Circuit's "slight connection" rule provides that once the government has proven the existence of a conspiracy, "evidence of only a *slight connection* is necessary

to convict a defendant of knowing participation in it." *Id.* (emphasis added) Relying on this impermissible standard, the Ninth Circuit held that the government had provided sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Rosca had a slight connection to the conspiracy. Pet. App. 1a at 2. But, the court never considered whether the government had proven beyond a reasonable doubt that Rosca knew the scope of the conspiracy and knew that his benefits were dependent upon the success of the entire venture. *Id.* Instead, the court upheld Rosca's conviction merely upon a finding of a slight connection to the conspiracy, despite the lack of substantial proof of these facts essential to prove the requisite *mens rea.*

The question presented here is whether the Ninth Circuit's "slight connection" standard, which allows the inference that a defendant with a slight connection to an existing conspiracy has knowingly joined in the conspiracy, violates the Due Process Clause of the Fifth Amendment, which requires the government to prove every element of a crime beyond a reasonable doubt.

REASONS FOR GRANTING THE PETITION

The federal circuit courts of appeal are divided as to whether a defendant's knowing participation in a criminal conspiracy may be inferred from a mere "slight connection" to the conspiracy or whether, instead, the government must prove every element of the crime beyond a reasonable doubt. The "slight connection" rule applied by the Ninth Circuit in this case subverts the requirement of proof beyond a reasonable doubt mandated by the Due Process Clause of the Fifth Amendment. The circuit split provides an incentive for forum shopping in multi-circuit conspiracies and

increases the significant advantages that prosecutors already enjoy in a conspiracy prosecution. The circuit courts require guidance from this Court to reaffirm the necessity of proof beyond a reasonable doubt of every element of a criminal conviction. As shown by this case, the Ninth Circuit's "slight connection" rule unconstitutionally allows the courts to uphold a conspiracy conviction absent the necessary proof that the defendant knowingly joined the conspiracy.

I. The Ninth Circuit's "Slight Connection" Rule is a Reincarnation of the Traditional "Slight Evidence" Rule That Has Been Widely Repudiated Because it Unconstitutionally Reduces the Government's Burden of Proof.

The history of the traditional "slight evidence" rule demonstrates that the rule was more the product of accident than carefully developed legal theory. The traditional "slight evidence" rule provided that once there is evidence establishing the existence of a conspiracy, the prosecution need only show slight evidence of a defendant's knowing or intentional involvement in the existing conspiracy. Brent E. Newton, *The Antiquated "Slight Evidence Rule" In Federal Conspiracy Cases*, 1 J. App. Prac. & Process 49, 51 (1999). The rule was created "out of thin air" by the Fifth Circuit in 1930 and courts applied it sporadically until 1970. *Id.* at 51-52. In fact, only 12 cases cited the "slight evidence" rule between 1930 and 1963, and 15 cases between 1963 and 1970. But after 1970, use of the "slight evidence" rule exploded. *Id.* at 52.

The sudden rise in prominence of the traditional "slight evidence" rule was quickly followed by its demise. In the late 1970s, both the Ninth and Fifth Circuits banished the

"slight evidence" rule out of concern for the increased risk it presented of wrongful convictions. *Id.* However, these two Circuits took very different approaches in crafting a replacement test.

The Ninth Circuit, in *United States v. Dunn*, held that the "slight evidence" rule in its traditional form could be "highly misleading." 564 F.2d 348, 356 (9th Cir. 1977). The court warned that, if applied literally,

> [the "slight evidence" rule] would vitiate the Government's ever-present burden of proof, the requirement that guilt must be proved to a moral certainty and beyond a reasonable doubt, the presumption of innocence, the rule that all doubts must be resolved, and equally plausible inferences drawn, in favor of defendants, and other traditional foundations of our nation's system of criminal justice.

Id. But, instead of abolishing the rule altogether, the Ninth Circuit merely re-characterized the traditional rule. The court emphasized that the word "slight" properly modifies a defendant's *connection* to the conspiracy, rather than the necessary *quantum of evidence. Id.* at 357. According to *Dunn*, the proper statement of the rule is that "[o]nce the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy." *Id.* This reformulation of the rule, however, shares the same vices as its predecessor.

