No. _____

JULIA LAGUNAS-HERNANDEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

1. Whether the United States committed prosecutorial misconduct, depriving Petitioner of a fair trial when it shifted burden of proof by stating that defense counsel failed to produce evidence to support theory of defense, and that he personally and purposely tried to "distract" jury by wanting them to forget evidence?

2. Whether Petitioner's right to confidential marital communications with her spouse via text messages was waived when she consented to search of her cell phone?

LIST OF PARTIES

1. In addition to Julia Lagunas-Hernandez, two other persons were charged in the conspiracy, Carlos Medrano, and Alvaro Melena-Melena. They did not participate or join any arguments made by Petitioner, Julia Lagunas-Hernandez.

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JURISDICTION

This is an appeal from a federal criminal judgment arising in the Southern District of Iowa. On February 5, 2020, Appellant was sentenced to 158 months following jury verdict on September 4, 2019. Judgment; Appx. E. and G. Appellant filed a timely notice of appeal on February 18, 2020. Appx. D. See Fed. R. Crim. Proc. 4 (b) (1) (A) (i) (appeals must be filed within 14 days of final judgment).

Federal question jurisdiction exists under 28 U.S.C. § 1331. The 8th Circuit

Court of Appeals issued final judgment affirming the convictions on June 9, 2021. Appx. A. The jurisdiction of this Court is invoked under § 28 U.S.C. §1254(1).

TIMELINESS

The 8th Circuit affirmed the conviction on June 9, 2021. Judgment and Panel Decision; Appx. A and B. This Petition is filed within 150 days of that date. See US Supreme Court Rule 13 (1) ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review."). Pursuant to its Supervisory Pandemic Order, this Court has extended the deadline to 150 days for all opinions falling before July 19, 2021. Thus, the deadline falls on November 6, 2021. A document is considered timely filed it were delivered on "if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing, or if it is delivered on or before the last day for fling to a third-party commercial carrier for delivery to the Clerk within 3 calendar days." Supreme Court Rule 29.2. This document was mailed via United States Postal Service on October 29, 2021, and post marked for delivery on that date. Thus, it is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Relevant Procedural History

District Court Proceedings in the Southern District of Iowa - United States v. Julia Lagunas Hernandez, No. 4:19-CR-40.

This case comes from a federal criminal appeal from the 8th Circuit Court of Appeals. It's a drug courier case in which the Petitioner was convicted for assisting a methamphetamine courier on a first time trip to Iowa.

On February 14, 2019, Petitioner, Julia Lagunas-Hernandez ("Lagunas") was arrested for conspiracy to distribute methamphetamine in violation of 21 U.S.C. Sections 846, 841 (a) (1), and (b) (1) (A). Indictment; Appx H. On March 19, 2019, a four count indictment was returned alleging:

A. Count 1: From October 2018 through February 13, 2019, Alvaro Melena-MelenA, Carlos Rojas Medrano, and Julia Lagunas conspired to distribute over 50 grams of pure methamphetamine and at least 500 grams of a mixture of methamphetamine in violation of 21 U.S.C. Sections 846, 841 (a) (1), and (b) (1) (A).

B. Count 2: On February 13, 2019, Julia Hernandez and Carlos Medrano did knowingly and intentionally distribute at least 50 grams of methamphetamine in violation of 21 U.S.C. § 841 (a) (1) and 18 U.S.C. § 2.

C. Count 3: On February 13, 2019, Alvaro Melene Melena did knowingly and with intent to distribute between at least 50 grams of methamphetamine and 500 grams of methamphetamine mixture.

D. Count 4, Alvaro Melena Melena being an unlawful user of a controlled substance, illegally possessed a firearm in violation of 18 U.S.C. 922 (g) (3) and 924 (a) (2).

Superseding Indictment; Docket 43. Additionally, the Government sought civil forfeiture, namely the guns listed in Count 3 as well as $4083 in cash. Ms. Lagunas elected to go trial and on September 4, 2019, a jury returned a guilty verdict against her. Verdict; Appx. G. Ms. Lagunas filed a Motion for New Trial on September 20, 2019. Motion; Docket 139. On November 14, 2019, the district court denied the Motion for New Trial. Order; Appx F.

