No.

IN THE SUPREME COURT OF THE UNITED STATES

FAN YANG,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

# PETITION FOR A WRIT OF CERTIORARI

Dane K. Chase, Esquire
Florida Bar Number: 0076448
Chase Law Florida, P.A.
111 2nd Ave NE
Suite 334
Saint Petersburg, Florida 33701
Direct: (727) 350-0361
Facsimile: (866) 284-1306
Email: dane@chaselawfloridapa.com

* CJA Counsel of Record

## QUESTION PRESENTED

Whether a court may exclude evidence under Fed. R. Evid. 403, where doing so would preclude a criminal defendant from presenting a complete defense to the jury?

## PARTIES TO THE PROCEEDING

Parties to the proceeding include Fan Yang (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), Roger B. Handberg, Esquire (United States Attorney), Yvette Rhodes (Assistant United States Attorney), and Elizabeth B. Prelogar (Solicitor General of the United States of America).

## TABLE OF CONTENTS


Question Presented ..... I

Parties to the Proceeding ..... II

Table of Contents ..... III

Table of Authorities ..... IV

Petition for Writ of Certiorari ..... 1

Opinion Below ..... 1

Jurisdiction ..... 1

Constitutional and Statutory Provisions Involved ..... 1

Statement of Facts ..... 2

Reasons for Granting the Petition ..... 13

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT A DISTRICT COURT MAY NOT EXCLUDE EVIDENCE UNDER FED. R. EVID. 403 WHERE DOING SO WOULD PRECLUDE A CRIMINAL DEFENDNAT FROM PRESENTING A COMPLETE DEFENSE TO THE JURY ..... 13

Conclusion ..... 21

Index to Appendix ..... i

Decision of the 11th Circuit Court of Appeal ..... Appendix A

Order Denying Petition for Rehearing En Banc ..... Appendix B

## TABLE OF AUTHORITIES

Cases

*United States v. Yang,* No. 22-11030,
2023 WL 8768889 (11th Cir. Dec. 19, 2023) ..... 1,12

*United States v. Todd,* 108 F.3d 1329 (11 th Cir. 1997)..... 9

*United States v. Lankford*, 955 F.2d 1545 (11 th Cir. 1992)..... 9,10

*United States v. Garber*, 607 F.2d 92 (5th Cir.1979) (en banc) ..... 10

*United States v. Sheffield*, 992 F.2d 1164 (11th Cir.1993) ..... 10,11

*United States v. Mills*, 704 F.2d 1553 (11 th Cir. 1983) ..... 10

*Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727,
164 L. Ed. 2d 503 (2006)..... 13,14,17,18

*Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)..... 13,17

*California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)... 13,17

*Hanson v. Beth*, 738 F.3d 158 (7th Cir. 2013) ..... 14

*Rock v. Arkansas,* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) ..... 14,18

*United States v. Ali*, 557 F.3d 715 (6th Cir. 2009) ..... 16

*Weeks v. Angelone*, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)..... 18

*Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) ..... 18

*United States v. Funches*, 135 F.3d 1405 (11th Cir. 1998)..... 6

*USA v. Yang*, No. 3:19-cr-00192-HES-LLL-1 (M.D. Fla.) ..... 3,15

Constitutional Amendments

U.S. Const. amend. V..... 1

U.S. Const. amend. VI ..... 1,2

U.S. Const. amend. XIV..... 2

**Rules**

Fed. R. Evid. 401 ..... 14,16

Fed. R. Evid. 402 ..... 14,16

Fed. R. Evid. 403 ..... 2,6,7,11,13,14,15,16,17,18,19,20,21

**Statues**

Title 18 U.S.C. § 371 ..... 3,15

Title 18 U.S.C. § 922 ..... 3,4

Title 18 U.S.C. § 924 ..... 4

Title 18 U.S.C. § 1001 ..... 5

Title 28 U.S.C. § 1254 ..... 1

Title 28 U.S.C. § 1291 ..... 1

**Other Authority**

Krista M. Pikus, We the People: Juries, Not Judges,
Should be the Gatekeepers of Expert Evidence,
90 Notre Dame L. Rev. 453 (2014) ..... 19

ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES
(Paul Finkelman ed., 2013) ..... 19

Adam Liptak, Cases Keep Flowing In, but the Jury Pool Is Idle,
N.Y. TIMES, Apr. 30, 2007,
http://www.nytimes.com/2007/04/30/us/30bar.html?pagewanted=all&_r=0..... 19

John Adams' Diary Notes on the Right of Juries: 1771. Feby. 12, found at
https://founders.archives.gov/documents/Adams/05-01-02-0005-0005-0004..... 20

Kenneth S. Klein, Why Federal Rule of Evidence 403 is
Unconstitutional, and Why That Matters, 47 U. RICH. L. REV. 1077 (2013) ..... 17

*Eleventh Circuit Pattern Jury Instructions (Criminal Cases)*
O13.1 General Conspiracy Charge 18 U.S.C. § 371. ..... 15

*Eleventh Circuit Pattern Jury Instructions (Criminal Cases)*
B9.1A On or About; Knowingly; Willfully – Generally. ..... 15

## PETITION FOR WRIT OF CERTIORARI

---

## OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals *infra*, was not selected for publication. The decision can be found at *United States v. Yang,* No. 22-11030, 2023 WL 8768889 (11th Cir. Dec. 19, 2023), and is attached as Appendix A.

## JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals, which had jurisdiction under Title 28 U.S.C. § 1291, was entered on December 19, 2023. However, a timely Petition for Rehearing was filed on December 28, 2023, which was not denied until January 10, 2024. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> 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 offence 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.

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Fed. R. Evid. 403 provides that:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 403.

## STATEMENT OF FACTS

On November 19, 2020, a federal grand jury in the Middle District of Florida, Jacksonville Division, returned a four-count Superseding Indictment naming Fan

Yang as the defendant. *USA v. Yang*, No. 3:19-cr-00192-HES-LLL-1 (M.D. Fla.)(Docket Entry 282). Count One charged that beginning in at least March 2017 and continuing through October 17, 2019, in the Middle District of Florida, and elsewhere, Mr. Yang did knowingly and willfully conspire with other persons, both known and unknown to the Grand Jury, to commit offenses against the United States, specifically the following, in violation of 18 U.S.C. § 371:

> a) knowing possession of firearms, specifically a Sig Sauer pistol and a Glock pistol, in and affecting interstate and foreign commerce by a person who knew he was an alien who had been admitted to the United States under a nonimmigrant visa, in violation of 18 U.S.C. § 922(g)(5);
>
> b) willfully transferring, giving, and delivering firearms, specifically a Sig Sauer pistol and a Glock pistol, to a person whom the transferor knew, and had reasonable cause to believe, did not reside in the State in which the transferor resided when neither the transferor nor the person who received the firearm was a licensed firearms dealer, importer, manufacturer, or collector, in violation of 18 U.S.C. § 922(a)(5); and
>
> c) knowing disposal of firearms, specifically a Sig Sauer pistol and a Glock pistol, to a person whom the transferor knew, and had reasonable cause to believe, was an alien who had been admitted to the United States under a nonimmigrant visa, in violation of 18 U.S.C. § 922(d)(5).

*Id.*

Count Two charged that on April 30, 2017, in the Middle District of Florida,

in connection with the acquisition of a firearm, that is a Sig Sauer pistol, from a federally licensed firearms dealer, Mr. Yang knowingly made a false and fictitious written statement intended and likely to deceive the firearms dealer with respect to a fact material to the lawfulness of the sale and disposition of the Sig Sauer pistol, that is, Mr. Yang falsely represented in writing on a Firearms Transaction Record (also known as ATF form 4473) that he was the actual transferee/buyer of the Sig Sauer pistol when, at that time, Mr. Yang was purchasing the Sig Sauer pistol on behalf of someone else, specifically, Ge Songtao who, as an alien admitted to the United States on a nonimmigrant visa, was prohibited from purchasing and possessing firearms, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). *Id.*

