No. _____

In the

Supreme Court of the United States

George Larsen,
Petitioner

v.

United States of America,
Respondent

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

Where a United States district court's bank-fraud jury instructions erroneously omit a factually supported bad-faith defense — which is an absolute defense — do the instructions violate defendants' Fifth and Sixth Amendment rights to due process and a fair trial?

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Petition for a Writ of Certiorari

Petitioner Larsen respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below

The United States Court of Appeal for the Ninth Circuit's April 17, 2020 Memorandum opinion (Pet. App. 1a-11a) is unpublished but can be found at 810 F. App'x 508.

Jurisdiction

The Ninth Circuit's Memorandum opinion issued on April 17, 2020. Pet. App. 1a-11a. Petitioner Larsen timely filed a petition for rehearing, which the Ninth Circuit denied on August 4, 2020. Pet. App. 12a. Thus, the jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

Relevant Constitutional Provision

The Fifth Amendment's due-process clause provides: "No person shall be … deprived of life, liberty, or property, without due process of law …." U.S. Const. amend V. And the Sixth Amendment's jury-trial right provides: "In all criminal prosecutions, the accused

shall enjoy the right to a speedy and public trial, by an impartial jury ….” U.S. Const. amend VI.

Under *United States v. Gaudin*, 515 U.S. 506, 509–11 (1995), the Fifth and Sixth Amendments require that criminal convictions rest on a jury finding that the defendant is guilty of every offense element beyond a reasonable doubt. And under *Neder v. United States*, 527 U.S. 1 (1999), when a jury instruction wrongly describes or omits an offense element, “the erroneous instruction precludes the jury from making a finding on the *actual* element of the offense,” violating the Fifth and Sixth Amendments.

Statement of the Case

1. In 2009, James Castle developed a mortgage relief “process” to help struggling homeowners.[1] Citing laws and using legalese, he recruited associates to help him implement his process.[2] Although Castle convinced his associates (including a former real estate broker) that his process was legal, it wasn’t.[3] The process involved recording fraudulent

[1] AOB 18. “AOB” stands for Appellant’s Opening Brief in the United States Court of Appeals for the Ninth Circuit.

[2] AOB 18.

[3] AOB 18.

title documents to defraud banks, letting Castle and his associates sell properties and divide the proceeds between the homeowners and themselves.[4] Castle recruited franchisees, like Petitioner George B. Larsen, to form fraudulent lending groups that used his process to "help" more distressed homeowners.[5] With the assistance of Castle's guidance, templates, and oversight, the franchisees sold properties, defrauding banks.[6]

2. In closing argument, Larsen's defense counsel argued that the government had not proved beyond a reasonable doubt that Larsen intended to defraud banks or conspired to commit any crime.[7] Using legalese and recision letters, Castle made people, including his associates, believe that his "administrative default process" could legally terminate a bank's mortgage interest.[8] The legalistic recision letters that

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[4] AOB 18.

[5] AOB 18.

[6] AOB 18.

[7] AOB 36–37 (citing 3ER 516). "ER" stands for Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit.

[8] AOB 37 (citing 3ER 512).

were sent to banks, and Castle's emails concerning securitization audits, show that someone could have believed the process was legitimate.[9] No evidence shows that Larsen knew the process was not believable.[10]

3. Larsen's mental state was the only contested issue presented to the jury.[11] Before deliberations, Larsen argued that the government hadn't proved beyond a reasonable doubt that he intended to defraud or conspire to commit any crime.[12] And some trial evidence supported Larsen's mental-state defense.[13] Multiple witnesses testified that they unequivocally believed Castle's representations that his process was lawful.[14] Further, evidence showed that several lawyers had reviewed the process and opined that the process was not illegal.[15]

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[9] AOB 38 (citing 3ER 514–15).

[10] AOB 38 (citing 3ER 516).

[11] AOB 59 (citing 3ER 516).

[12] AOB 59 (citing 3ER 517–18).

