No. _____

In the

Supreme Court of the United States

ROXANNE MARIE CARPENTER, Petitioner

v.

UNITED STATES, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented For Review

I. The Ninth Circuit has a "*Vasquez-Landaver*[1]" rule requiring a criminal defendant to lay out, in detail, her defense before the Government even calls its first witness.

Whether, then, the decision in this case making the defense's *Vasquez-Landaver* presentation of its case public record contravenes the disclosure requirements and specific exemptions in the Federal Rules of Criminal Procedure?

And, since the pretrial offer of proof in support of an affirmative defense is all of defense counsel's work product all in one place, whether public disclosure publicly eviscerates the attorney-client and work-product privileges before trial even begins?

II. Whether a *Pinkerton* instruction that "if one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed the crime" can properly be used to convict a defendant of the substantive crime of the object of a conspiracy rather than of an overt act in furtherance of a conspiracy, especially where the defendant has a valid and preapproved duress defense but the coconspirators, upon whose crimes the *Pinkerton* instruction predicates the defendant's criminal liability, do not have any defense and are, themselves, clearly guilty?

[1] *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008) ("We have long held that a defendant is not entitled to present a duress defense to the jury unless the defendant has made a prima facie showing of duress in a pre-trial offer of proof.")

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United States v. Carpenter, 923 F.3d 1172 (9th Cir. May 9, 2019).

United States v. Carpenter, Nos. 17-10498, 18-10006, 2019 U.S. App. LEXIS 13938 (9th Cir. May 9, 2019) (memorandum opinion).

Statement of the Basis for Jurisdiction

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Appeal was entered on May 9, 2019. Petitioner's motion for rehearing was denied on July 17, 2019.

This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Pursuant to Rule 29.4, service has been made on the Solicitor General of the United States.

Constitutional and Federal Provisions Involved

28 U.S.C. §2071, provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Fed. Rule Crim. Proc. 16(b)(2)(B) provides in pertinent part:

> *Information Not Subject to Disclosure.* Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
>
> (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or
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> (B) a statement made to the defendant, or the defendant's attorney or agent, by:
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> (i) the defendant;
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> (ii) a government or defense witness; or
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> (iii) a prospective government or defense witness.

U.S. CONST. amend. V, provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

U.S. CONST. amend. VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

Statement of the Case

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant was charged with a federal crime. The Ninth Circuit Court of Appeals had jurisdiction over the direct appeal pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on November 21, 2017.

On March 29, 2017, on the Mexican side of the Naco Port of Entry, the named victim in this case found the safety trunk release and came out of the trunk of Ms. Carpenter's car, shackled and duct-taped, as the car crossed into Mexico from the United States. When Ms. Carpenter crossed back into the United States a few hours later on foot she was arrested and charged with kidnapping and conspiracy to kidnap.

The details were fuzzy, but the broad parameters were that the alleged victim was a drug trafficker and heroin addict who worked for several different organizations and who was responsible for drugs missing from several different organizations. The alleged victim blamed the missing drugs on Ms. Carpenter's roommate, codefendant Fausto "Zombie" Velazquez. (RT August 29, 2017, p.13; EOR 90.) For his part, Fausto "Zombie" Velazquez blamed the missing drugs on the alleged victim.

The missing drugs were never Ms. Carpenter's problem until the people that the alleged victim was working for decided that they wanted to talk to the alleged victim. The alleged victim made himself scarce. Armed representatives of the drug trafficking organization showed up at Ms. Carpenter's house looking for the drugs or the alleged victim. (RT August 30, 2017, pp.69-78; EOR 152-161.) The police showed up to ask questions about the drug trafficking organization's armed representatives showing up. (RT August 29, 2017, pp.209-221; RT August 30, 2017, pp.78-93; EOR 104-116, 161-176.) Codefendant's Phoelix "Loki" Begay and Fausto "Zombie" Velazquez became very protective of Ms. Carpenter and warned her that the people that the alleged victim had been working for would pick her up to force them to turn the alleged victim over. (RT August 30, 2017, pp.94-110; EOR 177-193.) The alleged victim himself confirmed at trial that the people he was working for would round up his friends to force them to turn him over. (RT August 29, 2017, pp.139-140, 149-150; EOR 96-97, 99-100.)