Count Three charged that on May 25, 2018, in the Middle District of Florida, in connection with the acquisition of a firearm, that is a Glock pistol, from a federally licensed firearms dealer, the defendant knowingly made a false and fictitious written statement intended and likely to deceive the firearms dealer with respect to a fact material to the lawfulness of the sale and disposition of the Glock pistol, that is, Mr. Yang falsely represented in writing on a Firearms Transaction Record (also known as ATF form 4473) that he was the actual transferee/buyer of the Glock pistol when, at that time, Mr. Yang was purchasing the Glock pistol on behalf of someone else, specifically, Ge Songtao who, as an alien admitted to the United States on a nonimmigrant visa, was prohibited from purchasing and possessing firearms, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). *Id.*

Count Four charged that on January 7, 2019, in the Middle District of

Florida, in a matter within the jurisdiction of a department and agency of the United States, the defendant did knowingly and willfully make and use a writing and document containing materially false, fictitious, and fraudulent representations and entries to the United States Government, to wit, a written e-QIP form, in which he did the following, in violation of 18 U.S.C. § 1001(a):

a) fraudulently represented that the only passport issued to him by the PRC had been cut up and mailed to the Chinese consulate in New York;

b) fraudulently failed to disclose his employment by BQ Tree LLC;

c) falsely denied having, and having had, close and/or continuing contact with a foreign national within the last seven years with whom he or his spouse was bound by affection, influence, common interest, and/or obligation;

d) falsely denied having had any foreign financial interests;

e) falsely denied having had any foreign financial interests that someone controlled on his behalf; and

f) falsely denied having provided, in the last seven years, advice or support to any individual associated with a foreign business or other foreign organization.

*Id.*

On October 17, 2021, the Government filed a "Motion in Limine to Preclude Evidence and Argument Regarding Selective Prosecution." *Id.* at Docket Entry 446.

The government sought:

> to preclude defendant Fan Yang from eliciting testimony, presenting evidence, or suggesting to the jury through argument that individuals (apart from the defendant) have not been charged with violating federal firearms

> laws even though they allegedly engaged in conduct similar to the defendant's.

*Id.*

In support of its position, the government argued:

> The United States' prosecutorial decisions regarding third parties are not relevant to the central issue in this case: whether the defendant committed the offenses alleged in the indictment. Any claim that the defendant has been selectively prosecuted is not a proper question for the jury, but instead is an illegitimate play for jury nullification. The defendant, therefore, should be barred from presenting evidence or arguments in support of any defense, claim, or theory that he should be acquitted because he was prosecuted, but others were not.

*Id.* (footnotes omitted).

> In this case, the defendant is poised to elicit testimony regarding other individuals (largely outside of this district) who lent or purchased firearms for Ge Songtao to use, but who have not been prosecuted. The defendant wants the jury to hear this testimony to support a direct or indirect argument that he has been unfairly targeted for prosecution. As the case law cited above establishes, this is not a valid defense on the merits, this is not a relevant issue for the jury, and evidence and argument in support of this notion can and should be precluded in advance of trial.
>
> But even if such evidence or arguments were deemed somehow relevant, they should be excluded under Federal Rule of Evidence 403 because their probative value is substantially outweighed by the risk of unfair prejudice, confusion, misleading of the jury, waste of time, and undue delay. Telling stories about third parties who have not been charged would be a sideshow designed to generate sympathy for the defendant and antipathy for the United States, which are improper aims. *See United States v. Funches*, 135 F.3d 1405, 1408-09 (11th Cir. 1998) (noting that there is no right to present evidence relevant only to inspire jury nullification).

