No. 20-7491

IN THE SUPREME COURT OF THE UNITED STATES

ESMERVI CARONE RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by giving the Fifth Circuit's pattern aiding-and-abetting jury instruction.

2. Whether the district court abused its discretion by denying a requested jury instruction on the spoliation of evidence.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Rodriguez, No. 18-cr-128 (Nov. 6, 2019)

United States Court of Appeals (5th Cir.):

United States v. Rodriguez, No. 19-11230 (Sept. 14, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 821 Fed. Appx. 371.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2020. A petition for rehearing was denied on October 13, 2020 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on March 12, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of possessing 500 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii). Judgment 1. The district court sentenced petitioner to 151 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A4.

1. In October 2018, a police officer stopped petitioner's SUV for following other vehicles too closely, in violation of state law. Pet. App. A1-A2; C.A. ROA 440. When petitioner opened the glove box, the officer observed a wrench with a star-shaped socket. C.A. ROA 442-443, 469. The tool "seemed out of place" to the officer, who suspected that it could be used to access a compartment in the vehicle. Id. at 442-443. The officer also found it suspicious that petitioner had a Kentucky driver's license while the SUV had a temporary Arizona license plate. Id. at 443-444. The officer ordered petitioner to exit the vehicle. Id. at 444.

Because of a language barrier, petitioner spoke in Spanish to another officer over the phone. C.A. ROA 445-446. That conversation was recorded and transcribed. Id. at 446. The transcript reflects that petitioner stated that he had bought the SUV in Arizona about a month before, and that it had a problem

with the compressor. Id. at 448. As a result, petitioner explained, he had gone back to Arizona to return the SUV but, when he got there, the sellers "told [him] they were going to fix the issue." Ibid. Petitioner initially stated that the sellers had fixed the issue, but he quickly changed his story, stating that he was going to get the issue fixed later and sell the SUV when he returned home to Kentucky. Id. at 448-449. Petitioner explained that he had been in Arizona for three days -- during which time, the sellers had changed the SUV's oil, added new tires, and told him they would buy a compressor online -- and then decided to drive the SUV home. Id. at 450-451.

After the call, petitioner consented to a search of the SUV. C.A. ROA 454-458. During the search, officers discovered that tabs had been removed from the rear-quarter panels in the spare-tire storage compartment, exposing screws and bolts. Id. at 464-465. One bolt had fresh "tooling" marks, indicating recent tampering. Id. at 465-466. Although the wrench found in the glove box fit bolts on each side of the panels, the officers did not use that wrench to remove them. Id. at 469-470. They instead removed the panels by placing a screwdriver behind the panels and popping them loose. Id. at 467-468. The officers ultimately discovered 30 bundles of methamphetamine behind the panels. Id. at 463; Pet. App. A2.

2. A federal grand jury charged petitioner with conspiring to distribute methamphetamine, in violation of 21 U.S.C. 846, and

possessing 500 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii). Indictment 1-2. The government voluntarily dismissed the conspiracy charge before trial. D. Ct. Doc. 47 (July 16, 2019).

The officer who conducted the traffic stop testified at trial. C.A. ROA 435-473. The transcript of the conversation that petitioner had with another officer in Spanish was also read into the record. Id. at 447-454, 457-458. In the course of describing the stop, the officer explained that he had not kept the wrench that he saw in the glove compartment, but had taken a photograph of it, which the government entered into evidence. Id. at 468-469.

At the close of evidence, petitioner sought two changes to the proposed jury instructions. First, he requested "some form of spoliation instruction" because the government had not retained the wrench found in petitioner's car. C.A. ROA 718. Second, petitioner asked that the proposed instruction on aiding-and-abetting culpability "be revised to make clear that the jury should acquit unless the defendant knew that the drugs were in the car." Id. at 718-719. The district court denied both requests. Id. at 719. The district court subsequently gave an aiding-and-abetting instruction that tracked the relevant Fifth Circuit pattern instruction:

> [Y]ou 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.