[13] AOB 59 (citing 3ER 516).

[14] AOB 59 (citing 2ER 252, 254–55, 258, 262, 281–82; 3ER 417, 432–33).

[15] AOB 59-60 (citing 2ER 115, 175, 263–64, 287; 3ER 363).

4. The district court instructed the jury on the elements of bank fraud under 18 U.S.C. § 1344(1) as follows:

> [T]he government must prove each of the following beyond a reasonable doubt:
>
> First, each of the defendants knowingly executed, or attempted to execute, a scheme to defraud a financial institution as to a material matter;
>
> Second, each of the defendants did so with the intent to defraud the financial institution; and
>
> Third, the financial institution was insured by the Federal Deposit Insurance Corporation or was a mortgage lending business.[16]

Concerning the crime's intent-to-defraud element, the court told the jury that "[a]n intent to defraud is an intent to deceive or cheat."[17] And regarding the crime's knowingly element, the district court instructed the jury that "[t]he government is not required to prove that the defendant knew that his acts or omissions were unlawful."[18]

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[16] 1ER 35.

[17] 1ER 35.

[18] 1ER 38.

The trial court rejected Larsen's proffered theory-of-defense instruction, which would have advised the jury that it could consider whether Larsen acted in good faith when determining if he intended to defraud.[19] The jury's instructions said nothing about good faith or its relationship to the crime's elements, including intent to defraud.[20] The jury found Larsen guilty of bank fraud and conspiracy.[21]

5. In 2019, Larsen appealed to the Ninth Circuit arguing, among other things, that the district court violated due process by refusing to give the requested good-faith instruction.[22] The government defended the district court's rejection of the good-faith instruction,[23] by incorrectly suggesting that the court's "knowingly" instruction fully covered Larsen's theory-of-defense on good faith.[24]

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[19] AOB 73 (citing 1ER 29).

[20] AOB 73.

[21] AOB 17 (citing 1ER 42–44).

[22] AOB 72.

[23] GB 36–39. "GB" stands for Government's Brief (i.e. what the government calls "Answering Brief of the United States").

[24] GB 36–37 (citing *United States v. Hickey*, 580 F.3d 922 (9th Cir. 2009); *United States v. Shipsey*, 363 F.3d 962 (9th Cir. 2004); *United States v. Frega*, 179 F.3d 793 (9th Cir. 1999); *United States v. Sarno*, 73 F.3d 1470 (9th Cir. 1995); *United States v. Dees*, 34 F.3d 838 (9th

In its opinion, the Ninth Circuit aligned with the government's position that the instructions related to the knowledge requirement rendered Larsen's proposed good-faith instruction unnecessary.[25] The panel's decision deepens a circuit split about whether refusing to give the good-faith instruction is reversible error.

The United States District Court had original jurisdiction under Title 18, United States Code, section 3231.

Reasons for Granting the Certiorari Writ

I. This Court should grant the certiorari writ because — beyond the broad circuit split discussed below — the Ninth Circuit's opinion tramples on criminal defendants' due process right to a good-faith theory of the case.

In fraud trials, a trial court's jury instructions should include a defendant's factually supported good-faith theory of the case to uphold due process and the right to trial by *jury*. Treating the good-faith defense instruction as mere surplusage that reiterates the government's

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Cir. 1994); *United States v. Lorenzo*, 995 F.2d 1448 (9th Cir. 1993); *United States v. Solomon*, 825 F.2d 1292 (9th Cir. 1987)).

[25] Pet. App. 5a.

burden to prove the requisite *mens rea* (intent to defraud) deprives the jury of a pinpoint instruction on the defendant's good-faith defense. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."[26]

Here, as in many fraud prosecutions, the only disputed element of the offense is whether the defendant acted with criminal intent or in good faith. By rejecting Larsen's request for a good-faith instruction, the district court denied Larsen his basic right to a fair trial and deprived the jury of a clear understanding that Larsen's good faith is a complete defense to intent to defraud.

