No. _____

In the

Supreme Court of the United States

_____

Esmervi Carone Rodriguez,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. Whether pattern jury instructions approved by the circuit courts carry any independent legal force?

II. Whether federal criminal defendants may receive a permissive instruction regarding the spoliation of evidence without showing that the government acted in bad faith when destroying evidence?

PARTIES TO THE PROCEEDING

Petitioner is Esmervi Carone Rodriguez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Esmervi Carone Rodriguez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Rodriguez*, 821 Fed. Appx. 371 (5th Cir. September, 2020). It is reprinted in Appendix A to this Petition. On October 13, 2020, the Court of Appeals denied a timely petition for rehearing en banc, which order is reprinted as Appendix B. The district court's judgement and sentence is attached as Appendix C.

JURISDICTION

The panel opinion issued an order denying a timely petition for rehearing en banc on October 13, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

Article I, Section 1 of the U.S. Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article III, Section 2 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States,

and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

STATEMENT OF THE CASE

A. Proceedings in District Court

1. Overview

Petitioner Esmervi Carrone Rodriguez was subjected to a traffic stop by drug Task Force Officers in the Texas Panhandle. *See* [Appx. A at pp.1-2]; *United States v. Rodriguez*, 821 F. App'x 371, 372 (5th Cir. 2020)(unpublished). He consented to search, yielding 30 bundles of methamphetamine in his vehicle's hidden compartment. *See* [Appx. A at 1-2]; *Rodriguez*, 821 F. App'x at 372. A jury convicted him of possessing drugs with intent to distribute, *see* (Record in the Court of Appeals, at 200), and he received a sentence of 151 months imprisonment, *see* (Record in the Court of Appeals, at 220).

2. Trial Evidence

At trial, the government introduced significant evidence of consciousness of guilt. As the opinion below catalogued, this included:

> the inconsistencies in Rodriguez' story; the implausibility of his story that he traveled 1700 miles to have his vehicle repaired and yet did not have the contact information for the person who sold him the vehicle, did not speak to that person after arriving in Arizona, and decided not to have his vehicle repaired; Rodriguez' nervousness throughout the entirety of the traffic stop; and the lack of any reaction on his part after the methamphetamine was discovered…

[Appx. A, at 3]; *Rodriguez*, 821 F. App'x at 373.

The defense attempted to show that Petitioner may have had other reasons to be nervous, lie to officers, or otherwise behave suspiciously. Specifically, it sought to show that he may have possessed his vehicle as a result of recent fraudulent activity.

To do this, the defense focused on the defendant's relationship with a man named Alien Turcan Diaz. Defense evidence showed that Mr. Diaz occupied a position in the vehicle's chain of title and that he had been repeatedly convicted of a particular form of vehicle title fraud. *See* (Record in the Court of Appeals, at 444). In this scheme, straw owners borrow money to buy a vehicle, then give most of the loan proceeds to Mr. Diaz, keeping a small kickback for themselves. *See* (Record in the Court of Appeals, at 444). To complete the picture, the defense elicited testimony from a government witness about wire transfers with Mr. Diaz. These included payments of around $9,000 from Petitioner and his girlfriend to Mr. Diaz. *See* (Record in the Court of Appeals, at 668-669). And they included another $500 payment flowing the other direction, from Mr. Diaz to the defendant. *See* (Record in the Court of Appeals, at 669). Finally, the defense showed that Petitioner texted Mr. Diaz a picture of the SUV's dashboard light, alerting him to a malfunction in the vehicle. *See* (Record in the Court of Appeals, at 611).

All of this, contended the defense, amounted to circumstantial evidence of Petitioner's participation in a vehicle fraud scheme, and one that pertained to the very SUV he drove when stopped. *See* (Record in the Court of Appeals, at 443, 749). The defense thus argued that this other source of criminality might have explained Petitioner's suspicious behavior, even if he didn't know about the methamphetamine in the car. *See* (Record in the Court of Appeals, at 443, 749).

