No. 99-315

In the Supreme Court of the United States

GORDON PAUL COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's alleged compliance with an administrative regulation precludes his conviction under 33 U.S.C. 1319(c)(2) and 1342 for knowingly violating the conditions of a National Pollutant Discharge Elimination System permit issued by a State under 33 U.S.C. 1342, or precludes petitioner from being sentenced under Guidelines § 2F1.1(b)(1)(K).

2. Whether alleged use of perjured testimony by the government required reversal of petitioner's conviction.

3. Whether petitioner presented sufficient evidence that the government had promised to grant immunity to a prosecution witness and then had concealed the promise from the defense and from the court.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 173 F.3d 1192.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1999. A petition for rehearing was denied on May 28, 1999 (Pet. App. B1). The petition for a writ of certiorari was filed on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted by a jury in the Southern District of California of one count of conspiracy, in violation of 18 U.S.C. 371; one count of knowingly violating a condition of a National Pollutant Discharge Elimina-

tion System (NPDES) permit, in violation of 33 U.S.C. 1319(c)(2)(A), 1342 and 18 U.S.C. 2; and three counts of committing mail fraud, in violation of 18 U.S.C. 1341 and 2. The district court sentenced petitioner to 51 months' imprisonment. Pet. App. A11. The court of appeals affirmed. *Id.* at A1-A29.

1. Petitioner was a part-owner and an officer of Chino Corona Farms (CCF), a business based in San Juan Capistrano, California, that transported, composted, and sold sewage sludge. In 1990, CCF contracted with the City of San Diego to remove sewage sludge from the City's treatment site on Fiesta Island and to compost the sludge at a CCF facility in Thermal, California. The California Regional Water Quality Board (Water Board), a state agency authorized by the Environmental Protection Agency (EPA) under 33 U.S.C. 1342(b) to administer the NPDES permitting program in California, issued the City of San Diego a NPDES permit to process city sewage. That permit required the City to report regularly to the Water Board on how the sludge was being disposed, and to notify the Water Board of any changes in the city's disposal practice. Pet. App. A2-A3.

The rate at which CCF was receiving sludge from San Diego quickly overwhelmed the capacity of the facility in Thermal. In response, CCF received permission from San Diego and from the Water Board to haul some of the sludge to Mexicali, Mexico. Petitioner hired an individual by the name of Manuel Mier to supervise the trucks hauling sludge from Fiesta Island to Mexicali. According to Mier's testimony at trial, petitioner instructed Mier to prepare falsified weigh-master certificates that misrepresented the cargo weight of the trucks. CCF then used those certificates

to bill San Diego for the sludge hauled to Mexicali. Pet. App. A4-A5.

In February 1993, the EPA promulgated regulations that allowed the direct application of sewage sludge on agricultural lands, providing that the sludge met certain standards. See 40 C.F.R. Pt. 503. Petitioner arranged for samples of San Diego's sludge to be analyzed and, on the basis of the results of the analysis, decided that the EPA standards allowed CCF to deposit the sludge on agricultural land without composting it first. At petitioner's direction, CCF began shipping sludge at night to a farm in Imperial County, California. Petitioner never notified either the City or the Water Board of the change and continued to submit false certificates to San Diego representing that the trucks had been weighed and that the sludge had been transported to Mexicali. San Diego subsequently discovered the ruse, canceled its contract with CCF, and refused to pay the outstanding bills. As a result, CCF went out of business. Pet. App. A5-A8.

2. Petitioner was convicted after a jury trial of causing a violation of a condition of a NPDES permit by disposing of the sludge on farm land without notice to and approval of the Water Board, conspiring with others to violate a NPDES permit condition, and mail fraud for the false billing. The court of appeals affirmed. Pet. App. A1-A29.

The court of appeals rejected petitioner's contention that compliance with 40 C.F.R. Part 503 relieved him of a duty to comply with the City's NPDES permit. Pet. App. A12-A13. The court of appeals reasoned that "the federal regulations do not supersede the NPDES permit." *Id.* at A13.