Although the Ninth Circuit purports to recognize that a defendant cannot be convicted without proof beyond a reasonable doubt, its "slight connection" rule falls short of this imperative with respect to the *mens rea* element of a conspiracy charge. To convict a defendant of criminal conspiracy, the government must prove a *mens rea* of "knowing participation" in the conspiracy. *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990). Under the "slight connection" rule, however, the Ninth Circuit will uphold the conviction of a defendant who is only peripherally connected to a broad conspiracy, so long as the attenuated *slight connection* is proven beyond a reasonable doubt. The "slight connection" rule thus substitutes proof beyond a reasonable doubt of a *slight connection* to the conspiracy for proof beyond a reasonable doubt of a defendant's *knowing participation* in the conspiracy — the appropriate *mens rea* requirement.

In contrast, the Fifth Circuit banned the "slight evidence" rule without the unconstitutional back-sliding of the Ninth Circuit approach. In *United States v. Malatesta*, the Fifth Circuit resoundingly rejected the traditional "slight evidence" rule. 590 F.2d 1379 (5th Cir. 1979). It held that "[s]ince knowledge, actual participation, and criminal intent are the necessary elements of the crime of conspiracy, the government must, of course, prove each of those elements beyond a reasonable doubt." *Id.* at 1381. The Fifth Circuit reasoned that requiring proof beyond a reasonable doubt of *every element* of a conspiracy is necessary for compliance with this Court's mandate that a criminal conviction not be upheld on appeal absent substantial evidence of guilt. *Id.* at 1382 (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 469 (1942)). The Fifth Circuit expressed regret that the "slight evidence" rule had "been allowed to worm its

way into the jurisprudence of the Fifth Circuit" and unequivocally "banished" the rule from all future Fifth Circuit appeals. *Id.*

II. The Circuit Courts of Appeal Are Split as to Application of the "Slight Evidence" Rule and its Evolution Into the "Slight Connection" Test.

The Ninth Circuit's "slight connection" standard is consistent with case law in the First, Fourth, Sixth and Tenth Circuits, but contrary to published decisions of the Third, Fifth, Seventh and Eleventh Circuits, which have refused to dilute the requirement that a defendant's knowing participation in a criminal conspiracy must be proven beyond a reasonable doubt. This split between the Circuits means that a criminal defendant in one part of the country may be convicted of a violation of the federal criminal statute for conduct that would not constitute a violation if prosecuted in another Circuit. Such disparate treatment runs counter to the goal of judicial uniformity and equality before the eyes of the law.

Like the Ninth Circuit, the First, Fourth, Sixth, and Tenth Circuits have all determined that once the existence of a conspiracy is established, a defendant's knowing participation in that conspiracy can be inferred when the defendant has a "slight connection" to the conspiracy. *See United States v. Marsh*, 747 F.2d 7, 13 (1st Cir. 1984); *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996); *United States v. Braggs*, 23 F.3d 1047, 1051 (6th Cir. 1994); *United States v. Whitney*, 229 F.3d 1296, 1301 (10th Cir. 2000). These Circuits generally purport to require proof beyond a reasonable doubt of every element of a crime, but adhere to a rule that allows an inference of knowing

participation from proof of a mere "slight connection" to an established conspiracy. This "slight connection" test thus replaces the appropriate requirement of substantial proof to uphold a conviction challenged on appeal for insufficiency of the evidence.