Id. at 773; see 5th Cir. Pattern Jury Instructions (Criminal Cases) § 2.04 (2019).

The jury found petitioner guilty, and the district court sentenced petitioner to 151 months of imprisonment, to be followed by five years of supervised release. Judgment 1-3.

3. The court of appeals affirmed. Pet. App. A1-A4. As to petitioner's request to change the aiding-and-abetting jury instruction, the court explained that a "jury instruction is reviewed for abuse of discretion, affording substantial latitude to the district court in describing the law to the jury." Id. at A3-A4 (citation omitted). The court noted 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. at A4 (citation omitted). And the court of appeals observed that, in this case, the "aiding-and-abetting instruction closely mirrors our court's pattern jury instructions and is a correct statement of the law." Ibid.

As to petitioner's requested spoliation instruction, the court of appeals noted that a district court's denial of such an instruction is likewise reviewed for an abuse of discretion. Pet. App. A4. It explained that "[s]poliation of evidence is the

destruction or the significant and meaningful alteration of evidence," that "[a]n adverse inference against the spoliator is permitted only upon a showing of bad faith or bad conduct," and that "bad faith generally means destruction for the purpose of hiding adverse evidence." Ibid. (citation and internal quotation marks omitted). And it found that the district court had not abused its discretion by denying petitioner's request for a spoliation instruction, because petitioner had "failed to allege, much less establish, that law-enforcement officers engaged in bad-faith conduct for the purpose of hiding adverse evidence." Ibid.

ARGUMENT

Petitioner contends (Pet. 10-21) that the district court abused its discretion when denying his two requests for changes to the jury instructions. The court of appeals' contrary determination is correct, and its nonprecedential, factbound decision does not implicate any conflict among the courts of appeals warranting this Court's review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that the district court did not abuse its discretion by using the Fifth Circuit's pattern aiding-and-abetting jury instruction in this case. And that determination does not conflict with any decision of this Court or another court of appeals.

a. In the decision below, the court of appeals correctly explained that a "district court does not err by giving a charge

that tracks" its "pattern jury instructions" when the instruction in fact constitutes "a proper statement of the law." Pet. App. A4 (citation omitted). And as the court of appeals correctly determined, the district court here did not abuse its discretion by giving an aiding-and-abetting instruction that both "closely mirror[ed]" the Fifth Circuit's "pattern jury instructions" and was "a correct statement of the law." Ibid.

Petitioner acknowledges (Pet. 15) that the instruction was "an accurate statement of the law," but contends that it was incomplete "in the context of the case." That factbound determination was within the district court's discretion and does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

b. Petitioner's argument for further review rests on the assertion (Pet. 12-13) that the court of appeals gives its pattern jury instructions "independent legal force." That assertion is incorrect. The court has instead made clear that "pattern jury instructions do not themselves have the force of law" and do not constrain district courts' discretion "except to the extent that they recite what is controlling law." United States v. Peterson, 977 F.3d 381, 390 n.2 (5th Cir. 2020). Accordingly, it "unerringly

requires that even if an instruction is drawn from [its] studied and recommended pattern instructions, it, independently, must be confirmed to be 'a correct statement of the law.'" Ibid. (quoting United States v. Richardson, 676 F.3d 491, 507 (5th Cir. 2012)). And it confirmed that in this case. See Pet. App. A4.

The court of appeals' approach thus comports with the approach of other circuits, which similarly do not give pattern jury instructions independent legal force. See Pet. 12 n.3 (collecting cases). Petitioner maintains that the Ninth Circuit has held that "a district court can never err if it follows the pattern jury instructions." Pet. 13. But the only case petitioner cites does not support that proposition. See United States v. Robertson, 895 F.3d 1206, 1213-1214 (9th Cir. 2018) (concluding that a district court did not abuse its discretion by applying a pattern jury instruction that "identified the correct legal standard" by accurately quoting Ninth Circuit case law). In any event, even if the Ninth Circuit had adopted such an approach, it would not warrant review of the Fifth Circuit's unpublished decision here.