II. This Court should grant the certiorari writ to resolve the wide and longstanding circuit split.

Granting the certiorari writ on the question presented is long overdue to resolve the longstanding circuit split over a question that is fundamental to many criminal fraud trials: whether a defendant charged with a specific-intent fraud crime, for which a defendant's good-

[26] *See, e.g., Mathews v. United States*, 485 U.S. 58, 63–64 (1988).

faith is an absolute defense, is entitled to have the court specifically instruct the jury on that good-faith defense.[27]

The Third, Sixth, Seventh, Eighth, and Eleventh Circuits provide persuasive reasons, grounded in due process principles, for providing good-faith instructions. First, it is "well [ ] established that defendants are entitled to a theory of defense instruction if a timely request is made, the evidence supports the proffered instruction, and the instruction correctly states the law."[28] Second, relying on a general instruction on specific intent may not convey to the jury with sufficient clarity that the defendant's good faith is a complete defense. To uphold critical due process and fair trial principles, this Court should similarly find that district courts constitutionally err by refusing to instruct juries regarding the absolute defense of good faith in fraud cases like Larsen's.

In *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985), the Eighth Circuit held that the trial court committed reversible error when it refused to instruct a jury on a good-faith defense. Despite the trial judge giving instructions defining certain terms such as "wilful" and

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[27] *See United States v. Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) (recognizing the circuit split, which Justice White noted in 1985).

[28] *United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985).

"specific intent," the Eighth Circuit held that these instructions did not "direct[ ] the jury's attention to the defense of good faith with sufficient specificity to avoid error." *Id.* at 223.

Similarly, in *United States v. Jimenez*, 513 F.3d 62, 75 (3rd Cir. 2008), the Third Circuit found that a good-faith instruction was necessary to "accurately reflect[ ] the law and appropriately inform[ ] the jury of the relevance of the evidence." *Jimenez* found that this was accomplished where the district court "*explicitly* told the jury that good faith was a complete defense to bank fraud because good faith negated the [required] element of intent to defraud," and that "the Government bore the burden of proving beyond a reasonable doubt that the defendants acted with the requisite intent to defraud, negating a good-faith defense." *Id.* (emphasis added).

The Third Circuit has adopted a fulsome instruction on the good-faith defense.[29] The instruction (1) acknowledges that good faith is a complete defense to a charge that requires proof the defendant acted with "intent to defraud;" (2) defines the good-faith defense as having an

[29] United States Court of Appeals for the Third Circuit Model Criminal Jury Instructions § 5.07 (2015), *available at* https://tinyurl.com/CA3-JI-5-07.

"honestly held belief, opinion, or understanding" that is inconsistent with intent to defraud; and (3) emphasizes that the defendant does not have the burden of proving good faith because the government must prove the mental state element beyond a reasonable doubt.[30]

The Sixth Circuit is in accord, having repeatedly endorsed instructions including good-faith provisions.[31] Its current pattern instructions include a provision for the good-faith defense, specifically as applied to bank fraud.[32] The six-part good-faith instruction essentially tracks the Third Circuit's good-faith-defense instruction.[33]

And the Seventh Circuit explicitly endorses, "as a general rule," the use of a good-faith instruction "in cases in which the government must prove some form of 'specific intent,' such as intent to defraud or

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[30] *Id.*

[31] *See United States v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997); *United States v. McGuire*, 744 F.2d 1197, 1200–02 (6th Cir. 1984); *United States v. Stull*, 743 F.2d 439, 445–46 (6th Cir. 1984).

[32] United States Court of Appeals for the Sixth Circuit Pattern Criminal Jury Instructions § 10.04 (2019), *available at* https://tinyurl.com/CA6-JI-10-04.