> Further, presenting such evidence would protract the trial and may lead to jurors erroneously believing that the United States must charge all suspected of wrongdoing or no one at all. Potential for delay and confusion of the issues are sound grounds for excluding selective-prosecution evidence and arguments. *See Johnson*, 605 F.2d at 1030 (concluding evidence that the defendant was charged because he refused to cooperate with law enforcement, if introduced, would have prolonged the trial and confused the issues, making it subject to exclusion under Fed. R. Evid. 403).
>
> In addition, if a selective prosecution defense were advanced at trial, then fairness would require that the United States be permitted to respond with evidence supporting its charging decisions. This would include evidence regarding Ge, his background, and his motives for seeking a relationship with the defendant, all of which, in other circumstances, could be deemed too prejudicial to be admissible.
>
> Ultimately, whether (or why) others committed acts similar to the defendant's, but were not charged, says nothing about whether the defendant is guilty as charged. These matters are not relevant to any material issue, are not proper considerations for a jury, and should play no role at trial.

*Id.*

The defense responded:

> Lack of willfulness is the defendant's primary defense to the conspiracy to violate federal firearms laws alleged in Count One in that the defendant reasonably believed in the legality of his actions in accommodating co-defendant Ge's possession and use of firearms at firing ranges. Co-defendant Ge is a foreign national from the Peoples Republic of China ("PRC") who was present in the United States pursuant to a nonimmigrant visa when he possessed and used firearms with defendant Fan Yang and many other persons on numerous occasions only at firearms ranges. The United States is seeking to exclude

relevant evidence that is critical to the defendant's valid mens rea defense to Count One which relates to the defendant's state of mind concerning the lawfulness of his actions. Further, defendant Fan Yang was not alone in his belief that he acted lawfully and not in violation of any federal firearms laws when accommodating Ge's possession and use of firearms at the firing ranges in the United States. Numerous other individuals, both named and unnamed co-conspirators, who accommodated Ge's possession and use of firearms at the firing ranges in the United States all believed that their actions in that regard were legal and not in violation of federal firearms laws, including Gabriel Lopez, Tim Grover, Jim Vann, Mel Asencio, and numerous other persons. The fact that the defendant was present when firing range officials on numerous occasions permitted co-defendant Ge to use the firearms at the ranges knowing that Ge was a foreign national is strong evidence corroborative of defendant's state of mind defense that he believed his actions were lawful, that is, without any intent to do something the law forbids; that is, without any bad purpose to disobey or disregard the law. The fact that none of the numerous persons who were involved with accommodating co-defendant Ge's possession and use of firearms at firing ranges were ever arrested is highly probative and relevant to defendant's state of mind that the conduct was lawful, and, therefore, he lacked the mens rea to commit the offense.

The evidence at trial will show that Ge's possession use of firearms at firearms ranges with others was always out in the open. Co-defendant Ge did not conceal from firearms range personnel that Ge was a foreign national present in the United States on a nonimmigrant visa. None of the firearms range personnel advised anyone of any illegality in Ge's possession and use of the firearms at the firing ranges. None of the persons involved had any reason to believe their actions were unlawful. The fact that nobody was arrested for these actions that took place openly for years is a fact that in and of itself corroborates Defendant Fan Yang's reasonable belief that he was acting lawfully, that is, acting without any intent to do something the law forbids, that is, without bad purpose to disobey or disregard the law. The evidence is crucial to defendant's

primary defense of lack of willfulness and not for any purpose of claiming selective prosecution.

Indeed, the evidence at trial will show that Defendant himself openly inquired, in writing, of a firearms dealer about having a business relationship based on Chinese tourists visiting the United States for the purpose of using firearms at firearms ranges because such activity is not permitted for Chinese citizens in the Peoples Republic of China. The firearms dealer considered the request and did not speak one word to defendant about the business activity of "firearms tourism" being unlawful. Defendant reasonably understood and believed that the actions would be lawful in light of the silence of the firearms dealer about any illegality. Further, defendant was present for a few days when Tim Grover, a representative of a firearms range, hosted codefendant Ge at a firearms range for ten days while Grover had a film made of codefendant Ge using numerous firearms at Grover's firing range. There were numerous people present and no suggestion by anyone of any illegality in Ge's open use of the firearms at the firing range. (Indeed, it was so clear that nobody believed there was any illegality that Grover posted the film on his business Facebook page as a marketing tool for new business.)