Lagunas received a sentence of 156 months following a variance of her original guideline range of 188-235 months as set forth in the Presentence Investigation Report. Judgment; Appx. E. Ms. Lagunas' Co-Defendant Carlos Medrano, who pleaded guilty and cooperated against Defendant, received a sentence of 72 months. Judgment; Docket 182. The other Co-Defendant, Alvaro

Melena-Melena, received a sentence of 188 months. Judgment; Docket 163.

8th Circuit Appeal - United States of America v. Lagunas Hernandez, No. 20-1343

Ms. Lagunas filed an appeal. Following oral argument, the 8th Circuit Court of Appeals affirmed the District Court and Judgment on June 9, 2021. Judgment and Panel Decision; Appx. A and B.

Overview of Relevant Facts:

This is a drug courier case. The Government presented evidence of a methamphetamine dealer, Alvaro Melena Melena, arranging for an approximately five pounds of ICE methamphetamine from "Dona", a restaurant owner in California for a delivery to Grimes, Iowa. The Government alleged that Maria Murillo, also known as "Dona" and that she arranged for Julia Lagunas and Carlos Medrano to deliver approximately 8.7 pounds of ice methamphetamine to Grimes, Iowa in early February of 2019. The evidence clearly showed that Lagunas had no prior experience acting as a courier or being involved in drugs and that Medrano was a long time experienced drug courier who had made multiple prior trips by himself.

Ms. Lagunas will provide a brief summary of the case via the Presentence Report and do the deep dive in the transcript in her argument section.

The case began when, on October 11, 2018, law enforcement officials

(LEO) executed a federal search warrant at Alvaro Melena Melena's (Melena) residence located at 1719 Lucinda Street in Perry, Iowa. LEO had received information that for approximately the year prior, Melena distributed one-quarter to one-half pound quantities of methamphetamine multiple times per week. Law enforcement discovered guns, methamphetamine, and cash at Mr. Melena's house, none of which were connected with Ms. Lagunas. Presentence Investigation Report "PSI" ¶ 8. After the execution of the October 11, 2018, search warrant, LEO received information from a cooperating source (CS) regarding Melena's drug trafficking activity. PSI ¶ 14. Melena told the CS that his residence had been recently "raided" by LEO (believed to be a reference to the October 11, 2018, search warrant). Two days prior to the search warrant, Melena transported five to ten pounds of methamphetamine to the CS' s residence for safekeeping. PSI ¶ 14.

On February 5, 2019, the CS reported to LEO that Melena was expecting a shipment of methamphetamine from California within the next few days. The California source of supply was sending a female to deliver approximately nine pounds of methamphetamine to Melena in Iowa. PSI ¶ 16. Melena was supposed to pick up the methamphetamine in Grimes, Iowa, and the "runner" would be arriving via train or bus to Omaha, Nebraska. PSI ¶ 16. The runner was then to take a taxi to Grimes, Iowa, to meet with Melena. PSI ¶ 16

On February 10, 2019, Melena advised the CS that the runner was stuck in

Wyoming. PSI ¶ 17. Additionally, Melena said the source of supply had a nightclub in Sacramento, California, and was from Michoacan, Mexico. Melena estimated the methamphetamine would arrive around February 12, 2019. Id. On the morning of February 13, 2019, the CS informed LEO that Melena said the methamphetamine had arrived in Grimes, Iowa. Melena said that "they" were at the AmericInn hotel in Grimes. PSI ¶ 18.

AmericInn hotel records reflected that hotel room number 109 was rented to Julia Agunas (later identified as Julia Lagunas Hernandez (Lagunas)). PSI ¶ 18. The arrival date was listed as February 13, 2019, with the departure date as February 14, 2019. PSI ¶ 18. Later that afternoon, Melena told the CS that he was going to pick up the methamphetamine. PSI ¶ 19. LEO then observed Melena's truck leaving his residence a short time later and observed it traveling to, and arriving at, the AmericInn hotel. PSI ¶ 19.

