

Other Significant Evidence Issues (Vouching For Witness)



On direct examination, prosecutor may introduce evidence of a witness' plea agreement's truthfulness requirements without impermissibly vouching for the witness if prosecutor does not implicitly or explicitly communicate that the government can monitor and verify witness' testimonial truthfulness

United States v. Magallanez (10th Cir.)



The Case

Following a large, extensive investigation into a drug ring, defendant (Magallanez) was charged with conspiring to possess and distribute methamphetamine. During his trial, the prosecution called two drug agents to provide the "historical background of the investigation." [678] The defendant did not object at trial but raised the testimony of the agents on appeal, contending that the evidence on the background to the investigation and how it focused on the defendant resulted in admission of agent testimony that improperly vouched for the credibility of the witnesses. The defendant charged that the agents' testimony that the documents recovered in the investigation corroborated the statements made by the witnesses, thus vouching for the credibility of those witnesses. [677-78]

The circuit rejected the defendant's contention of vouching. The reason the vouching argument had no merit was that the defense attorney's assertions that the documents were not related to the defendant "opened the door" for the government to explain the purpose of the documents." [678 (citing *United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000))]

The circuit also found that the supposedly vouching testimony "was presented to explain the mechanics of a drug investigation. The agents spoke generally, even hypothetically, about how Western Union wire records, phone records, and hotel records help investigators to determine contact and money transfers between various individuals. General testimony of this sort does not run afoul of the rule against hearsay. See, e.g., *United States v. Trujillo*, 136 F.3d 1388, 1396 (10th Cir. 1998) [*cert. denied*, 525 U.S. 833 (1998)] Neither does it constitute improper vouching. The testimony of the agents served legitimate purposes. For instance, it provided necessary

background about the nature of the investigation, without which the jury would have been deprived of understanding how and why the drug enforcement agents proceeded as they did. Additionally, the testimony served to answer the questions left open by Mr. Magallanez's assertions that the investigative documents were not related to him. The district court did not commit substantial or obvious error in allowing the evidence to be heard." [679]

The defendant also contended that the prosecutor improperly vouched for the credibility of the government's witnesses by mentioning "their obligation to testify truthfully under their plea agreements." [679] The circuit also rejected this contention, concluding that "[a]rgument or evidence is impermissible vouching only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit personal assurances of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witness' testimony." [680 (quoting *United States v. Bowie*, 892 F.2d 1494, 1498 (10th Cir. 1990))]

Pointing out that evidence of plea agreements was admissible on direct examination, including any truthfulness provisions of the agreement, the circuit noted that any use of these truthfulness provisions will become impermissible vouching "only when the prosecutors explicitly or implicitly indicate that they can monitor and accurately verify the truthfulness of the witness' testimony." [680 (quoting *United States v. Bowie*, 892 F.2d 1494, 1498 (10th Cir. 1990))]. The defendant failed to show anything in the record of the case that was improper vouching. Rather, the circuit's examination of the record "shows that the prosecutor's references to credibility were limited to asking each witness if his or her plea agreement contained an obligation to testify truthfully. The prosecutor did no more than reveal the language of the plea agreements and the obligations within those agreements

to testify truthfully. Such actions are not prosecutorial misconduct.” [680]



Commentary

Comment – Circuit Split On Vouching: The circuit did not directly address the minority view for the circuits suggesting that the prosecution may not use a plea agreement of its witness that has a promise to testify truthfully as evidence. *See, e.g., United States v. Musacchia*, 900 F.2d 493, 496-98 (2d Cir. 1990) (trial court erred by allowing prosecutor to question witnesses on direct about truth-telling promises in their plea agreements before the defendant made any challenge to the witness’ credibility; however since the defense opening statement provided grounds for a good faith belief that defense would attack the witness’ credibility, the error here was deemed harmless). Rather, *Magallanez* is consistent with the Tenth Circuit’s adoption of the majority rule in *United States v. Lord*, 907 F.2d 1028, 1031-31 (10th Cir. 1990)


(identifying cases from seven circuits that allow prosecution to use the truthfulness provisions of plea agreements before the defense has tried to impeach the witness as the majority rule, adopting it for the Tenth Circuit).



Case Reference

Cross-Reference: For a discussion of other evidence issues in the case, *see* FRE 401 (p. 478), FRE 403 (p. 486), FRE 608(b) (p.499), and *Sixth Amendment – Confrontation Clause* (p. 467).

Citation: *United States v. Magallanez*, 408 F.3d 672 (10th Cir. May 17, 2005) (No. 04-8021) (Lucero, Murphy, McConnell).

Type of Action/Claim or Charge: 21 U.S.C. §§ 846 (conspiracy to possess with intent to distribute methamphetamine), 841(a)(1) (possessing with the intent to distribute methamphetamine). 

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Rebuttal agent testimony did not vouch for the defendant’s brother by testifying that the brother would not have received “safety valve credit” if he had not incriminated defendant because this testimony did not bolster the brother’s credibility and simply explained the safety valve process

United States v. Vazquez-Rivera (1st Cir.)



The Case

The defendant (Vazquez-Rivera) was charged and convicted of for conspiring to possess cocaine and heroin with intent to distribute. On appeal, the defendant argued that testimony during the trial by a drug agent had been improper. The challenged testimony involved the defendant’s brother, who had testified that the defendant was not involved in trafficking during the trial. The agent testified that the brother “would not have received a safety valve credit if he had not incriminated the defendant.” [480] The defendant claimed that admitting this testimony was an error because it constituted improper vouching for a witness. Because there was no contemporaneous objection at trial, the issue was reviewed for plain error.

The circuit rejected the contention that the agent had vouched for a witness. The circuit noted that the agent “initially testified in the government’s case in chief. The statements that defendant objects to on appeal were given after defendant’s brother, Víctor Vázquez Rivera, testified for the defense. Víctor Vázquez Rivera testified that his brother was not involved” in the alleged drug conspiracy. [480-81] This testimony by the brother was that which the agent was called to the stand to impeach.

The circuit noted that it was clear that the agent “was not attempting to bolster the credibility of any witness, he was merely explaining the procedure under 18 U.S.C. § 3553(f) [‘safety valve’ procedure].” 482] The agent’s testimony amounted to a statement that the brother “told the truth at the safety valve hearing” showing that the