No. _____

In the
Supreme Court of the United States

CLAY MELTON DENTON,
Petitioner
vs.
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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QUESTION PRESENTED

If critical evidence, which is at a minimum potentially exculpatory, is lost as a result of government's failure to preserve it, when is a defendant entitled to an instruction that permits the jury to consider the spoliation of said critical evidence and apply an adverse inference therefrom?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED PROCEEDINGS

1. *United States of America v. Clay Melton Denton*, 4:19-cr-00241-ALM-KPJ-1 (Eastern District of Texas, Sherman Division) (criminal judgment entered January 7, 2022).
2. *United States of America v. Clay Melton Denton*, No.22-40020 (5th Circuit Court of Appeals) (conviction and sentence affirmed January 10, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Clay Melton Denton respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

OPINION BELOW

The Fifth Circuit Court of Appeals' opinion affirming Petitioner's conviction and sentence can be found at *United States v. Denton*, No.22-40020, 2023 WL 143169 (5th Cir. Jan. 10, 2023) (concluding the district court did not err denying Petitioner's motion to dismiss the indictment or refusing his request for a spoliation instruction because he did not show that the government acted in bad faith). *See* Appendix. A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction and sentence on January 10, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. AMEND. V.

STATEMENT OF THE CASE

In 2018, law enforcement was conducting an investigation into a peer-to-peer file sharing network, eDonkey. Through that investigation, a particular internet protocol (IP) address was identified as being associated with files containing and sharing suspected child pornography. Special Agent Craanen with the

FBI, conducted an investigation through the registered internet provider and discovered that the IP address was assigned to a business – DS Services. DS Services' address was a residential address. Petitioner resided at this address with his wife and children. Petitioner owned DS Services, which was a computer consulting company specializing in clustering technology. A cluster is a collection of computers that are configured to act as one computer. This would enable, for example, a business's web server to run. Clustering enables a computer system to act as one and if one computer failed or was in need of maintenance and rebooted, the system's services are automatically provided by the other computers to prevent an outage or downtown. DS Services itself operated its web server through a cluster system in Petitioner's residence.

As part of his investigation into DS Services, a simple Google search revealed to Agent Craanen that Petitioner was an IT specialist with several accreditations and licenses including being the President of DS Services. Agent Craanen sought a search warrant for Petitioner's residence based on the IP addresses' connection to suspected child pornography. In the affidavit supporting the application for a search warrant, Agent Craanen provided the following specifics regarding the search and seizures of computers:

> **SPECIFICS REGARDING THE SEARCH AND SEIZURE OF COMPUTERS**
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> 28. Based on my training and experience, I am aware that the search of computers

and digital devices often requires agents to download or copy information from the computers and their components, or seize most or all computer items (computer hardware, computer software, and computer related documentation) to be processed later by a qualified computer expert in a laboratory or other controlled environment. This is almost always true because of the following two reasons:

a. Computer storage devices…can store the equivalent of millions of pages of information. Especially when the user wants to conceal criminal evidence, he or she often stores it in random order with deceptive file names. This requires search authorities to examine all the stored data that is available in order to determine whether it is included in the warrant that authorizes the search. This sorting process can take days or weeks, depending on the volume of data stored, and is generally difficult to accomplish on-site.

b. Searching computer systems for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment. The vast array of computer hardware and software available requires even computer experts to specialize in some systems and applications, so it is difficult to know before a search which expert

> should analyze the system and its data. The search of a computer system is an exacting scientific procedure that is designed to protect the integrity of the evidence and to recover even hidden, erased, compressed, password-protected, or encrypted files. Since computer evidence is extremely vulnerable to tampering or destruction (which may be caused by malicious code or normal activities of an operating system), the controlled environment of a laboratory is essential to complete and [sic] accurate analysis.
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> 29. In order to fully retrieve data from a computer system, the analyst needs all magnetic storage devices as well as the central processing unit (CPU). In cases involving child pornography where the evidence consists party of graphics files, the monitor(s) may be essential for a thorough and efficient search due to software and hardware configuration issues. In addition, the analyst needs all the system software (operating systems or interfaces, and hardware drivers) and any applications software which may have been used to create the data (whether stored on hard drives or on external media).