The government also elicited evidence about a socket wrench found by police during the traffic stop. When Petitioner produced his license and registration, the

detaining officer saw a socket wrench in the glove box. *See* (Record in the Court of Appeals, at 468-470). The officer testified that he thought the wrench might be indicative of drug trafficking, because it might fit a secret compartment in the car. *See* (Record in the Court of Appeals, at 468-470). Officers would eventually photograph the wrench and try it on a secret compartment, finding, according to officer testimony, that it fit a screw on the compartment. *See* (Record in the Court of Appeals, at 469-470). Nonetheless, the officers opened the compartment by popping it open with a screwdriver, and discarded the wrench "[b]ecause of the lack of room and, you know, we just can't keep every little indicator that we collect from any particular stop just because of the -- the amount of storage space we have." (Record in the Court of Appeals, at 469).

3. Charge Conference

During the charge conference, the defense requested a supplement to the court's aiding and abetting instruction. *See* (Record in the Court of Appeals, at 718-719). This instruction would have emphasized that an aiding and abetting theory did not relieve the government of an important element: that Petitioner knew about the methamphetamine in the car. *See* (Record in the Court of Appeals, at 718-719). As regards aiding and abetting, the defense requested the following:

> that this section be revised to make clear that the jury should acquit unless the defendant knew that the drugs were in the car. In other words, that instruction appears when the substantive offense is defined.... But the aid -- the way aiding and abetting is defined appears to dispense with the requirement that the Government prove personal knowledge of the presence of the drugs.

(Record in the Court of Appeals, at 718-719).

The government opposed the request, and the court denied it. *See* (Record in the Court of Appeals, at 718-719). Instead, the court instructed the jury as follows:

> You may not find the defendant guilty as an aider and abettor unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission **with the intent to violate the law**.

(Record in the Court of Appeals, at 774)(emphasis added).

The defense also requested an instruction on the spoliation of evidence, specifically, that the jury could draw and adverse inference against the government due to the loss of the socket wrench. *See* (Record in the Court of Appeals, at 718). The court overruled that request too. *See* (Record in the Court of Appeals, at 718-719).

The jury convicted. *See* (Record in the Court of Appeals, at 200).

B. Proceedings in the Court of Appeals

1. Petitioner's Arguments

Petitioner challenged his conviction on four grounds. Relevant here, he contended that the district court erred in denying his requested instruction on aiding and abetting, and that it erred in denying his requested spoliation instruction. *See* Appellant's Initial Brief in *United States v. Rodriguez*, No. 19-11230, 2020 WL 1643806, at *13-16 (5th Cir. Filed March 25)("Initial Brief").

He conceded that the aiding and abetting instruction was accurate in the abstract, but he argued that in the context of the case, it gave rise to a serious risk of misunderstanding by the jury. *See* Initial Brief, at 53-55. In particular, he argued that the jury might be confused by the aiding and abetting instruction's reference to

"the intent to violate the law." *See id.* A jury reading that instruction, he argued, might think it sufficient that the defendant intended to violate a different law (such as a prohibition on vehicle fraud) if a confederate actually engaged in drug trafficking. See id. That concern, he argued, was exacerbated by another part of the charge which told the jury that it could convict on an aiding and abetting theory "...if the defendant joins another person and performs acts ***with the intent to commit a crime***..." (Record in the Court of Appeals, at 772)(emphasis added); *see* Initial Brief, at 54. Again, the charge's general language regarding intent – "the intent to commit **a** crime" – created a risk of conviction without an intent to assist in drug trafficking generally. *See* Initial Brief, at 54.

As respects the spoliation instruction, Petitioner stressed that the police threw away the socket wrench on purpose and aware of its evidentiary value. *See* Initial Brief, at 58-59. And he argued that an adverse interest instruction could counteract the government's argument that the socket wrench proved his knowledge of the drugs in the car. *See id.* at 60. Further, it could independently compel reasonable doubt. A jury might doubt that drug traffickers would send the drugs with a knowing mule, giving him no way to access the secret compartment in the case of an emergency. *See id.*

2. The Opinion

A panel of the Fifth Circuit affirmed in an unpublished opinion. It rejected the aiding and abetting charge claim on the sole ground that the district court followed the Fifth Circuit pattern jury instruction, which instruction correctly stated the law.