At the hotel, Carlos Noel Rojas Medrano (Rojas) was observed in the lobby area. PSI ¶ 20. Melena and Gracia were observed entering the hotel carrying no items. PSI ¶ 20. Rojas was observed entering room 109, and a short time later, Melena and Gracia were observed exiting that room with a large duffle bag. PSI ¶ 20. Melena and Gracia then left the hotel and drove away in a truck. PSI ¶ 20. Lagunas was also observed entering and exiting room 109. PSI ¶ 20.

A short time later, LEO stopped Melena and Gracia's vehicle. The vehicle

was searched, and a black Nike duffle bag was located in the vehicle. PSI ¶ 21. Inside, LEO found clothes and three plastic bags containing approximately nine pounds of methamphetamine (100 percent pure, per laboratory analysis). PSI ¶ 21.

Melena was read his Miranda rights and agreed to speak with LEO. Melena said there was nothing illegal in his vehicle, but if LEO found anything, it did not belong to him or Gracia. PSI ¶ 21. Melena initially denied going to the Americlnn hotel, but when LEO told Melena they had been following him, Melena stated he went there but never went in. Melena admitted he went to the hotel to pick up a bag but did not know what was in it. Eventually, he admitted there was that was was methamphetamine. PSI ¶ 21.

Melena said his source of supply was a Hispanic female from California that Lagunas was the one who handed him the bag, that Medrano was present, and that Maria Murillo was the older woman on CA who sent Lagunas with the methamphetamine to Iowa. PSI 22.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THE SCOPE AND EXTENT TO WHICH PROSECUTOR DURING CLOSING CAN CHARACTERIZE DEFENSE ATTORNEY AS TRYING TO MISLEAD JURY AND SHIFT BURDEN OF PROOF TO DEFENDANT.

A. Since Berger v. United States, there have been very few decisions by this Court relating to the scope of permissible advocacy by prosecutors in closing arguments.

In 1935, this Court famously defined the limit of when a prosecutor's

zealous advocacy crosses the barrier of fairness and deprives a defendant of a fair trial. In *Berger*, this Court stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).

Since that decision, there have not been very many cases by this Court relating to permissible advocacy by prosecutors. There have been a few cases about scope of permissible argument. For example, in *Griffin v. California*, this Court held that a prosecutor could not comment upon a Defendant's decision to decline to testify. *Griffin v. California*, 380 U.S. 609, 613–14, 85 S. Ct. 1229, 1232, 14 L. Ed. 2d 106 (1965). In *Young*, this Court found that the prosecutor providing response to a Defense attorney's attacks were an invited response and thus, did not amount to plain error. *United States v. Young*, 470 U.S. 1, 5–6, 105 S. Ct. 1038, 1041, 84 L. Ed. 2d 1 (1985). Notably, even though not plain error in *Young*, this Court did find that the prosecutor's comments *were error*, even in

response to Defense counsel, by interjecting his personal beliefs during closing argument. *Id.* It just found that error was not significant enough to constitute plain error.

In *Donnelly v. DeChristoforo*, the Court found that the following statements did not amount to prosecutorial misconduct depriving Defendant of a fair trial.

1. "As to the guilt of respondent the prosecutor told the jury: 'I honestly and sincerely believe that there is no doubt in this case, none whatsoever.'"

2. "And he went on to say: 'I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.'"

Id. 416 U.S. 637, 650, 94 S. Ct. 1868, 1874–75, 40 L. Ed. 2d 431 (1974). The Court held that was far short of a due process violations, but yet cautioned that it was not retreating from prior cases relating to due process violations during closing.

> We countenance no retreat from that proposition in observing that it falls far short of embracing the prosecutor's remark in this case. The 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed *647 in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning

from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 650, 94 S. Ct. 1868, 1874–75, 40 L. Ed. 2d 431 (1974)

Since those cases, this Court not really clarified outer boundaries of what can and not be argued during closing arguments. This an important area of law relating to due process violations and closing arguments. It should be clarified. See Supreme Court Rule 10 (c).

B. In this case, the Government accused Defense counsel of wanting to mislead and distract the jury.

In its rebuttal in this case, the Government strongly implied that the defense counsel was trying to deceive or mislead the jury by telling the jury that Counsel was trying to distract the jury and that he wanted the jury to personally wanted to forget several pieces of key evidence.