The fact that nobody was arrested in connection with these activities (helping Ge possess and use firearms at firearms ranges) is a fact that corroborates defendant's state of mind defense that he believed the conduct was lawful; it is not a improper claim of selective prosecution by the defendant. In this regard, in United States v. Todd, 108 F.3d 1329, 1332-34 & fn.4 (11 th Cir. 1997), the Eleventh Circuit reversed a district court judgment for exclusion of evidence that was legally irrelevant for one purpose, but relevant and critical to defendant's theory of defense and to rebut the government's theory of defendant's criminal intent. Further, in United States v. Lankford, 955 F.2d 1545, 1550 (11 th Cir. 1992), the Eleventh Circuit reversed another district court judgment for exclusion of relevant evidence that was critical to a defendant's defense stating; "where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence

tending to show lack of intent." Id. quoting United States v. Garber, 607 F.2d 92, 99 (5th Cir.1979) (en banc). The Eleventh Circuit, in Lankford had a second ground for reversal for improper limitation of cross-examination of witness by a district court's exclusion of evidence of a possible motive for a witness's cooperation with the prosecution. Id. at 1548-49. The Court held that the defendant's Sixth Amendment right to cross-examine for possible motive or bias because the district court excluded evidence of the fact that the witness's sons had been arrested by state authorities for the sale of twenty pounds of marijuana and had entered guilty pleas to the state charges, and they were on probation at the time of the defendant's trial. Id. The evidence was not relevant to a defense of the criminal charge, but was relevant for proper impeachment of the witness consistent with the Sixth Amendment. Likewise, in the instant case, should the government call as witnesses any of the multitude of persons who engaged in conduct similar to the defendant's conduct, but were never arrested or charged for any violation of law, an inquiry on cross-examination to flesh out any reason for the government's leniency and potential motive or bias would be highly relevant and critical to compliance with the Sixth Amendment. The undersigned cross-examined codefendant Zheng Yan, who testified in a deposition pursuant to a plea agreement, asking her whether she had been charged with a firearms violation and she responded that she had not been charged for firearms violations. Zheng Yan deposition, Doc. 399-1 at page 97. The United States cannot seriously dispute that the question was valid cross-examination under the Sixth Amendment, yet its motion in limine would seek exclusion of the question as a claim of selective prosecution.

In United States v. Sheffield, 992 F.2d 1164 (11th Cir.1993), the Eleventh Circuit reversed on the grounds of an abuse of discretion for the district court's exclusion of evidence to explain defendant's acts which supported a legitimate defense theory. The Sheffield Court held that the evidence should have been admitted to put the charges in context, "to complete the story of the crime on trial." Id. quoting United States v. Mills, 704 F.2d 1553, 1559 (11 th Cir. 1983). In the instant case, like in

> Sheffield, the United States is seeking exclusion of evidence involving inferences that are highly significant to a material element of the case. In the instant case, the evidence is that defendant observed numerous persons over several years openly providing firearms to Ge for use at firearms ranges, that all believed their actions were legal, and nobody was arrested at firearms offenses. This evidence clearly corroborates defendant's reasonable belief that he was not violating the law when engaging in the same conduct with the others. The evidence is relevant and admissible for defendant's lack of willfulness defense.

*Id.* at Docket Entry 453.

The court ultimately granted the government's motion, concluding, in relevant part, that regardless of whether evidence concerning the exercise of prosecutorial discretion was relevant, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and undue delay under Fed. R. Evid. 403. Accordingly, the court precluded the defense from presenting evidence related to who was and was not arrested and/or prosecuted because it "would constitute a diversion meant to engender sympathy for Yang and contempt for the Government based, not on the charged conduct or a defense to the charged conduct, but some generalized feelings unrelated to the case," and "would also confuse the jury and unduly delay the trial, threatening to become a mini-trial within a trial by introducing 'extraneous and collateral matters' to the charged offenses." *Id.* at Docket Entry 461.

