No. 20-7491

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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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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ARGUMENT

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 Fifth and Ninth Circuit's treatment of pattern jury instructions delegates judicial power to non-judicial bodies, or to judges acting outside their constitutional role.

Two federal circuits hold that district courts conducting federal criminal trials can never err by using their pattern jury instruction, at least provided that it correctly states the law. *See* [Appx. A at pp.3-4]; *United States v. Rodriguez*, 821 Fed. Appx 371, 373 (5th Cir. 2020)(unpublished)(emphasis added)(citing *United States v. Whitfield*, 590 F.3d 325, 354 (5th Cir. 2009)); *United States v. Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018). That is, if they acknowledge that the pattern jury instruction may be *incorrect*,[1] they do not acknowledge that it can be *inadequate* or *incomplete.*

In this way, the Fifth and Ninth Circuits have effectively outsourced the work of federal courts. Judges, in our system, apply law to particular factual circumstances. *See* Art. III, Sec. 2 ("The judicial Power shall extend to all Cases … and Controversies

[1] The Fifth Circuit recognizes that pattern jury instructions can be legally incorrect. *See United States v. Patterson*, 977 F.3d 381, 391, n.2 (5th Cir. 2020). But the Ninth Circuit may not even acknowledge this much. *See Robertson*, 895 F.3d at 1213 ("…by reviewing this circuit's model instruction and comment, the district court *ipso facto* identified the correct legal standard.").

…."). To the extent that they make law prospectively, they may do so only in the context of a concrete factual dispute. *See United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). The Fifth and Ninth Circuits, however, have delegated an important judicial duty to a drafting committee, namely to decide whether a concrete factual dispute requires a given instruction to protect the defendant's right to a fair trial. And while most such committees include Article III judges, they do not operate in a concrete factual dispute, but rather prospectively, imagining cases that have yet to arise. In this way, the Fifth and Ninth Circuits have elevated the drafting committee to a law-making body. This is contrary to the strong consensus of circuit authority.[2] More importantly, it effects an unacceptable contortion of the constitutional design.

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[2] *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*

B. The government's defense of the Fifth Circuit rule is incorrect.

The government resists review on the ground that the case presents only a fact-bound question about the adequacy of a single aiding-and-abetting instruction. *See* (Brief in Opposition, at 7)("BIO"). But of course that isn't the question presented. This Court should grant certiorari to address a broad and recurring issue: whether pattern jury instructions are necessarily adequate if they are not contaminated by an affirmative legal error. That question implicates cases in all manner of factual circumstances, and, indeed, the surpassingly important question of who the constitution empowers to make and apply the law.

According to the government, this question is not presented because the Fifth Circuit requires that pattern jury instructions be *correct*. See (BIO, at 7-8)(citing *United States v. Peterson*, 977 F.3d 381, 390, n.2 (5th Cir. 2020)). It does. *See Peterson*, 977 F.3d at 390, n.2.

But not all correct statements of the law are complete. An instruction stating that the government bears the burden of proof would be accurate, but it would not be complete without also stating that this burden requires proof beyond a reasonable doubt. Here, the district court and the pattern jury instruction provided an aiding-and-abetting instruction that was accurate in the abstract. But it became confusing in the particular factual context of a defendant suspected of involvement in more than

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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.").

one crime. *See* (Record in the Court of Appeals, at 772)(requiring proof "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*.")(emphasis added); (Record in the Court of Appeals, at 774)(permitting jury to convict on an aiding-and-abetting theory "...if the defendant joins another person and performs acts *with the intent to commit a crime*...")(emphasis added); *compare United States v. Williams*, 985 F.2d 749, 753 (5th Cir. 1993)("[t]o be guilty of aiding and abetting possession of drugs with intent to distribute, each defendant must have aided and abetted both the possession of the drug and the intent to distribute it."). It is for precisely this reason that the judicial power depends on a concrete factual presentation of legal issues; broad pronouncements may require adjustment in a particular circumstance to protect the rights of the parties.