In prior 8th Circuit cases on which Ms. Lagunas relied below, the 8th Circuit stated that "personal, unsubstantiated attacks on the character and ethics of opposing counsel have no place in the trial of any criminal or civil case." *United States v. Holmes*, 413 F.3d 770, 775 (8th Cir. 2005). Such statements are improper because a prosecutor's comment "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19,

105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). They are also improper because the role of the prosecutor is not merely to pursue convictions, but to pursue justice-"the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

In pursuit of these dual goals, a government attorney may "prosecute with earnestness and vigor ... may strike hard blows ... [but] is not at liberty to strike foul ones." Id. Accordingly, prosecutors may not inject their own testimony nor cast aspersions upon the defendant through offhand comments, suggestions of conspiracy with defense counsel, *nor personal attacks upon the integrity of defense counsel*." *See McDonnell v. United States*, 457 F.2d 1049, 1052-53 (8th Cir.1972) (finding that a prosecutor deserved censure for admittedly describing defense counsel's offer of proof as a "common trick," but finding no abuse of discretion in the denial of a motion for mistrial because the judge and reporter had not heard the remark and the court of appeals was unwilling to assume the jury had heard the remark) (emphasis added); see also *United States v. Pungitore*, 910 F.2d 1084, 1142 (3d Cir.1990) (collecting cases); *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir.1989) (reversing conviction because prosecutor improperly accused defense counsel of hiding expert witness to prevent government's use of witness); *United States v. McLain*, 823 F.2d 1457, 1462-63 (11th Cir.1987) (reversing conviction under plain error standard in part because

prosecutor repeatedly stated that defense counsel "intentionally misle[d] the jurors and witnesses and ... [lied] in court"), overruled on other grounds by *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) (as recognized in *United States v. Watson*, 866 F.2d 381, 385 n. 3 (1989)).

This case is most like *United States v. Holmes*, 413 F.3d 770, 775–76 (8th Cir. 2005). Holmes was a possession of a firearm case wherein the Government attempted impugned Defense counsel by making it look like defense counsel was attempting to trick or deceive the jury. The Government said that, "Mr. Moss is a good defense attorney, tries to get you to focus your attention over here when what really is important is right in front of you. It's all smoke and mirrors." (Mr. Moss was Mr. Holmes's trial counsel.) *United States v. Holmes*, 413 F.3d 770, 775 (8th Cir. 2005). Defense counsel objected and the Court overruled. Further in rebuttal, The government stated that the defense counsel "wants to distract you and tell you about all this other evidence that's not important," and that issues that Mr. Moss had raised about who had owned the gun in question were a "red herring." *Id.* The government also commented that "Mr. Moss needs to make sure that they get their stories straight" ("they" presumably referred to Mr. Moss and Mr. Holmes), and that the jury should "look at Mr. Moss's story. That's why I said he's got to get his stories straight." *Id.* With those statements, this Court had no trouble finding prosecutorial misconduct because the argument was focused

on counsel's character, unnecessarily focusing on the defense counsel rather than the facts.

1. The Government's arguments here were very similar to Holmes.

The Government began by shifting the burden to Defendant, noting that Defense counsel had failed to present evidence to back up his "speculation." After noting that defense counsel had failed to present evidence to back up his argument, the Government "The burden is completely on the government and it has been from the outset of this trial and remains there today." Tr. 335. But, then, after making that black letter statement, the Government directly faulted Counsel for not producing evidence.

> What Mr. Cole has been telling you is that this was
> some sort of legitimate business trip that the defendant was on.
> But have you heard any evidence to support that theory?

Tr. 335, Tr 20-25. This is akin to have a prosecutor say that the Defendant does not have to testify and then make extensive argument about the fact that the Defendant should not testify. Just like the Government, a Defendant is entitled to make closing argument based upon its interpretation of the evidence. "It is not improper for the government to comment on its interpretation of the evidence." *United States v.* Jewell, 614 F.3d 911, 928 (8th Cir. 2010) (finding no plain error in a prosecutor's statement that a "smoke and mirrors" defense was misleading the jury because the "comments referred to the prosecutor's view of the strength

of the theory of defense, and did not suggest fabrication of testimony"). Similarly, it is not improper for the Defense to offer its own interpretation of the evidence or criticize the Government's failure to call a critical defense witness.