Petitioner's assertion (Pet. 13) of intra-circuit tension in the court below does not warrant this Court's review, see Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam), and is incorrect in any event. The court has recently explained that its separate lines "of instructional error caselaw" are "converging" and "often overlapping." Peterson, 977 F.3d at 390 n.2.

2. The court of appeals also correctly determined that the district court's denial of a spoliation instruction was not an abuse of discretion. The court of appeals found that petitioner was not entitled to a spoliation instruction where he had "failed to allege, much less establish, that law-enforcement officers engaged in bad-faith conduct for the purpose of hiding adverse evidence." Pet App. A4.

The decision below does not implicate any circuit conflict warranting this Court's review. As petitioner appears to recognize, most circuits would arrive at the same result on the same grounds. See Pet. 17-18 (collecting cases). That approach is consistent with this Court's decision in Arizona v. Youngblood, 488 U.S. 51 (1988), which held that the government's failure to preserve evidence that is merely "potentially exculpatory" violates due process only if the government acted in bad faith. Id. at 57-58 (citation omitted). And petitioner identifies no circuit that would have reached a different result on the facts here.

Although the Ninth Circuit has occasionally required an adverse-inference instruction where evidence is missing because of government negligence, see United States v. Sivilla, 714 F.3d 1168, 1173 (2013), it has done so only when the defendant establishes that he was meaningfully prejudiced by the absence of the evidence, see id. at 1174 (deeming the government's sale of defendant's vehicle prejudicial where the substitute evidence used at trial

-- photographs of the vehicle -- was "grainy and indecipherable"). The Ninth Circuit does not require an adverse-inference instruction where only "minimal" prejudice exists. Robertson, 895 F.3d at 1213-1214; see, e.g., United States v. Loud Hawk, 628 F.2d 1139, 1155-1156 (9th Cir. 1979) (en banc) (Kennedy, J., concurring) (finding that the defendant had not shown adequate prejudice for the imposition of any sanction where secondary evidence -- "photographs and eyewitness descriptions" -- was a "satisfactory substitute"), cert. denied, 445 U.S. 917 (1980), abrogated on other grounds by United States v. W.R. Grace, 526 F.3d 499, 502 (9th Cir. 2008) (en banc); see also Sivilla, 714 F.3d at 1173 (deeming then-Judge Kennedy's concurrence in Loud Hawk to be the "controlling concurrence" on the standard for issuing a remedial jury instruction). Here, petitioner would not have been entitled to a spoliation instruction in the Ninth Circuit any more than he was in the court below, because he could not establish that the absence of the socket wrench at trial meaningfully prejudiced him in light of the adequate substitute evidence available -- namely, a photograph of the wrench and the presentation of testimony about the wrench that was subject to cross-examination. See C.A. ROA 442-443, 468-469.

For similar reasons, petitioner errs in suggesting (Pet. 18-20) that he would be entitled to his requested spoliation instruction under the law of the First or Fourth Circuits. He could not satisfy the standard in the Fourth Circuit's unpublished

decision in United States v. Olubuyimo, 152 Fed. Appx. 303 (2005) (per curiam), cert. denied, 546 U.S. 1223 (2006), which required that the requested instruction "dealt with some point in the trial so important" that its absence "seriously impaired the defendant's ability to conduct his defense." Id. at 304 (quoting United States v. Lewis, 53 F.3d 29, 32 (4th Cir. 1995)). And while the First Circuit has indicated, without holding, that "unusual circumstances" might exist in which negligence sufficed to justify a spoliation instruction, it has made clear that such an instruction "usually makes sense only where the evidence permits a finding of bad faith destruction," United States v. Laurent, 607 F.3d 895, 902-903 (2010), cert. denied, 562 U.S. 1182 (2011), and petitioner provides no basis for concluding that the First Circuit would view a departure from that general rule to be warranted in the circumstances here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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