The Fifth Circuit has repeatedly delegated its responsibility to decide the adequacy, if not the accuracy, of a charge to the drafting committee, at least for the purposes of appellate review. *See* [Appx. A at pp.3-4]; *Rodriguez*, 821 Fed. Appx at 373 ("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."); *Whitfield*, 590 F.3d at 354 ("It is well-settled that a district court does not err by giving a charge that tracks this Circuit's pattern jury instructions and that is a correct statement of the law."); *United States v. Richardson*, 676 F.3d 491, 506–07 (5th Cir. 2012) ("because the district court's instruction tracked this circuit's pattern jury instruction, we need only determine whether the charge is a correct statement of the law."); *United States v.*

Cessa, 856 F.3d 370, 376 (5th Cir. 2017)(asking "[w]hat if the pattern charge correctly states the law, but a party requests an additional instruction that is also an accurate description of the law?" and concluding that in such a case the conviction must be affirmed).

Peterson, cited by the government, simply does not repudiate this clear and extensive line of authority, which constituted the sole rationale for the decision below. *See Peterson*, 977 F.3d at 390, n.2. At any rate, its discussion of the issue is plainly *dicta,* because the case was resolved on the ground that the defendant himself failed to offer a legally correct instruction. *See id*. Here, Petitioner sought review of this issue through rehearing, but the court denied the Petition without comment. There is accordingly every reason to think the court below will continue to apply the constitutionally offensive rule regarding the status of the pattern jury instructions. This Court should intervene and vindicate our constitution's vision of the judicial power.

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 clearly divided on an important issue of federal law.

The government does not deny the existence of a circuit split, and could hardly do so. The court below held that "**[a]n adverse inference against the spoliator is permitted only upon a showing of bad faith or bad conduct**." [Appendix A, at 4]; *Rodriguez*, 821 Fed. Appx at 373 (quoting *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015))(emphasis added)(internal quotation marks and citation omitted). In very direct contradiction, the Ninth Circuit has held that "**[b]ad faith is the wrong legal standard for a remedial jury instruction**...." *United States v. Sivilla*, 714 F.3d 1168, 1173 (9th Cir. 2013)(emphasis added).

These are quite plainly opposite rules of law. They pertain to an important matter – how defendants may prove their innocence when the government is free to discard relevant evidence – and reflect a long-standing rather than a nascent circuit split. Further, multiple courts have concurred with both sides of this question. ***Compare*** *United States v. Nelson*, 481 Fed. Appx 40, 42 (3d Cir. 2012)(unpublished); *United States v. Braswell*, 704 Fed. Appx 528, 534–36 (6th Cir. 2017)(unpublished); *United States v. Tyerman*, 701 F.3d 552, 561 (8th Cir. 2012); *United States v. Lanzon*, 639 F.3d 1293, 1302–03 (11th Cir. 2011), ***with*** *United States v. Laurent*, 607 F.3d 895, 902–03 (1st Cir. 2010); *United States v. Flores-Rivera*, 787 F.3d 1, 19, n.13 (1st

Cir. 2015), *superseded by statute on other grounds*; *United States v. Olubuyimo*, 152 F. App'x 303, 304 (4th Cir. 2005)(unpublished).

B. Petitioner would enjoy a good chance at reversal in the absence of a bad faith requirement. He should at least be permitted to advance his case under the correct standard.

Unable to deny the circuit split, the government instead reviews the law of each circuit that does not require bad faith. *See* (BIO, at 9-11). It seeks in each case to find some circuit-specific reason that Petitioner would not obtain reversal in that jurisdiction. *See* (BIO, at 9-11). Of course, none of this was presented, argued, or decided below. There, it sufficed that the police who discarded the socket wrench did so without an affirmative, malicious, intent to damage the defendant's case. [Appx. A at 4]; *Rodriguez*, 821 Fed. Appx. at 373 (relying exclusively on the fact that Petitioner "failed to allege, much less establish, that law-enforcement officers engaged in bad-faith conduct *for the purpose* of hiding adverse evidence.")(emphasis added). If the bad faith requirement is not required, Petitioner should enjoy one good chance to argue for reversal under the correct standard. In any case, the government cannot show that Petitioner would have lost the case in any the First, Fourth, or Ninth Circuits.