The court of appeals also rejected petitioner's challenge to the government's use of Mier as a witness.

The court of appeals concluded that the government did not violate petitioner's rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by allegedly failing to produce before trial an exculpatory FBI report that indicated that there was no evidence that the print shop that Mier identified as the source of the false weighmaster certificates ever printed such certificates. Pet. App. A17-A18.[1] The court of appeals reasoned that the "FBI report was not material" to the outcome of the case, because "[t]he defense was able to impeach Mier extensively," and "[t]here was ample evidence of [petitioner's] guilt even without Mier's testimony." *Id.* at A18.

The court of appeals similarly rejected petitioner's contention, raised for the first time on appeal, that the government knowingly presented perjured testimony by Mier. The court of appeals concluded that, because petitioner's attorney "was able to impeach Mier extensively with inconsistent statements," any prejudice to petitioner resulting from Mier's perjury "was not great" and did not constitute "plain error." Pet. App. A19.

The court also found that the government did not improperly fail to disclose an immunity agreement with Mier. The court of appeals explained that the government had denied that any such agreement existed, and that petitioner had not presented any direct evidence to the contrary. Pet. App. A19-A20.[2]

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[1] The court of appeals observed that the parties had disputed whether the government properly disclosed the FBI report and that the district court did not resolve that factual dispute. Pet. App. A18.

[2] The court of appeals also concluded that petitioner could be found liable for violating a NPDES permit even though he was not a party to the permit, Pet. App. A13-A14, that 33 U.S.C.

ARGUMENT

1. Petitioner argues (Pet. 5-7, 13-17) that, under the Supremacy Clause (U.S. Const. Art. VI, § 2), he could not be convicted under 33 U.S.C. 1319(c)(2)(A) for failing to notify the City of CCF's change in disposal practices, because the disposal complied with 40 C.F.R. Part 503, which permits the direct application of sludge to agricultural land under certain conditions and relieves the person disposing of the pollutant from the notice requirements under 40 C.F.R. 503.12(j). That contention has no merit.

As an initial matter, this case presents no issue under the Supremacy Clause, under which "any state legislation which frustrates the full effectiveness of federal law is rendered invalid." *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971). The alleged conflict that petitioner posits is not between federal and state law, but between two sources of federal law, 33 U.S.C. 1319(c)(2)(A) and 40 C.F.R. Part 503. The Supremacy Clause is therefore simply irrelevant in this case.

Moreover, compliance with EPA's regulations under 40 C.F.R. Part 503 in no way bars a conviction under 33 U.S.C. 1319(c)(2)(A), which imposes criminal liability on a "person who knowingly violates * * * any permit condition * * * in a [NPDES] permit." The regulations on which petitioner relies simply provide that, when a person meets certain conditions that permit the

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1319(c)(2)(A) and 1342 were not unconstitutionally vague, Pet. App. A15-A16, that alleged prosecutorial misconduct did not require reversal of petitioner's conviction, *id.* at A21-A22, and that the district court did not misapply the provisions of the Guidelines that provide for sentencing enhancements for obstruction of justice, discharge of a pollutant, permit violation, more than minimal planning, and role in the offense, *id.* at A23-A25, A28-A29. Petitioner does not challenge those rulings in this Court.

direct application of sewage sludge onto land, that person is exempt from complying with another regulatory requirement that requires a person applying sewage sludge to land to provide written notice to the permitting authority for the State in which the sludge will be applied. 40 C.F.R. 503.10, 503.12. Petitioner, however, was not convicted of violating the notice requirements of EPA's regulations.[3] Rather, petitioner was convicted for knowingly causing the violation of the City's extant NPDES permit by failing to notify the City of a change in CCF's disposal practices and by misrepresenting that CCF was sending sludge to Mexico for treatment, when in fact it was directly depositing it on agricultural land in California. Pet. App. A12-A15. There is nothing in EPA's regulations or the Clean Water Act that purports to immunize petitioner from knowingly violating the terms of an extant permit.