In assessing, whether Government's criticism of the Defendant's "failure" to produce evidence, the Court needs to look at whether it was a fair response to argument raised by Ms. Lagunas. *United States v. Robinson*, 485 U.S. 25, 34, 108 S. Ct. 864, 870, 99 L. Ed. 2d 23 (1988) (finding no error where Government comment on Defendant's failure to take the stand where it was fair response to claim made by Defendant). Eighth Circuit Court of Appeals explained that "[i]n closing arguments, a prosecutor is entitled to make a fair response and rebuttal when the defense attacks the government's case." In *United States v. Flynn*, 196 F.3d 927 (8th Cir.1999), the Id. at 930 (citations omitted). The Flynn court further stated that when a prosecutor's allegedly improper comments are in response to the defendant's attack, the court must determine whether the prosecutor's comments were a fair response. Id. The United States Supreme Court in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) discussed the "invited reply" or fair response rule, explaining that the idea of "invited response" is used not to excuse improper comments, but to determine their effect on the trial as a whole. Id. at 13, 105 S.Ct. 1038. In assessing whether the prosecutor's comment was "invited," the *Young* court stated:

> In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did not more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.

The Government flat out misrepresented the argument. Mr. Cole made no claim whatsoever that it was a "legitimate business trip." Instead, he argued based upon testimony that Carlos Medrano, an experienced drug courier for Mary Murillo, used Lagunas as a foil in case that he got caught based upon the actual testimony provided by Carlos Medrano. "You heard that he (sic) [referring to Murillo] had experience, nearly eight years' worth of experience with Carlos Medrano in distributing methamphetamine." Tr. 317, LL 3-5. Defense counsel also argued, based upon the actual testimony given, that the "modus operandi or the way that he did things for Tia Mary or Mary Murillo is he used women's clothes inside the backpack or the duffle bag because in case he was ever caught, they would have the perfect excuse, the perfect explanation, at least as they identified, that if there were women's clothes in the duffle bag, they could blame someone else in terms of the responsibility." Tr. 317, LL 5-12. Then based strictly on the evidence, and making a reasonable interpretation, Defense counsel argued that not only did he used women's clothing, as in past operations, he used an actual women, the Defendant, "as the perfect foil, as the perfect person to

dispense with in case any of them were caught." Tr. 317, LL 13-25.

He made that not on unfounded speculation outside of the record, but based upon what Medrano actually told law enforcement upon being detained on February 13, 2019. The very first thing he did was "blame, Julia Lagunas." Tr. 13-25, LL 17-21. He claimed he didn't know that there was methamphetamine and they was "collecting money." Tr. 317, LL 21-25. Medrano lied a second time to law enforcement telling them that he was just there to "collect money," and that "Julia was the one who recruited me to do that." Tr. 318, LL 20-22. He also argued that Lagunas and he only used the term "work" while discussing the plans, but that she must have known the true purpose of the trip. Tr. 319, LL 20-25.

Finally, in closing, Counsel made a closing based upon the reasonable doubt instruction. The burden to establish facts does notrest on the defendant. Ms. Lagunas Hernandez does not have to hire a private investigator to go out to California and subpoena and bring her in. She doesn't have to do that. That is thegovernment's job to answer those questions. That's the government's job. Tr. 323, LL 12-18.

> No. 16, I
> want you to read that very, very carefully. It says, "A
> reasonable doubt may arise from careful and impartial
> consideration of all of the evidence or from lack of evidence."

> When you talk about lack, what should form in your mind? That big gaping hole in that puzzle of Maria Murillo. That's a hole. That is a lack of evidence that should cause you to find reasonable doubt. Tr. 325, LL 1-10.

So that argument was based upon the failure of the Government to satisfy its burden of proof. It did not "open the door" to the Government faulting Defendant for failing to produce evidence relating to questions he raised based upon the Government's failure to the produce the central orchestrator of the entire operation, Mary Murillo.