On April 25, 2018, law enforcement executed their search warrant. Despite being aware that a computer consulting business, specializing in clustering technologies, was listed at the residential address, Agent Craaneen testified that he did not

anticipate or prepare to conduct a business search warrant. Upon arrival at Petitioner's residence, law enforcement encountered a vast array of complex networked computer devices with routers, storage area network switches, servers, which took up a large amount of space in the residence. Agent Craanen acknowledged that the system within the home was atypical for a residence and was akin to a complex business computer system or that of a data center. The system was unlike any computer set up that Agent Craanen had seen in his career with racks of servers and easily 10,000 pieces of digital equipment in the home. Yet, despite attesting in his affidavt that an analyst would need to collect electronic all storage devices and processing units to fully retrieve the relevant data in this type of investigation and the search of computers requires the seizure of most or all computer items to be processed later by a qualified computer expert, which is a process that could take weeks, agents simply pulled the power to some of the computer system and seized approximately 80 items from Petitioner's residence. For example, in a clustered computer system, such as the one in Petitioner's residence, the system's storage used a form of shared storage called a "SAN," a storage area network tied in via a SAN switch and controllers. Here only some of the systems within the cluster were taken, the SAN switch itself was not taken, and all of the SAN controllers were not taken. Law enforcement elected not to seize switches, routers, and were unable to map the computer system or reconfigure the system in the lab because only some items were seized. A standard controlled shutdown of the system was not performed and the system could not be reconstituted

in the lab. The computer network was also not backed up before it was shut down resulting in the potential for data loss.

Agent Craanen testified that the volume of items in the residence, the time it would have taken to log,[1] map, shutdown, and seize all of these items, as well as Petitioner's lack of cooperation explained the failure to preserve the integrity of the computer system in the home. Agent Craanen testified that he conducted the search warrant as he would any other home despite the extensive data-center like system encountered. Law enforcement acknowledged the possibility of remote access into the system and the potential for data loss. Petitioner called an expert witness who likewise testified that information stored on routers or switches within the system could be lost if the system was simply powered down or disconnected/taken down without proper shutdowns and mapping including logs that could provide means to determine if there had been hacking. Petitioner himself testified to the business use of his system and the risk of data loss because power was simply pulled from the servers. Petitioner testified he believed he had been hacked.

Ultimately, child pornography and file titles or hash values associated with those identified in the initial investigation. Petitioner was eventually

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[1] A detective testified he estimated it could take weeks to map a configuration of the network system present in the residence. But a defense expert and Petitioner both testified that a proper mapping and shutdown of the system to preserve its data would have likely taken minimal time such as hours not weeks.

charged by superseding indictment with one count of distributing child pornography, one count of receiving child pornography, and possession of child pornography. 18 U.S.C. § 2252A(a)(2)(A), (a)(5)(B) & (b)(1)-(2).

Before trial, Petitioner filed a pretrial motion to dismiss the indictment alleging that the government violated his due process rights by failing to preserve or destroying exculpatory or potentially useful evidence. *See California v. Trombetta*, 467 U.S. 479, 485 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988); Appendix G. The district court held a hearing on the motion and ultimately elected to carry the motion with the trial. At the conclusion of the evidence, Petitioner re-urged his motion for dismissal and made a motion for directed verdict. The district court denied both motions. Before the case was returned to the jury, Petitioner also requested that the district court include a spoliation of evidence instruction in the jury charge instructions that would permit, but not require, the jurors to consider an adverse inference from the spoliation of evidence if they found that the government failed to preserve or caused evidence to be lost. *See Mali v. Federal Ins. Co.*, 720 F.3d 387 (2d Cir. 2013); Appendix D. The district court denied Petitioner's request. The jury convicted Petitioner on all counts. Appendix C.