In contrast, the Seventh Circuit has expressly repudiated the Ninth Circuit's "slight connection" test. In *United States v. Durrive*, the Seventh Circuit rejected both the "slight evidence" rule and its "slight connection" reformulation by the Ninth Circuit. 902 F.2d 1221, 1227-28 (7th Cir. 1990). The Seventh Circuit recognized that the "slight connection" rule shares the "same dubious heritage" as the "slight evidence" rule, which it recognized as a "poorly articulated standard of . . . suspect lineage." *Id.* In *Durrive*, the Seventh Circuit put an end to the "infestation" of the "slight evidence" and "slight connection" rules within the Circuit's criminal conspiracy cases. *Id.* at 1228-29. Instead, the court adopted the generally applicable standard that "when the sufficiency of the evidence to connect a particular defendant to a conspiracy is challenged on appeal, 'substantial evidence'" is required to uphold the conviction. *Id.* at 1228. While acknowledging that the phrase "slight connection" is "arguably" a fair articulation of the potential criminal culpability of a minor player in a conspiracy, the court recognized that the phrase as historically applied risked impermissibly diluting the government's burden to prove every element of guilt beyond a reasonable doubt. *Id.* at 1226.

The Third, Fifth, and Eleventh Circuits have strictly adhered to the constitutional requirement of affirming convictions on appeal only upon substantial evidence proving each element of the crime. *United States v. Brodie*, 403 F.3d 123, 134 (3d Cir. 2005); *Malatesta*, 590 F.2d at 1382; *United*

States v. Baker, 432 F.3d 1189, 1231-32 (11th Cir. 2005). The Third Circuit has emphasized that, because conspiracy cases are usually based on circumstantial evidence, the courts must give "close scrutiny" to the sufficiency of the government's evidence in a conspiracy case. *Brodie*, 403 F.3d at 134. Accordingly, a "[c]onspiracy cannot be proven by piling inference upon inference where those inferences do not logically support the ultimate finding of guilt." *Id.* (internal citations omitted).

Likewise, the Fifth and Eleventh Circuits also require every element of a crime to be proven beyond a reasonable doubt. Rather than allowing proof of a "slight connection" to substitute for the required proof of knowing participation, these Circuits properly focus on whether the defendant's *mens rea* has been proven beyond a reasonable doubt. *Malatesta*, 590 F.2d at 1382; *United States v. Baker*, 432 F.3d 1189, 1231-32 (11th Cir. 2005).

Other circuits have chosen still different tests. The Second Circuit, for example, holds somewhat vaguely that once the existence of a conspiracy has been established, "evidence sufficient to link another defendant with it need not be overwhelming." *United States v. Provenzano*, 615 F.2d 37, 45 (2d Cir. 1980). The Eighth Circuit, on the other hand, appears to have one foot planted on each side of the fence. In *United States v. Lopez*, the Eighth Circuit states that "a defendant may be convicted for even a minor role in a conspiracy, so long as the government proves beyond a reasonable doubt that he or she was a member of the conspiracy," but then cites to cases employing the "slight connection" standard. 443 F.3d 1026, 1030 (8th Cir. 2006). The Circuits are thus clearly in need of guidance from this Court to resolve this split of authority.

III. The Ninth Circuit "Slight Connection" Test Fails to Comport With the Due Process Requirement of Proof Beyond a Reasonable Doubt of Every Element of a Criminal Conviction.

The government enjoys substantial substantive and procedural advantages in criminal conspiracy prosecutions that impose a "particularly heavy burden" on the defendant. *United States v. Alvarez*, 610 F.2d 1250, 1254 (5th Cir. 1980). The prosecutor's advantages include, *inter alia*, "the inherent vagueness of the crime itself;" the ability to introduce hearsay statements of co-conspirators; and "the disposition of all courts ... to admit circumstantial evidence on somewhat relaxed standards of relevance on the rationale that the clandestine nature of the crime makes it unprovable in any other fashion." *Id.* Thus, conspiracy has been called the "darling" of prosecutors. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). Courts recognize that "the conspiracy doctrine is inherently subject to abuse and that the government frequently uses conspiracy to cast a wide net that captures many players." *United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992). Conspiracy convictions therefore require close scrutiny.

The Due Process Clause of the Fifth Amendment provides a safeguard against convictions based on insufficient evidence. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73 (1970). In the context of criminal conspiracy, these "necessary" facts include the fact of the defendant's knowing participation in the conspiracy.

The requirement of proof beyond a reasonable doubt "operates to give 'concrete substance' to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S. Ct. 2781, 2787 (1979). "[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship*, 397 U.S. at 363-64.