Eventually the alleged victim asked to borrow Ms. Carpenter's car to go visit a former girlfriend in Douglas, Arizona. (RT August 30, 2017, pp.106-112; EOR 189-195.) The rest of the plan, to the extent that there ever was a plan, pretty much wrote itself. One thing that was very clear was

that, once codefendant Phoelix "Loki" Begay and cooperating codefendant Brian Meyers had the alleged victim in the trunk of Ms. Carpenter's car, nobody had any idea what to do next or how the alleged victim was going to get to Mexico. (RT August 28, 2017, pp.190-194, 264; RT August 29, 2017, pp.150, 246-247; RT August 30, 2017, pp.14, 122, 130; EOR 81-85, 100, 121-122, 129, 205, 213.) Because Ms. Carpenter was the only person with identification and not on some form of federal supervision, and because it was her car that the alleged victim was in the trunk of, she eventually volunteered to drive him to Mexico. (RT August 30, 2017, p.130; EOR 213.) She needed directions, got lost on the way and her friends had to find her and guide her to the port of entry. (RT August 28, 2017, p.264; RT August 29, 2017, pp.151-152, 246-247; RT August 30, 2017, pp.14-16, 131-133; EOR 86, 101-102, 121-122.) As the car was crossing into Mexico, the alleged victim found the release lever inside of the trunk of the car and came out on the Mexican side of the border. (RT August 30, 2017, pp.58-59; EOR 141-142.)

Ms. Carpenter had an obvious duress defense at trial. The Ninth Circuit has, separately from the Rules of Criminal Procedure, created a rule requiring a pretrial offer of proof in duress cases. *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008). At the same time, however,

Fed. Rules of Criminal Procedure, Rule 16(b)(2)(B), contemplates that the defense will not be sharing any statements made to the defendant's attorney or agent, either by the defendant or by any actual or prospective witness.

Counsel tried to comply with both of these two opposing rules by following the best-practice procedure outlined in Federal Defenders of San Diego, Inc., *Defending a Federal Criminal Case* § 8.04, at 8-375 (2016), and moving to seal Ms. Carpenter's *Vasquez-Landaver* pretrial offer of proof. (CR 85.) The district court denied counsel's motion to seal and ordered that the offer of proof be publicly filed. (CR 97.)

The Government understood, at least in this case, that defense pretrial strategy is privileged and, to its credit, the Government declined to read the offer of proof that the district court ordered publicly filed. (CR 114; RT August 17, 2017, p.9; EOR 70.) But publicly filed is publicly filed. It was publicly accessible by the case agents, indicted codefendants, cooperating codefendants, unindicted coconspirator witnesses and to anyone else who cared to read it. (CR 85, 86, 97, 106, 117.) It was ECF electronically delivered directly to the computers of both of the attorneys representing the alleged victim and also directly to the computer of the attorney representing cooperating codefendant Brian Meyers.

The offer of proof was as through and as detailed as counsel could possibly make it. (CR 106.) If the district court had entered a judgment against Ms. Carpenter based on the sufficiency of her pretrial pleadings, those pleadings would have been the entire record on her duress defense in this court. So nothing got left out. At the pretrial hearing on, among other things, the sufficiency of the pretrial pleadings in support of a duress defense, undersigned counsel laid out, in lengthy detail, the manner in which Ms. Carpenter's two separate, two-hour long, post-arrest interviews supported a duress defense. (RT August 17, 2017, pp.3-9; EOR 64-70.)

Between Ninth Circuit's *Vasquez-Landaver* rule and the district court's refusal to allow the offer of proof to be filed under seal, Ms. Carpenter was forced to preview all of the evidence and all of her own testimony supporting her duress defense to the Government and to all of the Government's witnesses and to all of their attorneys before she was permitted to present it to a jury.