[33] United States Court of Appeal for the Third Circuit Model Criminal Jury Instructions § 5.07 (2015), *available at* https://tinyurl.com/CA3-JI-5-07.

willfulness."[34] Notably, the Seventh Circuit is less protective than it should be, given the constitutional rights at stake. In the Seventh Circuit, failing to use the terms "good faith" in instructing the jury may be tolerable, as long as the trial court explains "that the Government ha[s] to prove that the defendant acted with the specific knowledge that was an element of the offense *and* that the burden would not be met if the defendant acted through ignorance, mistake, or accident." *United States v. Prude*, 489 F.3d 873, 882 (7th Cir. 2007) (emphasis in original) (internal quotations omitted) (quoting *United States v. Given*, 164 F.3d 389, 394–95 (7th Cir. 1999). This permissive fine-line exception to the general rule is difficult for district courts to administer and lacks the clarity and force of the bright-line rule this Court should adopt: If a good-faith instruction is factually supported in a fraud case, district courts err by failing to give it.

Finally, in *United States v. Hamaker*, 455 F.3d 1316, 1325–26 (11th Cir. 2006), the district court defined "intent to defraud" as "knowingly and with the specific intent to deceive" and instructed the jury that

[34] United States Court of Appeal for the Seventh Circuit Federal Criminal Jury Instructions § 6.10 (2019), *available at* https://tinyurl.com/CA7-JI-6-10.

"good faith" was a complete defense to the charges. The Eleventh Circuit held that the combination of these instructions was "entirely correct." *Id.*

But other circuits are much less protective of a defendant's right to have the jury properly instructed that good faith is an absolute defense. While less-protective circuits, like the First Circuit, acknowledge that "good faith is an absolute defense to a charge of mail or wire fraud," they hold that "the court need only convey the substance of the theory to the jury." *Dockray*, 943 F.2d at 155. This less-protective view is followed by the First, Second, Fifth, Sixth, Ninth, and D.C. Circuits. *See, e.g.*, *United States v. Nivica*, 887 F.2d 1110, 1124–25 (1st Cir. 1989); *United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *United States v. Rochester*, 898 F.2d 971, 978–79 (5th Cir. 1990);[35] *United States v. McGuire*, 744 F.2d 1197, 1201–02 (6th Cir. 1984); *United States v. Dorotich*, 900 F.2d 192, 193–94 (9th Cir. 1990); *United States v. Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

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[35] The Fifth Circuit formerly required a specific good-faith instruction, but more recent Fifth Circuit cases have been less protective of constitutional rights. *See United States v. Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986) (abrogating *United States v. Fowler*, 735 F.2d 823 (5th Cir. 1984), and *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981)).

Here, defendants, like Larsen, who propose good-faith instructions in the Ninth Circuit, however, are denied the only opportunity to inform the jury that good faith is a complete defense to their charge.[36] This is wrong. As the Eighth[37] and Tenth Circuits (en banc)[38] have held "where the charge makes no mention of good faith, a standard instruction on specific intent is insufficient to submit the substance of the defense to the jury." *Nivica*, 887 F.2d at 1124. And "[t]he Supreme Court has recognized the [now decades long] conflict among the courts of appeals, but has not resolved it." *Dockray*, 943 F.2d at155 (citing *Green v. United States*, 474 U.S. 925 (1985) (White, J., dissenting from the denial of certiorari)).

This Court should resolve the decades-long circuit split to uphold the right to trial by a jury that has been correctly instructed regarding a factually supported and absolute defense. Furthermore, this Court should side with the circuit courts to have endorsed requiring a specific

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[36] *United States v. Berroa*, 856 F.3d 141, 161 (1st Cir. 2017) (affirming Berroa's conviction despite the lack of a good-faith instruction where the district court instructed on intent to defraud).

[37] *See Casperson*, 773 F.2d at 222–24.

[38] *See United States v. Hopkins*, 744 F.2d 716, 717–18 (10th Cir. 1984) (en banc).

instruction on a properly requested good-faith defense to best comport with justice, due process, and the right to a fair jury trial.

Conclusion

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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