See [Appx. A, at 3-4]; *Rodriguez*, 821 Fed. Appx. at 373. It quoted *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009), for the proposition that "[a] district court does not err by giving a charge that tracks our circuit's pattern jury instructions and is a proper statement of the law." *Id.*

The court below did not find that the defense's requested instruction was incorrect, nor that it was otherwise covered in the charge, nor that it pertained to an insignificant issue. *See id.* In the court's view, it was enough that the charge actually given correctly stated the law and appeared in the pattern jury instructions. *See id.*

The court also rejected Petitioner's claim that the district court erred in denying his request for a spoliation instruction. It reasoned that the defendant had not shown bad faith:

> A district court's denial of a spoliation jury instruction is reviewed for abuse of discretion. *United States v. Valas*, 822 F.3d 228, 239 (5th Cir. 2016). "Spoliation of evidence is the destruction or the significant and meaningful alteration of evidence." *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (internal quotation marks and citation omitted). An adverse inference against the spoliator is permitted only upon "a showing of 'bad faith' or 'bad conduct' ". *Id.* (internal citation omitted). For a spoliation claim, bad faith "generally means destruction for the purpose of hiding *adverse* evidence". *Id.* (emphasis added).

Id.

3. The Petition for Rehearing

Petitioner timely sought rehearing en banc, asking the court to reconsider its view that defendants are never entitled to deviations from the pattern jury instructions if those instructions are free of legal error. This rule, he argued, conflicted with the court's more general standard for evaluating the denial of a jury

charge: whether the requested charge accurately states the law, whether it is otherwise covered in the charge, and whether it pertains to an important point in the case. *See United States v. Daniel*, 933 F.3d 370, 379 (5th Cir. 2019). Further, he argued that the court's deference to pattern jury instructions conflicted with Article III's requirement that law be made in the context of a live case or controversy, and with other constitutional limits on the power to make or declare law.

The court of appeals denied the Petition without comment. *See* [Appx. B].

REASONS FOR GRANTING THE PETITION

I. The court of appeals entered a decision in conflict with the decision of another United States court of appeals on the same important matter, namely whether the circuits' pattern jury instructions have independent legal force. The rule applied below – holding that any pattern jury instruction free from affirmative legal error necessarily suffices to protect a defendant's right to a fair trial – bypasses the constitutional constraints on the power to make and state the law, and hence represents an intolerable departure from the accepted and usual course of judicial proceedings.

A. The courts of appeals are divided.

Several federal circuits have compiled pattern jury instructions to assist district courts in the conduct of criminal trials.[1] The circuits produce the instructions

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[1] *See First Circuit Pattern Criminal Jury Instructions* (last revised 2015)("First Circuit PJI"), *available at https://www.ca1.uscourts.gov/sites/ca1/files/citations/2015%20Revisions%20to%20Pattern%20Criminal%20Jury%20Instructions%20for%20the%20District%20Courts%20of%20the%20First%20Circuit.pdf, last visited March 11, 2021*; *Third Circuit Model Criminal Jury Instructions* (2018, some revisions 2021), *available at https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions, last visited March 11, 2021; Fifth Circuit Pattern Jury Instructions* (*Criminal Cases*) (2019)("Fifth Circuit PJI"), *available at https://www.lb5.uscourts.gov/viewer/?/juryinstructions/Fifth/crim2019.pdf, last visited March 11, 2021* ; *Sixth Circuit Pattern Criminal Jury Instructions* (last revised 2019)("Sixth Circuit PJI"), *available at https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/crmpattjur_full.pdf, last visited March 11, 2021*; *The William J. Bauer Pattern Criminal Jury Instructions* (2020 ed.)(7th Circuit PJI"), *available at http://www.ca7.uscourts.gov/pattern-jury-instructions/pattern_criminal_jury_instructions_2020edition.pdf, last visited March 11, 2021*; *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* (2017 ed.)("Eighth Circuit PJI"), *available at https://ecf.mowd.uscourts.gov/jmi/criminal_instructions.htm, last visited March 11, 2021*; *Ninth Circuit Manuel of Model Jury Instructions* (2010 ed.), *available at https://www.rid.uscourts.gov/sites/rid/files/documents/juryinstructions/otherPJI/9th%20Circuit%20Model%20Criminal%20Jury%20Instructions.pdf, last visited March 11, 2021*; *Tenth Circuit Criminal Pattern Jury Instructions* (2011 ed., last revised 2018)("Tenth Circuit PJI"), *available at https://www.ca10.uscourts.gov/clerk/downloads/criminal-pattern-jury-instructions, last visited March 11, 2021*; *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)*(2020 ed.), *available at https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227, last visited March 11, 2021*.