Ms. Carpenter was charged in a two-count indictment with conspiracy to kidnap and with kidnapping. Kidnapping was the object of Ms. Carpenter's conspiracy. The *Pinkerton* instruction given in this case makes no sense in a conspiracy case if it is used to convict a defendant of the substantive crime of the object of a conspiracy rather than of an overt act in

furtherance of a conspiracy. A *Pinkerton* instruction that "If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed the crime" makes even less sense and deprives a defendant of a fair trial where the defendant has a valid defense (duress) but the members of the conspiracy do not have any (duress) defense and are, themselves, clearly guilty.

Argument I
Court Ordered Pretrial Public Disclosure of Defense Trial Strategy, Client Interviews and Intended Cross-Examination

The *Vasquez-Landaver* rule requiring a criminal defendant to lay out, in detail, her defense before the Government even calls its first witness is an enormous reversal of the usual order of proceedings and a violation of her right to remain silent until after the Government has presented its case. The Ninth Circuit's decision in this case making the defense's *Vasquez-Landaver* pretrial presentation of its case public record ensures that the Government and other represented parties can adjust their case in anticipation of the defense before the trial ever starts.

Waiting to present the defense case until after the Government presents its case is an issue of exceptional and fundamental importance. After hearing the Government's case, the defendant may choose to remain

silent. After hearing the Government's case, the defendant may see flaws in the Government's case that were not apparent pretrial.[2] In fact, given that *Jencks* Act disclosure is not required until after prosecution witnesses testify, the defendant may be seeing the Government's case for the first time ever.

Criminal trials are fluid situations with whole panoply of trial rights, fickle witnesses, confrontations, late discovery, unexpected evidentiary rulings, last minute investigation, privileges waived or asserted and jury dynamics to consider before the defendant has to do anything at all. The criminal rules take all of this into account by not requiring pretrial disclosure of defenses other than insanity, alibi and public authority, and by not requiring disclosure of defense trial preparation, specifically anything that defense witnesses might say. To force a criminal defendant to select a defense and to lay out and support that defense before the trial even starts stands the entire process on its head. Doing so publicly, as the panel decision here does, is to require presentation of the defense case before the Government presents its case.

[2] For instance, in the recent war crimes trial of Navy SEAL Edward Gallagher, a Navy SEAL medic testified under immunity, to the Government's surprise, that he himself had killed the teenaged captive himself by obstructing the prisoner's breathing tube after Chief Gallagher stabbed the prisoner.

The Ninth Circuit has authority to prescribe rules, provided that they are consistent with the other Federal Rules of Criminal Procedure. 28 U.S.C. §2071. When combined with *Vasquez-Landaver* rule requiring a pretrial offer of proof in duress and other cases, the Ninth Circuit's decision in this case making that *Vasquez-Landaver* offer of proof public record contravenes the disclosure requirements and specific exemptions in the Federal Rules of Criminal Procedure. And it is contrary to the Ninth Circuit's own decision in *United States v. Gurolla*, 333 F.3d 944 (9th Cir 2003), where the Government conceded that appellant's offer of proof supporting an entrapment defense was properly sealed by the district court and where the offer of proof remained sealed on direct appeal and after the direct appeal on remand.

A pretrial offer of proof on duress or any other defense is, by its nature, as complete and through as possible. If a pretrial offer of proof is unsuccessful, it constitutes the entirety of the record on the defendant's defense. It contains all of the evidence that the defense attorney plans on introducing, whether through cross-examination of the Government's witnesses, through the testimony of defense witnesses or through the testimony of the defendant herself. It contains all of the evidence that the defense attorney is even thinking of introducing, depending on how the

Government's evidence turns out. It contains everything the defendant is going to say. It contains everything the defense witnesses are going to say. It contains everything the defense attorney is going to ask of the Government witnesses. It is a roadmap of every hole the defense attorney is about to poke in the Government's case.