Petitioner appealed. The Fifth Circuit found that to "prevail on his motion to dismiss the indictment, [Petitioner] was required to show that potentially useful evidence was lost or destroyed by the Government in bad faith. *Denton*, 2023 WL 143169 at * 1 (citing *Youngblood*, 488 U.S. at 57-58); Appendix

A. The Fifth Circuit concluded that district court did not err finding there was "no evidence that law enforcement personnel intentionally lost or destroyed any digital evidence in order to impede [Petitioner's] defense." *Id.* Petitioner also challenged the district court's refusal to give a spoliation jury instruction. *Id.* The Fifth Circuit concluded it was bound by circuit precedent to require a demonstration of bad faith meaning that any spoliation of evidence was for the purpose of hiding adverse evidence. *Id.* (citing *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (addressing spoliation in the civil context)). The Fifth Circuit concluded that nothing in the record established that law enforcement agents acted intentionally for the purpose of hiding exculpatory evidence. *Id.* Petitioner's conviction and sentence were affirmed. *Id.*

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's conclusions conflict with decisions of this Court and other United States courts of appeals on this same important matter that impacts defendant's due process rights.

Due process guarantees defendants the right to a fundamentally fair trial and as such requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S.479, 485 (1984). In *Trombetta*, two defendants were stopped on suspicion of drunk driving and each submitted to an "Intoxilyzer" breath test. *Id.* at 482. Each defendant attempted to suppress the results of said test on grounds that the arresting officers had failed to preserve the samples of breath

despite it being feasible to do so claiming the samples, if preserved, would have enabled them to impeach the test results. *Id.* at 482-83. The California Court of Appeals ruled in the defendant's favor finding that due process required law enforcement to preserve the evidence for use by the defendant. *Id.* at 483. This Court, however, reversed finding the failure to retain the samples did not violate the Constitution reasoning that "[i]n failing to preserve the breath samples . . . the officers . . . were acting 'in good faith and in accord with their normal practice . . .'" *Id.* at 488 (citing *Killian v. United States*, 368 U.S. 231, 242 (1961)). The Court found that the constitutional duty to preserve evidence is "limited to evidence that might be suspected to play a significant role in the suspect's defense" meaning the evidence possesses both "an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 488-89. Due process considerations are violated when the government fails to preserve evidence, which possessed an apparent exculpatory value. *Id.* at 489.

This Court has also said that when the government fails to preserve potentially useful evidence due process is violated upon a showing of bad faith on the part of law enforcement. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988). In *Youngblood*, the Arizona Court of Appeals reversed the defendant's convictions based on the State's failure to preserve biological and phsyical evidence. *Id.* at 55. This Court reversed holding that the Due Process Clause of the Fourteenth Amendment did not

require Arizona to preserve biological samples in this sexual assault case even though the samples might have been useful to the defense. *Id.* at 57. The Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* at 56-57 n. * (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

Here, The Fifth Circuit employed a standard for bad faith, which required proof that failure to preserve evidence was done intentionally to impede Petitioner's defense. *Denton*, 2023 WL 143169 at * 1 (citing *United States v. McNealy*, 625 F.3d 858, 870 (5th Cir. 2010) (finding no evidence of bad faith in absence of evidence that government intended to destroy evidence in order to impede defendant's defense)). This standard conflicts with the standard imposed by this Court in *Youngblood*, which does not require that law enforcement acted with intent to impede the defense. If the potential exculpatory value of evidence was known to law enforcement when it was destroyed that should be sufficient to establish bad faith. Otherwise, defendants will never be able to establish bad faith in this context.