For similar reasons, petitioner also errs in contending (Pet. 29-30) that his compliance with the regulations barred the district court from sentencing petitioner under Guidelines § 2F1.1(b)(1)(K), which provides for a ten-level enhancement for fraud involving a loss exceeding $500,000. Whether or not petitioner complied with EPA's regulations, petitioner violated the mail fraud statute, 18 U.S.C. 1341, when CCF submitted false certificates to the City representing that the sludge was being shipped to Mexicali. Pet. App. A3.[4]

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[3] Nor was petitioner convicted of violating CCF's contract with the City. Petitioner therefore errs in relying (Pet. 7-8) on the fact that the contract did not incorporate the terms of the City's NPDES permit.

[4] Petitioner is also incorrect in contending (Pet. 30) that the City "was not defrauded out of anything, since they refused to pay petitioner's bills." Although CCF's disposal of sludge by directly depositing it on farmland "had some value to the City," petitioner's

2. Petitioner also argues (Pet. 17-24) that this Court should grant certiorari to determine whether the court of appeals properly applied the plain error standard of review under Federal Rule of Criminal Procedure 52(b)[5] to his contention that the prosecutor knowingly allowed Mier to commit perjury while testifying against petitioner. That claim lacks merit and does not warrant this Court's review.

This Court in *Johnson* v. *United States*, 520 U.S. 461, 466 (1997), concluded that "the seriousness of the error claimed does not remove consideration of it from the ambit of" Rule 52(b), "which by its terms governs direct appeals from judgments of conviction in the federal system." Because petitioner did not argue to the trial court that the prosecutor knowingly used perjured testimony, the court of appeals correctly reviewed petitioner's contention under Rule 52(b).

The court of appeals also correctly applied Rule 52(b) in this case. Even assuming that the government had knowingly used perjured testimony, any resulting prejudice was minimal. Pet. App. A19. As the court of appeals concluded, "[t]here was ample evidence of [petitioner's] guilt even without Mier's testimony." *Id.* at A18. Moreover, petitioner's attorney "was able to impeach Mier extensively with inconsistent statements." *Id.* at A19. The court of appeals therefore

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action in violating the terms of the City's permit "exposed the City to potential clean-up liability and to the loss of its NPDES permit." Pet. App. A27. Thus, as the court of appeals concluded, the district court's "[u]sing the invoiced amount for the shipments of sludge to the Mason farm was in this case a reasonable, if rough, estimate of the intended loss." *Id.* at A28.

[5] That Rule states that "[p]lain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b).

properly concluded that "[t]here was no plain error." *Ibid.*[6] That fact-bound contention does not warrant further review by this Court.

3. Petitioner further contends (Pet. 24-28) that the government must have made an immunity deal with Mier because he was not prosecuted for his commission of crimes and that the government's failure to disclose the deal requires a reversal of his conviction. That fact-bound contention also lacks merit.

Petitioner points to no evidence that the government either offered or actually entered into an immunity deal with Mier, or represented to Mier that he would not be prosecuted for crimes he may have committed in exchange for his testimony. Indeed, Mier testified at trial that no such agreement existed, and the government represented to the courts below that it had not entered into any such agreement with Mier. Pet. App. A19; Pet. 25. In the absence of an indication that the court or the jury was deceived as to the circumstances under which Mier was testifying, petitioner has no cognizable claim to a deprivation of due process. Cf. *Giglio* v. *United States*, 405 U.S. 150, 153-155 (1972) (reversing the petitioner's conviction because "evidence of any [immunity agreement] * * * would be relevant to [the witness's] credibility and the jury was entitled to know of it").

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[6] Indeed, absent prejudice to petitioner, petitioner could not establish that any error occurred in the first place. See *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (due process violation occurs when there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999