The government argues that the Ninth Circuit would have affirmed because Petitioner had available substitute evidence for the discarded wrench, namely a picture of the wrench and cross-examination. *See* (BIO, at 9-11)(citing *Sivilla*, *supra*, *United States v. Robertson*, 895 F.3d 1206 (9th Cir. 2018), and *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979) (en banc)(Kennedy, J., concurring)). But the

Ninth Circuit does not permit the denial of a spoliation instruction based on any substitute at all – the substitute must be evidence of comparable probative value. Thus, the Ninth Circuit held that a grainy picture did not obviate the need for a spoliation instruction where the government discarded (sold) the defendant's vehicle. *See Sivilla*, 714 F.3d at 1173. So here. Without the wrench itself, the defendant could not really dispute the officer's assertion that it actually fit the secret compartment. The picture did not really resolve the issue. And cross-examination, for all its value in the truth-seeking process, ultimately leaves the jury to believe or disbelieve a police officer without further proof. The jury should have been invited to consider the probative value of the officers' decision to discard the wrench.

Nor can the government show that it would have prevailed in the First Circuit. *See* (BIO, at 10-11). That court requires the defendant to show "negligent destruction of a particular piece of evidence likely to be exculpatory or routine destruction of a class of such evidence." *Laurent*, 607 F.3d at 902–903. Here, the officers testified that the socket wrench fit the secret compartment, but did not actually use it to open that space. *See* (Record in the Court of Appeals, at 469-470). Then they threw it away. *See* (Record in the Court of Appeals, at 469). Further, they testified that they did so for a facially implausible reason: lack of storage space, and limited probative value. *See* (Record in the Court of Appeals, at 469)("Q. But why did you take even a picture of it? A. Because it was an important item to note and to take a picture of. Because 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.").

A socket wrench takes up very little space, and its probative value – whether the defendant could even access the drugs with which he was charged – was not small. Under these circumstances, a court that required "evidence likely to be exculpatory" might find the standard satisfied. By contrast, the court below was not required to consider that question because Petitioner "failed to allege, much less establish, that law-enforcement officers engaged in bad-faith conduct *for the purpose* of hiding adverse evidence." [Appx. A, at 4]; *Rodriguez*, 821 Fed. Appx. at 373 (emphasis added).

Nor could the government show that it would prevail in the Fourth Circuit. *See* (BIO, at 10-11). That court applies the familiar three-part test for instructional error to spoliation charges. *See Olubuyimo*, 152 Fed. Appx at 304. It asks whether the defense's requested instruction offered a correct statement of the law, whether it was otherwise covered in the charge, and whether it pertained to an important issue in the trial. *See id*. None of this requires a finding of bad faith, and in the present case the defense position could only be reasonably disputed on the third prong – whether spoliation pertained to an important issue in the case.

That issue would probably be resolved in Petitioner's favor. It mattered a great deal whether the wrench could open the secret compartment containing the drugs in this case. Evidence that the occupant could access the drugs tended to show his knowledge, and would have been counteracted by evidence that he could not do so. Indeed, the government introduced evidence that a lone tool in the glove box reflected drug trafficking. S*ee* (Record in the Court of Appeals, at 442-443). Yet the police

knowingly discarded evidence that would have determined whether the defendant could have accessed this secret compartment with the only tool in the car. A jury could rationally conclude that it would have been retained if it helped the prosecution's case. The court below never decided this issue. Instead, it applied a per se rule that defendants are never entitled to a spoliation instructions absent bad faith, which it defined as an intent to harm the defendant's case. *See* [Appx. A, at 4]; *Rodriguez*, 821 Fed. Appx. at 373.

But even if the government could muster a reasonable argument for affirmance under the law of every circuit, that should not prevent the Court from granting certiorari. The First, Fourth, and Ninth circuits employ fact-sensitive tests to decide when it is an abuse of discretion to deny a spoliation instructions. *See Laurent*, 607 F.3d at 902–903; *Olubuyimo*, 152 Fed. Appx at 304; *Sivilla*, 714 F.3d at 1173-1174. As such, the government will always be able to muster a reasonable argument, if not a compelling or successful argument, for affirmance under these tests. If this is sufficient to defeat review, the uncontested circuit split about a broad and constitutionally significant proposition of law – whether bad faith is required to receive a spoliation instruction – will remain forever unaddressed.

C. The bad faith requirement encourages the destruction of probative evidence in both good faith and bad, tends to result in unreliable verdicts, and is unfair to the citizenry.