in a wide diversity of ways, drawing on the assistance of legal professors, Article III judges, and sometimes prosecutors and defense attorneys.[2]

None of these instructions, however, purport to provide what Article III demands: the considered judgment of an Article III judge in a particular factual setting and in the context of an actual dispute between the parties. *See United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). Further, for a variety of reasons, they cannot be treated as authoritative statements of law. They are not approved by Congress. *See* Art. I, Sec. 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). They are not created by Article III judges in the adjudication of cases or controversies. See Art. III, Sec. 2 ("The judicial Power shall extend to all Cases … and Controversies ...."). And they may sometimes involve the cession of drafting authority to people who, for all their professional distinction, have no official lawmaking role.

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[2] *See First Circuit PJI*, Preface to the 1998 Edition, at 7; *Introduction to Third Circuit Model Criminal Jury Instructions* (2018), *available at https://www.ca3.uscourts.gov/sites/ca3/files/INTRODUCTION_2018_for_website.pdf, last visited March 11, 2021; Fifth Circuit PJI, Introduction, at p.0*; *Sixth Circuit PJI, Introduction*; *Seventh Circuit PJI, Introductory Letter from Committee to Chief Judge Wood*, at 2; *Eighth Circuit PJI*, at iii; *Ninth Circuit PJI*, at ii-iv; *Tenth Circuit PJI*, at iii-v; *United States v. Dohan*, 508 F.3d 989, 994 (11th Cir. 2007) ("The pattern jury instructions are drafted by a committee of district judges appointed by the Chief Judge of the Circuit and adopted by resolution of the Judicial Council of the Eleventh Circuit").

For these reasons, most circuits that employ pattern jury instructions have held that they are merely aids, containing no independent legal force.[3] The opinion below, and the authority it cites, diverges from this consensus about the status of pattern jury instructions. True, the court below recognizes that the pattern instructions should not be followed if they state the law incorrectly. *See United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009). But it also accords the pattern instructions controlling force on the question of which instructions a defendant is entitled to receive, holding flatly that "[a] district court ***does not err*** by giving a charge that tracks our circuit's pattern jury instructions and is a proper statement of

[3] *See United States v. Gomez*, 255 F.3d 31, 39, n.7 (1st Cir. 2001)("By their terms, those instructions are precatory, not mandatory. A district court possesses wide discretion to instruct in language that it deems most likely to ensure effective communication with jurors, and the compilation of pattern instructions does not in any way curtail this wide discretion.")(internal citations and quotations omitted)(citing *First Circuit PJI, preface*, and *United States v. Houlihan*, 92 F.3d 1271, 1299 n. 31 (1st Cir.1996)); *Teixeira v. Town of Coventry by & through Przybyla*, 882 F.3d 13, 17–18 (1st Cir. 2018)("a compilation of pattern instructions is merely an informal guide, which 'does not in any way curtail' the 'wide discretion' enjoyed by a district court to 'instruct in language that it deems most likely to ensure effective communication with jurors.'")(quoting *Gomez, supra*); *Thomas v. United States*, 968 F.2d 1216 (6th Cir. 1992)(approving omission of pattern instruction because "[a]s is stated in the introduction to the pattern jury instructions manual, 'These instructions are not binding.'"); *United States v. Chavez*, 976 F.3d 1178, 1196, n.11 (10th Cir. 2020)("Our pattern jury instructions, although not binding, provide telling confirmation of the state of our existing practice…"); *United States v. Ettinger*, 344 F.3d 1149, 1158 (11th Cir. 2003)("Our pattern instructions are not precedent and cannot solely foreclose the construction of the necessary elements of a crime as stated in the statute."); *Dohan*, 508 F.3d at 994 ("Although generally considered 'a valuable resource, reflecting the collective research of a panel of distinguished judges,' they are not binding; Eleventh Circuit case law takes precedence.")(quoting *United States v. Polar,* 369 F.3d 1248, 1252–53 (11th Cir.2004)); *cf. Tenth Circuit PJI*, at *Introductory Note* ("…the presence or absence of a particular instruction is not indicative of the Committee's view that the instruction should or should not be given.").