It is no wonder, then, that the best-practice procedure outlined in Federal Defenders of San Diego, Inc., *Defending a Federal Criminal Case* § 8.04, at 8-375 (2016), is to keep that pretrial offer of proof *ex parte*. The Government knew better and, even after the district court ordered the defendant's pretrial offer of proof publicly filed, refused to read it.[3] (CR 114; RT August 17, 2017, p.9; EOR 70.) The Government understood that it had no business holding a roadmap of the defense case, with a detailed outline of everything to which the defendant would testify, a detailed outline of everything the to which every defense witness would testify, a detailed outline of every bit of evidence defense counsel intended to elicit from the Government's witnesses and every inference defense counsel intended to

[3] Even so, publicly filed is publicly filed. It was ECF electronically delivered directly to the computers of both of the attorneys representing the alleged victim and also directly to the computer of the attorney representing cooperating codefendant Brian Meyers. It was publicly accessible by the case agents, indicted codefendants, cooperating codefendants, unindicted coconspirator witnesses and to anyone else who cared to read it. (CR 85, 86, 97, 106, 117.)

draw and every argument defense counsel intended to make. A pretrial offer of proof in support of an affirmative defense is all of defense counsel's work product all in one place. Public disclosure publicly eviscerates the attorney-client and work-product privileges before trial even begins.

Fed. Rule Crim. Proc. 16(b)(2)(B) contemplates that defense counsel's roadmap, including everything that the defendant and the defense witnesses will say at trial, will remain with defense counsel before trial:

> *Information Not Subject to Disclosure.* Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
>
> (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or
>
> (B) a statement made to the defendant, or the defendant's attorney or agent, by:
>
> (i) the defendant;
>
> (ii) a government or defense witness; or
>
> (iii) a prospective government or defense witness.

In *Hickman v. Taylor*, 329 U.S. 495 (1947), this Court recognized the work product doctrine as essential to the proper functioning of our adversarial system, stating:

> "In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed . . . as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand,

> much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 510-511 (1947). In *United States v. Nobles*, 422 U.S. 225, 238-39 (1975), this Court stated that the work-product doctrine is even more vital in criminal cases.

> "Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case. At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. Moreover, the concerns reflected in the work-product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case.

United States v. Nobles, 422 U.S. 225, 238-39 (1975).

In *Mercator Corp. v. United States*, 318 F.3d 379, 383 (2d Cir. 2002), the Court noted both that Rule 16(b)(2) codified the work product doctrine and that the rule was stricter in criminal cases.

> "The attorney work product doctrine, now codified in part in Rule 26(b)(3) of the Federal Rules of Civil Procedure and Rule 16(b)(2) of the Federal Rules of Criminal Procedure, provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial. Both "distinct from and broader than the attorney-client privilege," *United States v. Nobles*, 422 U.S. 225, 238 n.11, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975), the work product doctrine permits discovery of "documents and tangible things" prepared by or for counsel in anticipation of civil litigation "only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means," Fed. R. Civ. P. 26(b)(3). In the context of a pending criminal prosecution, the doctrine is even stricter, precluding discovery of documents made by a defendant's attorney or the attorney's agents except with respect to "scientific or medical reports." Fed. R. Crim. P. 16(b)(2).

Mercator Corp. v. United States, 318 F.3d 379, 383 (2d Cir. 2002).

Even the simple fact that the defendant intends to rely on a defense of duress is not a disclosure contemplated by the Rules of Criminal Procedure. *Mathews v. United States*, 485 U.S. 58, 65 (1988) ("The only matters required to be specially pleaded by a defendant are notice of alibi, Fed. Rule Crim. Proc. 12.1, or of intent to rely on insanity as a defense, Fed. Rule Crim. Proc. 12.2 [and now R12.3 notice of public authority]."). And, in the case of Rule 12.1, 12.2 and 12.3 notices, those are not fully-fledged offers of

proof containing complete outlines of substantive testimony in support of a pretrial determination of the merits of the defendant's case. They are simply notices. A *Vasquez-Landaver* offer of proof is already compelled pretrial interview conducted by the defense attorney and then relayed to the court. Now, under this new decision, it is also relayed to the Government. It is disclosure of everything that Rule 16(b)(2)(B) exempts from disclosure, the substance of what the defense witnesses and the defendant are going to say, all in a single pleading.