While virtually all Circuits have recognized that the traditional "slight evidence" rule violates the Due Process Clause, some Circuits still cling tenaciously to its modern reincarnation under the "slight connection" articulation. As Judge Easterbrook insightfully observed in his concurrence in *United States v. Martinez de Ortiz*, however:

> 'Conspiracy' is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh. Prosecutors have many legitimate advantages in the criminal process. Defendants' great counterweight is the requirement that the prosecution establish guilt beyond a reasonable doubt. References to 'slight evidence' and 'slight connection' reduce the power of that requirement.

883 F.2d 515, 524-25 (7th Cir. 1989) (internal citations omitted). As Judge Easterbrook correctly noted, the "slight connection" rule impermissibly dilutes the government's burden of proof in a conspiracy case.

As employed by the Ninth Circuit and other Circuits, the "slight connection" rule thus circumvents the crucial

protection provided by the Due Process Clause and allows the government to deprive a defendant of liberty based upon a dubious inference. By allowing the courts to infer proof of the required *mens rea*, the Ninth Circuit's "slight connection" rule undermines the constitutional protection of the Due Process Clause and paves the way for wrongful convictions.

IV. This Case Illustrates Why the "Slight Connection" Test Should Be Abolished In All Circuits, Because the Ninth Circuit in this Case Used the Standard to Uphold a Conspiracy Conviction in the Absence of Evidence Showing Knowing Participation.

The Ninth Circuit's application of the "slight connection" test in this case circumvented its own conspiracy case law. Under Ninth Circuit precedent, to convict Rosca for participating in the vast overall conspiracy with which he was charged, the government was required to demonstrate beyond a reasonable doubt that Rosca had actual or constructive knowledge of (1) the scope of the overall conspiracy, and (2) the fact that his own benefits were dependent upon the success of the entire venture. *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990); *Daily v. United States*, 282 F.2d 818 (9th Cir. 1960). There was insufficient evidence to prove either of these two prongs beyond a reasonable doubt. But, rather than reverse Rosca's conviction for insufficient evidence, the Ninth Circuit substituted the "slight connection" inference for substantial proof of the two required prongs and improperly upheld the conviction. As a result, Rosca's conviction was affirmed based on his connection to one member of a large group of conspirators, despite the lack of evidence that he knowingly joined the conspiracy.

None of the government's seven co-conspirator witnesses could point to any involvement by Rosca in any aspect of the conspiracy. One witness stated that he did not discuss illegal activities in front of Rosca because he knew that Rosca was not involved in the conspiracy. There was no evidence that Rosca knew anything about the conspiracy's international smuggling activities, or gained any benefit whatever from the success of the overall venture.

Even viewed in the light most favorable to upholding Rosca's conviction, the evidence against him amounted to nothing more than his connection to three vehicles, one attempted act of insurance fraud, and false statements to police in an attempt to protect a long-time friend, Eljammal, who was a central figure in the conspiracy. While this evidence arguably demonstrated that Rosca participated in an isolated case of insurance fraud, and at least temporarily possessed two vehicles connected to other conspirators, it was plainly insufficient to show knowing participation in the overall conspiracy involving more than one hundred vehicles, eighteen conspirators, and acts committed in at least four countries, on three continents. While articulating the two-prong test for knowing participation in the conspiracy, the Ninth Circuit never reconciled its decision with the lack of evidence supporting either prong, but instead simply relied on the "slight connection" standard as a substitute – by inference – for the requisite proof.

Like its predecessor, the "slight evidence" rule that has been widely repudiated, the "slight connection" rule violates the Due Process guarantee of the Fifth Amendment by allowing convictions based upon a lesser standard than proof of every element of the crime beyond a reasonable doubt. The Ninth Circuit's reliance on this lower standard of proof

in this case resulted in the conviction of Rosca despite the lack of evidence that he knowingly participated in or benefited from the vast, multinational conspiracy.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court grant review and reverse the ruling below.

Respectfully submitted,

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