the law." [Appx. A at pp.3-4]; *United States v. Rodriguez*, 821 F. App'x 371, 373 (5th Cir. 2020)(unpublished)(emphasis added)(citing *Whitfield*, 590 F.3d at 354). In so doing, the court below elevates this advisory resource into a source of law. The Ninth Circuit has gone a step further, holding that a district court can *never err* if it follows the pattern jury instructions. *See United States v. Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018) ("…by reviewing this circuit's model instruction and comment, the district court ipso facto identified the correct legal standard.").

There is no good reason to think that the Fifth Circuit will abandon its view of the pattern instructions absent the intervention of this Court. The deferential rule applied below is not an isolated holding, nor an outlier. Rather, it is a frequently repeated per se rule used to dispose of novel jury charge issues.[4] Indeed, the court below has held that this rule of deference to pattern instructions is "well-settled." *Whitfield*, 590 F.3d at 354.

As Petitioner argued below, there is tension between the Fifth Circuit's general standard for evaluating the denial of jury instructions – whether the requested instruction accurately states the law, whether it is otherwise covered in the instructions, and whether it pertains to an important point in the trial, *see United States v. Daniel*, 933 F.3d 370, 379 (5th Cir. 2019) – and the *per se* rule applied below. But the Fifth Circuit declined to address that conflict in the present case, denying the

[4]*See United States v. Toure*, 965 F.3d 393, 403 (5th Cir. 2020)(quoting *Whitfield*, 590 F.3d at 354); *United States v. McLaughlin*, 739 Fed. Appx. 270, 273 (5th Cir. 2018)(unpublished)(quoting *Whitfield*, 590 F.3d at 354)); *United States v. Richardson*, 676 F.3d 491, 506–07 (5th Cir. 2012).

petition for rehearing without comment. Further, the court below has even issued a panel opinion suggesting that the two tests may be reconciled. *See United States v. Patterson*, 977 F.3d 381, 391, n.2 (5th Cir. 2020)(describing the relevant lines of authority as "converging"). In any case, the Ninth Circuit has held that a pattern jury instruction is "ipso facto … the correct legal standard." *Robertson*, 895 F.3d at 1213. Whatever happens in the Fifth Circuit, division among the courts of appeals about the legal status of the pattern instructions will persist.

B. The issue merits certiorari.

This issue merits the Court's attention, and would do so even in the absence of a circuit split. As Rule 10 acknowledges, certiorari may be appropriate when "a court of appeals … has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Such is the case here. By announcing a rule of formal, legal deference to the pattern jury instructions, the court below has bypassed the constitutional boundaries of the law-making power. In a democracy, the law is made by the people's representatives, and by courts only to the extent necessary to decide cases. The court below, however, has endowed an unelected committee of judges and scholars with the power to deprive criminal defendants of jury instructions in cases that committee knows nothing about.

C. This is an appropriate vehicle.

The present case squarely presents the issue. The court below offered no justification for the deprivation of the requested jury instruction other than: 1) the

absence of any affirmative error in the charge provided, and 2) the absence of Petitioner's requested language in the pattern instructions. [Appx. A at pp.3-4]; *Rodriguez*, 821 F. App'x at 373. It cited authority indicating that these two circumstances will *always* defeat a defendant's claim of charge error. See id. (citing *Whitfield*, *supra*). The contested rule is thus the sole basis offered below for the decision below.

And absent per se deference to the pattern instructions. Petitioner would likely be entitled to relief. Here, the jury charge correctly instructed that the jury that it:

> may not find the defendant guilty as an aider and abettor unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission ***with the intent to violate the law***.

(Record in the Court of Appeals, at 774)(emphasis added).

Without question, this charge is an accurate statement of the law, but in the context of the case, it was not complete. The evidence here included evidence of Petitioner's possible involvement in vehicle fraud. *See* (Record in the Court of Appeals, at 592, 648-649, 711-714). In this context, the jury might have misinterpreted the jury charge, even though it was correct in the abstract. Specifically, it might have thought that the charge authorized an aiding and abetting conviction if the defendant intended "to violate the law" by knowingly participating in a vehicle fraud scheme.