Had, for instance, the Government not been so certain that the defense was duress and that the defendant would have to testify in order to present evidence of her duress case, the Government could never have rearranged its witness lineup to save cooperating codefendant Brian Meyers for its rebuttal case. When the Government rested its case in chief without calling cooperating codefendant Brian Meyers as a witness, undersigned counsel called Mr. Meyers as a defense witness in order to give the defendant an opportunity to respond to Mr. Meyers testimony, but also resulting in one of the most excruciatingly awkward direct examinations ever conducted. (RT August 29, 2017, pp.66, 221-273; RT August 30, 2017, pp.3-52.) Reversing the order of the proceedings so that the defense case is publicly presented before the Government's case is presented or even disclosed is fraught with

the potential for mischief. Certainly, as this Court noted in *United States v. Nobles*, 422 U.S. 225, 239 (1975), pretrial disclosure of an attorney's efforts "could [and did] disrupt the orderly development and presentation of his case."

Argument II
Pinkerton Instruction

Pinkerton v. United States, 328 U.S. 640 (1946), involved overt acts committed in furtherance of the conspiracy that were charged as substantive offenses. This was never a *Pinkerton* type of case where a foreseeable overt act in furtherance of kidnapping was committed by a coconspirator. This was a kidnapping committed in the course of a kidnapping conspiracy. And, of the kidnappers, Ms. Carpenter was the kidnapper with the victim in the trunk of her car. The Government did not need this instruction except for the fact that Ms. Carpenter had a duress defense and this instruction got the Government around Ms. Carpenter's duress defense by predicating her liability on the codefendant's liability:

> "If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed the crime."

(RT August 31, 2017, p.15 EOR 283.)

Codefendant Phoelix "Loki" Begay, for instance, never had a dog in this fight. It was not his house, he had no dealings with the alleged victim, he did not even like the codefendant Fausto "Zombie" Velazquez, he was never threatened and he was never under any kind of duress. (RT August 30, 2017, pp.54, 93, 96, 98, 111; EOR 137, 176, 179, 194.) Yet he was the most enthusiastic of the kidnappers. (RT August 29, 2017, pp.73, 75, 89, 137-138, 141, 248; RT August 30, 2017, pp.6, 9, 10, 122; EOR 91-95, 98, 123, 126-128, 205.) Cooperating codefendant Brian Meyers similarly did not live at the house, he testified that he was never threatened and he had no duress defense. (RT August 29, 2017, pp.230, 232-234; EOR 117-120.) Begay and Meyers were both clearly guilty, both clearly had no defense and both pled guilty. But the nonsensical *Pinkerton* instruction in Ms. Carpenter's case bootstrapped her culpability all the way from their guilt, past Ms. Carpenter's duress defense, to Ms. Carpenter's conviction. There is no arguing with an instruction that "under the law" Ms. Carpenter has "committed that crime". By tying Ms. Carpenter's guilt to that of her codefendants, the instruction in this case prevented individualized consideration of her guilt or innocence and resulted in a denial of due process. See, *Bruton v. United States*, 391 U.S. 123, 130 (1968) ("If it is a denial of due process to rely on a jury's presumed ability to disregard an

involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.").

This case was never an aiding-and-abetting type of case, so no aiding-and-abetting instruction was ever asked for or given. An aiding-and-abetting instruction would have lacked that "under the law, committed that crime" language, however, that the Government needed to bypass Ms. Carpenter's duress defense. Aiding-and-abetting lists the elements that the Government must prove, but leaves room for a legal excuse (like duress) to the crime charged. The phrase "under the law, committed that crime" carries a lot of weight and it is understandable that the Government wanted it, in a case like this where it was wrestling with a defense like duress.

Nor does the fact that there were two separate (but very highly related) counts save the conviction and sentence. By rendering the kidnapping indefensible, the *Pinkerton* instruction also rendered the conspiracy to kidnap indefensible. There is no tenable way to argue that a conspiracy to do the indefensible is, itself, defensible. Or, to put it another way, if the conspiracy is the basis for a *Pinkerton* shortcut directly to Ms.

Carpenter's guilt on the underlying offense, the jury could not have viewed the conspiracy as lawful.

Undersigned trial counsel objected to the Government's requested *Pinkerton* instruction at trial. (RT August 30, 2017, pp.197-200; EOR 277-280.)

The decision of Ninth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power,

Dated August 19, 2019.

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