In addition to seeking the dismissal of the indictment on due process grounds, Petitioner sought a spoliation jury instruction allowing an adverse inference from the failure to preserve evidence. A

spoliation instruction "is commonly appropriate in both civil and criminal cases where there is evidence from which a reasonable jury might conclude that evidence favorable to one side was destroyed by the other." *United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010) (citing 4 L. Sand et al., *Modern Federal Jury Instructions* § 75.01 (instruction 75-7), at 75-16 to -18 (2010)). As the First Circuit has recognized, "the case law is not uniform in the culpability needed for the instruction." *Id.*[2] The Sixth Circuit, for example, has held that a spoliation instruction may be warranted through a "showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, but even negligent conduct may suffice to warrant spoliation sanctions under the appropriate circumstances." *Stocker v. United States*, 705 F.3d 255, 235 (6th. Cir. 2013); *see also Vodusek v.*

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[2] n. 5 (citing *e.g., Buckley v. Mukasey*, 538 F.3d 306, 322-23 (4th Cir. 2008) (mere negligence not enough, intentional conduct — but not bad faith — required); *United States v. Artero*, 121 F.3d 1256, 1259-60 (9th Cir. 1997) (bad faith required), cert. denied, 522 U.S. 1133 (1998); *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (same); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) (same); *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (suppression of the evidence must be intentional, not accidental); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101, 108-10 (2d Cir. 2002) (negligent destruction is enough if other indications suggest the evidence would have favored the party affected by the destruction). Our own decision in *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 217-20 (1st Cir. 1982), is not entirely clear on this point. *See also Blinzler v. Marriott Int'l*, 81 F.3d 1148, 1159 (1st Cir. 1996) (stating that the factfinder is "free to reject" the adverse inference when it believes the evidence was "destroyed accidentally or for an innocent reason")).

Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (requiring evidence of a knowing spoliation of relevant evidence by willful conduct that resulted in loss or destruction); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (holding that an adverse inference may not be drawn from merely negligent loss or destruction but requires a showing that willful conduct – something less than bad faith – resulted in the loss or destruction). The Fifth Circuit, consistent with its sister circuits, applied civil circuit precedent in considering whether the district court erred to refuse Petitioner's request for a spoliation instruction. *Denton*, 2023 WL 143169 at *1 (citing *Guzman*, 804 F.3d at 713 (addressing spoliation in the civil context and imposed a bad faith standard to "means destruction for the purposes of hiding adverse evidence.")); *see also United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000). However, what is not consistent among the circuits is how the standard for spoliation applies in the context of criminal proceedings given the wide variation among the circuits applying spoliation instructions in civil cases. To be sure, some circuits require a showing of bad faith before the jury will be permitted to consider the spoliation of evidence.[3] But the First, Second, Fourth,

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[3] *See, e.g., Bracey v. Grondin*, 712 F.3d 1012, 1018 (7th Cir. 2013) ("In this circuit, when a party intentionally destroys evidence in bad faith, the judge may instruct the jury to infer the evidence contained incriminatory content."); *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 461 (8th Cir. 2013) ("[W]e conclude that a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction."); *United States v. Nelson*, 481 F. App'x 40, 42 (3d Cir. 2012) (noting that "where there is no showing that the evidence was destroyed

Sixth, and D.C. circuits have all found that a spoliation instruction may be warranted even in the absence of bad faith. *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) ("Certainly bad faith is a proper and important consideration…But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think the district court is entitled to consider imposing sanctions, including exclusion of the evidence."); *Residential Funding Corp. v. DeGeroge Financial Corp.,* 306 F.3d 99, 108 (2d Cir. 2002) ("The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence."); *Hodge v.*, 360 F.3d at 450; *Stocker*, 705 F.3d at 235; *Grosdidier v. Broad Bd. Of Governors,* 709 F.3d 19, 27 (D.C. Cir. 2013) ("the spoliation inference was appropriate in light of the duty of preservation notwithstanding the fact that the destruction was negligent."). Whereas, the Fifth Circuit requires a showing of bad faith. *See United States v. Rodriguez*, 821 F. App'x 371, 373 (5th Cir. 2020) ("An adverse inference against the spoliator is permitted only upon a showing of bad faith or bad conduct" and "bad faith generally means destruction for the purpose of hiding