The defense instruction would have disabused the jury of this misapprehension. *See* (Record in the Court of Appeals, at 718-719). Further, that

requested instruction passed the more general three-part test: it was true, *see United States v. Williams*, 985 F.2d 749, 753 (5th Cir. 1993), it wasn't clearly stated elsewhere in the charge, and it pertained to the case's only contested issue. Yet the court below affirmed on the sole ground that the court's charge accurately stated the law and tracked the pattern. *See* [Appx. A at pp.3-4]; *Rodriguez*, 821 F. App'x at, 373. In other words, Petitioner has a strong claim for reversal when the pattern instructions are no longer endowed with an irrebuttable presumption of adequacy.

II. The court of appeals entered a decision in conflict with the decision of another United States court of appeals on the same important matter, namely whether a criminal defendant may receive an instruction regarding the spoliation of evidence without showing that the government acted in bad faith. The rule applied below is unfair to criminal defendants and undermines efforts to deter the destruction of evidence.

A. The circuits are divided.

The due process clause does not forbid the prosecution of the defendant when the police fail to retain material evidence. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). Rather, the destruction of evidence violates due process only when the government acts in bad faith and the defendant suffers prejudice. *See Youngblood*, 488 U.S. at 57.

That does not mean, however, that juries must ignore the government's deliberate spoliation of probative evidence absent bad faith. Rather, juries may reasonably conclude that the government – like any other party – is more likely to discard evidence that harms its case than evidence that helps it. *See Vodusek v. Bayliner Marine Corp*., 71 F.3d 148, 156 (4th Cir. 1995)("Even the mere failure, without more, to produce evidence that naturally would have elucidated a fact at

issue permits an inference that 'the party fears [to produce the evidence]; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party'.")(quoting 2 *Wigmore on Evidence*, § 285 at 192 (Chadbourn rev. 1979)). Or, juries may simply think it fair to require the government to bear the risk of its own conduct. As one district court explained:

> [The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.

Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y.1991, *quoted with approval in Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)(brackets added by *Residential Funding Corp.*). Those fairness concerns ought to be most pronounced in criminal cases. Police, not the defendant, have the right to seize and keep evidence – it is only fair that they bear the risk of its destruction.

The court below rejects this logic, at least in criminal cases. As reflected in the opinion below, that court requires a showing that the government acted in bad faith for the defendant to obtain even a permissive adverse inference instruction. *See* [Appx. A, at 4]; *Rodriguez*, 821 Fed. Appx. at 373; *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000). And it is certainly not alone in that view. *See United States v. Nelson*, 481 F. App'x 40, 42 (3d Cir. 2012)(unpublished)(requiring bad faith for an

adverse inference instruction); *United States v. Braswell*, 704 F. App'x 528, 534–36 (6th Cir. 2017)(unpublished)(same); *United States v. Tyerman*, 701 F.3d 552, 561 (8th Cir. 2012)(same); *United States v. Lanzon*, 639 F.3d 1293, 1302–03 (11th Cir. 2011).

But the First, Fourth, and Ninth Circuits have all issued opinions that do not require a showing of bad faith. The First Circuit has recognized that bad faith will usually be necessary. *See United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010). Yet it has expressly held open the possibility that an instruction may be necessary in the absence of bad faith:

> In general, the instruction usually makes sense only where the evidence permits a finding of bad faith destruction; ordinarily, negligent destruction would not support the logical inference that the evidence was favorable to the defendant. But the case law is not uniform in the culpability needed for the instruction and, anyway, unusual circumstances or even other policies might warrant exceptions. Consider, for example, negligent destruction of a particular piece of evidence likely to be exculpatory or routine destruction of a class of such evidence-neither variation being present here.

United States v. Laurent, 607 F.3d 895, 902–03 (1st Cir. 2010)(internal citation omitted)(citing 4 L. Sand et al., *Modern Federal Jury Instructions* § 75.01 at 75-17)(2010)). Indeed, that court has recognized one case in which the defendants "likely would have been entitled to a spoliation instruction, allowing the jury to make an adverse inference that the destroyed evidence was favorable to the defense," even though the district court defensible made a "finding of no bad faith …" *United States v. Flores-Rivera*, 787 F.3d 1, 19, n.13 (1st Cir. 2015), *superseded by statute on other grounds*.