C. The Government made a very similar smoke and argument that the 8th Circuit found inappropriate in Holmes.

After attacking Defense for failing to produce evidence, the Government made it personal, claiming that Defense counsel was trying to intentionally misdirect the jury. Holmes directly condemned the following arguments that the defense attorney "tries to get you to focus your attention over here when what really is important is right in front of you. It's all smoke and mirrors." (Mr. Moss was Mr. Holmes's trial counsel.) *United States v. Holmes*, 413 F.3d 770, 775 (8th Cir. 2005). The government continued "Mr. Moss wants to distract you and tell you about all this other evidence that's not important," and that issues that Mr. Moss had raised about who had owned the gun in question were a "red herring." The government also commented that "Mr. Moss needs to make sure that they get their stories straight" ("they" presumably referred to Mr. Moss and Mr.

Holmes), and that the jury should "look at Mr. Moss's story. That's why I said he's got to get his stories straight."

This is very similar to the argument made here. Near the close of its rebuttal, the Government claimed that "[b]y making this case all about Carlos Royas Medrano, he is trying to distract you from the mountain of evidence against his client. Tr. 338, LL 11-15. This was not isolated remark, but continued through the close of its rebuttal:

> pounds of methamphetamine across the country. He wants you to forget that she was the one who rented that hotel room. He wants you to forget that she is the one who had all of the contact with the customer. He wants you to forget that she was the one that handed over the bag of drugs in the hotel room. of the bag and helped hide them in that hotel room.

Trial Tr. 338, LL 16-25.

> He wants you to forget about all of those incriminating text messages. He wants you to forget all of these things because he wants you to forget that his client is guilty.

Tr. 339, LL 1-3.
The Cambridge Online Dictionary defines "smoke and mirrors" as something that "is intended to make you believe that something is being done or is true, when it is not." https://dictionary.cambridge.org/us/dictionary/english/smoke-and-mirrors. This is precisely what a magician, distracting the audience by pointing in one direction while misdirecting their attention in another direction.

C. The Panel's Decision demonstrates the need to clarify this important area of law.

The Panel's decision hear illustrates the need to grant *certiorari*. It cited virtually no Supreme Court caselaw relating to the two issues of prosecutorial misconduct.

Without citing any Supreme Court authority, the Panel found no problem with the Government claim that Defendant failed to produce evidence to support its argument "that she could have believed that she was going on a 'legitimate business trip.'" *United States v. Hernandez*, 999 F.3d 1181, 1183–84 (8th Cir. 2021); Appx. B.

It also found that there was no issue with the Government claim that Defense counsel was "trying to distract [the jury] from the mountain of evidence against his client," and that he wanted the jury to "forget" the government's evidence. Id. Lagunas likens her case to *United States v. Holmes*, 413 F.3d 770 (8th Cir. 2005), where a divided panel ruled that there was prosecutorial misconduct in closing argument. The Panel distinguished *Holmes* because the Government did not "suggest fabrication of testimony" or directly attack the integrity of defense counsel. *Id.* Citing *United States v. Jewell*, 614 F.3d 911, 928 (8th Cir. 2010). The Panel concluded that the argument did not "exceed the 'considerable latitude' available in rebuttal." *United States v. LaFontaine*, 847 F.3d 974, 981 (8th Cir. 2017) (internal quotation omitted).

Notably absent from the Panel's decision was any reference to guidance

from this Court. This Court should grant the Writ to clarify this important area of law.

GROUND 2 - THIS COURT SHOULD CLARIFY THE SCOPE OF COMMON LAW MARITAL PRIVILEGE.

A. This Court should provide more guidance about the scope of marital privilege relating to marital communications being defeated because the communications were alleged to be in furtherance of a conspiracy.

This case candidly does not present classic grounds for a writ such a split in the circuits, but this case nevertheless warrants review under United States Supreme Court Rule 10 (c), *i.e.* presents an important, but unresolved area of law relating to marital privilege in criminal cases. Government's intrusion without a warrant into intimate communications between spouses provided an essential piece of evidence to convict Ms. Lagunas.