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in order to prevent it from being used by the adverse party, a spoliation instruction is improper"); *Dalcour v. City of Lakewood*, 492 F. App'x 924, 937 (10th Cir. 2012) (both permissive and mandatory adverse inference instructions require showing of bad faith). *But see Reiff v. Marks*, 511 F. App'x 220, 224 (3d Cir. 2013) (applying standard of "actual suppression or withholding of the evidence" with no discussion of bad faith (quoting *Brewer v. Quaker State Oil Rig Corp.*, 72 F.3d 326, 334 (3d Cir. 1995)).

adverse evidence."); *see also Wice*, 221 F.3d at 156. The Fifth Circuit's standard requires that a defendant, who can no longer access the spoiled evidence at issue, be able to establish that said evidence had apparent exculpatory value known to law enforcement and that law enforcement intentionally destroyed the evidence for the purpose of hiding it. In this way, in order to have the jury consider a spoliation defense raised by the evidence, a defendant is required to establish he was entitled to have the indictment dismissed or the evidence suppressed by showing bad faith. More fundamentally, if potentially exculpatory evidence is at issue – and that evidence has been lost or destroyed – it is impossible for a defendant to establish that the evidence was adverse to the government's case. The Fifth circuit's standards essentially ensure that no criminal defendant will ever be entitled to have a jury instruction on the spoliation of evidence. That the Fifth Circuit provides no lesser standard for the inclusion of a spoliation jury instruction is in conflict with other circuit courts of appeals.

This Court should grant Petitioner's petition to address the applicability of a spoliation jury instruction in criminal cases wherein there is evidence of a failure to preserve evidence. Doing so would allow the Court to create a uniform standard for when an adverse inference instruction was appropriate. Currently, applying civil precedents, the circuits "employ widely divergent approaches with respect to the level of culpability required." [4] Defendants in

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[4] Hon. Shira A Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based*

criminal cases have a due process right to present a meaningful and complete defense. *Trombetta*, 467 U.S. at 485. "To safeguard that right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence." *Id.* (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). However, even absent a due process violation that warrants dismissal of an indictment or the suppression of evidence, a criminal defendant may be entitled to an adverse inference instruction if spoliation is raised by the evidence. *See United States v. Johnson*, 996 F.3d 200, 206 (4th Cir. 2021) ("In order to draw the inference, there must be "a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.").

Here, Petitioner's defense was that his system had been hacked. Petitioner testified he believed he had been hacked and provided expert testimony regarding the data and logs lost as a result of the government's execution of the search warrant. The government's execution of the search warrant did not comply with the procedures laid out in its own affidavit. Despite encountering racks of servers, a clustering system running a business server, and thousands of pieces of digital equipment, which government agents acknowledged were akin to that of a business computer system or data center, law enforcement elected to simply pull the power plug on the servers and disconnect the internet. Law

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Proposal, 83 Fordham L. Rev. 1299, 1300 (2014) (noting that about half of the circuits require a showing of bad faith).

enforcement executed a search warrant on Petitioner's system as it would any other residential search warrant despite their advance knowledge that a computer consulting company was headquartered in the residence. Law enforcement acknowledged the possibility of remote hacking into the system but powered it down without mapping the configuration, backing up the system, or ensuring that data was not lost. Law enforcement acknowledged the possibility that a result of this, data could have been lost. Yet, the district court here refused to dismiss the indictment or provide a spoliation jury instruction because Petitioner was obviously unable to prove that law enforcement intentionally destroyed data it knew to be adverse to its case. This is not consistent with the principles of fundamental fairness and due process. Moreover, there is a significant split in the circuits regarding what standard applies to a request for an adverse inference instruction when a criminal defendant seeking to present a complete and meaningful defense produces evidence of spoliation or the failure to preserve evidence. This Court should grant Petitioner's petition to answer this question.

CONCLUSION

The error raised in this petition involves an important matter concerning whether and when defendants are entitled to have a jury consider the government's failure to preserve evidence. The circuits employ a wide range of standards based on divergent standards in civil law cases. This Court should grant the petition to resolve the conflicting approaches taken by the lower courts and answer an important question of federal law that has not been settled.

Respectfully submitted,

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