A handful of older Ninth Circuit cases have applied a bad faith requirement. *See United States v. Romo-Chavez*, 681 F.3d 955, 961 (9th Cir. 2012); *United States v. Artero*, 121 F.3d 1256, 1259 (9th Cir. 1997); *United States v. Jennell*, 749 F.2d 1302, 1308 (9th Cir. 1984). More recently, however, the Ninth Circuit has expressly and consistently eschewed any such requirement. *See United States v. Sivilla*, 714 F.3d 1168, 1173 (9th Cir. 2013)("[b]ad faith is the wrong legal standard for a remedial jury instruction...."); *United States v. Robertson*, 895 F.3d 1206, 1213–14 (9th Cir. 2018)(requiring an inquiry into whether the government was "culpable" which includes an evaluation of, *inter alia*, "whether the government was negligent"); *United States v. John*, 683 F. App'x 589, 593 (9th Cir. 2017)(unpublished)("A defendant may be entitled to an adverse inference instruction even if the government did not act in bad faith, but only when the quality of the government's conduct was poor and the prejudice to the defendant was significant."). Indeed, that court has reversed a conviction where the district court denied an adverse inference instruction for want of bad faith. *See Sivilla*, 714 F.3d at 1174. Notably, the Ninth Circuit traces this view to an en banc decision. *See Sivilla*, 714 F.3d at 1173-1174 (citing *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir.1979)(en banc)); *Robertson*, 895 F.3d at 1213–14 (same). The law of the Ninth Circuit is thus now stable and clear: defendants need not show bad faith to obtain a spoliation instruction.

Finally, the Fourth Circuit has addressed the defendant's right to a spoliation instruction under its general framework for charge error. *See United States v. Olubuyimo*, 152 F. App'x 303, 304 (4th Cir. 2005)(unpublished). This requires a

showing that the requested instruction "'(1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense.'" *Olubuyimo*, 152 F. App'x 303, 304 (quoting *United States v. Lewis,* 53 F.3d 29, 32 (4th Cir.1995)). This test does not demand a showing of bad faith.

B. The issue merits certiorari.

The courts of appeals have thus issued directly conflicting authority regarding the defendant's need to show bad faith in order to obtain a spoliation instruction. The conflict implicates multiple jurisdictions on both sides, and is longstanding. Moreover, it is important. Criminal defendants do not have the power to seize and hold relevant evidence – we generally give that power to the police. The capacity of defendants to prove their own innocence with physical evidence is thus largely at the mercy of the police and prosecution. An adverse inference instruction provides meaningful deterrence against negligent or non-malicious destruction of evidence, without resort to the extreme sanction of dismissal.

C. This case is the appropriate vehicle to address the conflict.

The issue is well presented in this case. The record here shows that the police discarded probative physical evidence, namely the socket wrench in the glove box. *See* (Record in the Court of Appeals, at 469). The decision was conscious, not accidental, and the police were aware of its probative value. *See* (Record in the Court of Appeals, at 469). Yet because the defendant could not show that police discarded

the wrench for the malicious purpose of harming the defense, the defendant received no remedy for the potential impairment of his defense.

Significantly, the government introduced evidence that a lone tool in the glove box reflected drug trafficking, *see* (Record in the Court of Appeals, at 442-443), that the wrench itself had unusual features, *see* (Record in the Court of Appeals, at 442-443), and that it fit the screw on the entrance to the vehicle's secret compartment, *see* (Record in the Court of Appeals, at 469-470). This arguably showed that the vehicle's sole occupant was expected by whoever packed the drugs to access them, something he couldn't do if he didn't know of them. An adverse inference would have counteracted this evidence. Perhaps more importantly, it would have independently raised reasonable doubt, and not merely because juries may find reasonable doubt from a sloppy investigation. *Cf. Kyles v. Whitley*, 514 U.S. 419, 445-446 (1995). Rather, a jury asked to decide whether a courier who knew of the methamphetamine in the secret compartment might reasonably doubt that he would be sent across country with no way to access the drugs in an emergency.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 12th day of March, 2021.

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