Notably, the government does not defend the bad faith requirement on the merits, and it is not hard to see why. It is one thing to dismiss a case because the government failed to retain evidence of unknown evidentiary value. The Supreme

Court has held that prosecutions following such destruction do not violate due process – to achieve dismissal, the defendant must show that the evidence was probably exculpatory. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988). It does not follow from this proposition, however, that defendants should be without any remedy at all when police or prosecutors knowingly destroy evidence that *may or may not* exculpate them. In such cases, the modest remedy of a permissive spoliation instruction serves several important functions, without resorting to the draconian sanction of a dismissed prosecution.

First, and most importantly, a permissive instruction provides some measure of deterrence against bad faith destruction of exculpatory evidence. A defendant's inability to prove the exculpatory nature of the evidence, or a bad faith motivation, does not mean that exculpatory evidence has not been destroyed in bad faith. Sometimes, it only means that the government got away with it. That problem is probably rare, but not so rare as to be negligible, and a potential tragedy when it occurs. *See* Samuel Gross, *et al*, National Registry of Exonerations, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, at 83 (Sept. 1, 2020)(calculating that destruction of exculpatory physical objects was implicated in 13% of wrongful convictions ultimately resulting in exonerations), *available at https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf last visited August 11, 2021*. A permissive instruction provides some consequence for these cases of true bad faith, without

providing any unfair or excessive consequence for the good faith actors, who may be justly called on to bear the risk of their failure to preserve potentially important evidence.

Second, a permissive spoliation instruction also provides an important and proportional incentive to preserve probative evidence in cases lacking bad faith. Our system ultimately places the decision as to guilt and innocence in the hands of the people, through the jury system. *See Gaudin v. United States*, 515 U.S. 506 (1995). To ensure adequate presentation of all facts and arguments in the case, it provides the defendant with adversarial counsel, who zealously presents the evidence in the light most favorable to him or her. *See Strickland v. Washington*, 466 U.S. 668 (1986). It is thus not for police or prosecutors to decide unilaterally whether evidence it has seized has potential exculpatory value. *See Kyles v. Whitley*, 514 U.S. 419, 439 (1995)(holding that due process cannot tolerate a rule that "boils down to … a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."). Indeed, they cannot be expected to do so, given their professional incentives and biases. As such, the right of defendants to obtain, and juries to consider, the most probative evidence in the case often requires something more than a police officer or prosecutor's good faith belief that it does not tend to prove the defendant's innocence. It requires a consequence when probative evidence is needlessly discarded.

Third, quite apart from the instruction's salutary effect on the system as a whole, the instruction helps the jury reach the correct result in the case before it. A

permissive spoliation instruction merely honors the common sense observation that parties are more likely to preserve evidence that helps their case. *See Nation-Wide Check Corp. v. Forest Hills Distributors, Inc*., 692 F.2d 214, 218 (1st Cir. 1982)("The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document."). A party's loss or destruction of evidence, even unintentional, tends to show that the evidence did not help the party's case. *See* 2 *Wigmore on Evidence*, § 285 at 192 (Chadbourn rev. 1979)).

Fourth, independent of its effect on the criminal justice system, and on the accuracy of the verdict, the instruction is fair. As the United States Court for the Southern District of New York has explained:

> [t]he 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*.). This fairness rationale is especially pronounced in criminal cases. In those cases, one side – the prosecution – possesses nearly all of the relevant evidence, and bears a special responsibility to promote just results. *See Berger v. United States*, 295 U.S. 78, 88 (1935). Indeed, it is often illegal for the defendant to conceal probative evidence. *See* 18 U.S.C. §4.

Certainly police officers cannot be compelled to return seized evidence if it may be used in judicial proceedings. If the unilateral right to control the case's physical evidence is not to be equated with the right to destroy it with impunity, there must be some consequence. A permissive instruction is the least the courts can do for defendants in Petitioner's position.

The court below requires the defendant to prove the bad faith intent of police or prosecutors to destroy adverse evidence. [Appx. A, at 4]; *Rodriguez*, 821 Fed. Appx. at 373. If he could do this, he wouldn't need a presumption. As such, the Fifth Circuit has essentially nullified an ancient and common sense precept of evidentiary law, in precisely those cases where the most is at stake. This Court should intervene.

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 August, 2021.

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