B. The Panel's resolution of this issue.

The 8th Circuit found that the privilege did not apply for two reasons. It found that Appellant failed to produce evidence of a valid marriage. *United States v. Hernandez*, 999 F.3d 1181, 1184–85 (8th Cir. 2021); Appx. B. Secondly, citing a 1934 Supreme Court case, *Wolfle v. United States*, 291 U.S. 7, 16-17, 54 S.Ct. 279, 78 L.Ed. 617 (1934), it found that Ms. Lagunas waived the issue by consenting to search of her phone since the text messages were found there. Appx. B 6-7.

C. The Panel's decision demonstrates the need to grant the Writ.

Relying on 87 year old precedent, the Panel found that waiver applied. *Wolfle* obviously predates cell phones and the privacy issues relating to intimate material found on cell phones.

At this Court has noted, cell phones contain intimate details and as such, fit well within the protections of the 4th Amendment warrant requirement absent an of the exceptions to the warrant requirement. *Riley v. California*, 573 U.S. 373, 403, 134 S. Ct. 2473, 2495, 189 L. Ed. 2d 430 (2014)

This case involves important questions relating to intersection of the 4th Amendment, marital privilege, and claims of "waiver" relating to obtaining cell phone data as well as marital communications on those phones.

In *Wolfle*, this Court found waiver applied where a husband and wife communicated in the presence of a stenographer. *Wolfle, v. United States*, 291 U.S. 7, 16-17, 54 S.Ct. 279, 78 L.Ed. 617 (1934).

Twenty years after *Wolfle*, this Court considered, but ultimately declined to address the scope of material privilege in *Pereira v. United States*, 347 U.S. 1, 6, 74 S. Ct. 358, 361, 98 L. Ed. 435 (1954). Like Wolfe, this Court found that the privilege did not apply because it was made in the presence of a 3rd party. Id. ("A review of Mrs. Joyce's testimony reveals that it involved primarily statements

made in the presence of Brading or Miss Joyner, or both, acts of Pereira which did not amount to communications, trips taken with third parties, and her own acts.")

In 1980, this Court abrogated adverse spouse privilege while affirming the need to protect confidential communications between spouses. Noting that the information disclosed between husband and wife are one of "solaces of human existence", this Court nevertheless found that the need to prevent one spouse from testifying against another spouse about non privileged matters no longer was sufficiently strong to override the public interest obtaining reliable evidence in court proceedings. *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 912–13, 63 L. Ed. 2d 186 (1980).

Since *Trammel*, this Court has not seriously considered the scope of marital privilege as it relates to criminal cases.

D. The admission of these communications prejudiced Ms. Lagunas' right to a fair trial.

The evidence came in through the case agent Brandon West. These statements were presented in Exhibit 24, a chart describing verbatim translated text messages between RB and Lagunas. She is referred to as Julia Lagunas and her husband is described as RB.

Brandon West, the case agent providing foundation for exhibit, testified that Exhibit 24 "is a summary of the calls and text messages between Tia Mary, Alvaro

Melena, Julia Lagunas, Carlos Medrano and who we believe was Julia's Lagunas's boyfriend or husband." Trial Tr. 244, 1-10. The objection was then admitted without objection.

Following Trial, he sought a new trial on the basis of violation of marital privilege. While at the hotel in Grimes, Lagunas told RB because they were coming… "for the things." Ex. 24, 5. In closing the Government argued that the things were referring to "methamphetamine." The Laguanas also told RB via text, "next time you'll come with me and you do the deal ok," and that "my whole life with you, I've been risking my life and you don't give a fuck." Ex. 24, L 5. In response to RB wanting to video chat, Lagunas said, "screw that next time you're coming." Ex. 24, 8.

The Government effectively used Exhibit 24 during closing referring to texting her "husband" R.B. and referring to the things. Tr. 304, Tr. 20-25. The Government also referred to Lagunas statements to husband about being nervous and crazy about the risks she is taking. Tr. 305, LL 1-5. She continues to referring to the text messages. "I am the one risking my life. So next time you do the deal." Tr. 306, LL 1-7.

CONCLUSION AND REQUESTED RELIEF

The Court should grant the Writ on these two important, but unresolved questions of law.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Petitioner, hereby certify that, on October 29, 2021, I mailed an original and 10 copies to the Supreme Court via United States Postal Service Express Mail to:

United States Supreme Court
Clerk's Office
1 First Street, N.E.,
Washington, D.C. 20543

and one copy to:

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