During trial, Mr. Yang testified that he purchased Sig Sauer and Glock pistols for himself and/or his wife, and he intended for Mr. Songtao to be able to use them only at firearm ranges, as it was his understanding Mr. Songtao could legally

use them there. Mr. Yang did not deny that Mr. Songtao paid for the firearms, but explained he remained the owner; Mr. Songtao paid for the firearms as a way of compensating Mr. Yang for allowing him to use them at firearm ranges. Mr. Yang ultimately let Mr. Songtao use his Sig Sauer pistol at a firearms range in Florida, and admitted the Glock pistol had been shipped to a firearms range in Nebraska, where Mr. Songtao may have used it. Mr. Yang also denied any wrongdoing as to any of the charges against him.

During closing argument, the defense argued Mr. Yang did not willfully conspire to commit a firearm offense. Nonetheless, the jury found Mr. Yang guilty on all counts, and he was sentenced to concurrent terms of 48 months imprisonment followed by 36 months of supervised release.

On appeal Mr. Yang argued that the district court reversibly erred by precluding him from raising a willfulness defense premised upon his observations that others had not been arrested for the same conduct and offering evidence in support thereof, as by doing so the court impaired the presentation of his defense.

The Eleventh Circuit recognized that "the district court precluded evidence of selective prosecution related to Yang's willfulness defense[,]" *United States v. Yang*, No. 22-11030, 2023 WL 8768889, at *1 (11th Cir. Dec. 19, 2023), but concluded that although "[s]elective prosecution remains a claim to hold the institutions of the legal system accountable for misconduct [it] has no bearing on the determination of factual guilt; therefore, the district court properly prohibited the evidence and argument of selective prosecution in Yang's criminal jury trial." *Yang*, No. 22-11030,

2023 WL 8768889, at *1 (citations and quotations omitted).

This Petition follows.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT A DISTRICT COURT MAY NOT EXCLUDE EVIDENCE UNDER FED. R. EVID. 403 WHERE DOING SO WOULD PRECLUDE A CRIMINAL DEFENDANT FROM PRESENTING A COMPLETE DEFENSE TO THE JURY.

At issue in this Petition is whether a court may exclude evidence under Fed. R. Evid. 403, where doing so would preclude a criminal defendant from presenting a complete defense to the jury. This Court should grant review to establish that a court may not do so, and, instead should permit the defendant to introduce his evidence subject to any limiting instruction which may be appropriate in light of the rule.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Holmes v. South Carolina*, 547 U.S. 319, 324–25, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006)(citing, *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); citations omitted). "[R]ules of evidence must yield to a defendant's constitutional right to present a defense when the rules 'infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to

serve.'" *Hanson v. Beth*, 738 F.3d 158, 163 (7th Cir. 2013) (quoting, *Holmes,* 547 U.S. at 324, 126 S.Ct. 1727 (internal quotation marks and alterations omitted); (citing, *Rock v. Arkansas,* 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) ("[A] state rule of evidence ... may not be applied mechanistically to defeat the ends of justice.")).

Under Fed. R. Evid. 401:

> Evidence is relevant if:
>
> **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> **(b)** the fact is of consequence in determining the action.

Fed. R. Evid. 401.

Under Fed. R. Evid. 402:

> Relevant evidence is admissible unless any of the following provides otherwise:
>
> • the United States Constitution;
>
> • a federal statute;
>
> • these rules; or
>
> • other rules prescribed by the Supreme Court.
>
> Irrelevant evidence is not admissible.

Fed. R. Evid. 402.

Under Fed. R. Evid. 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay,

wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. However, the Advisory Committee Notes to the rule recognize that "[i]n reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction[,]" and "[t]he availability of other means of proof may also be an appropriate factor." Fed. R. Evid. 403 Advisory Committee Notes, 1972 Proposed Rules.

Here, the district court mischaracterized Mr. Yang's desired willfulness defense as a selective prosecution defense, and erred by precluding Mr. Yang from presenting evidence in support of the willfulness defense. To prove the conspiracy charged in Count One, the government was required to prove that Mr. Yang "knew the unlawful purpose of the plan and willfully joined in it[.]" *See*, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* O13.1 General Conspiracy Charge 18 U.S.C. § 371. "The word 'willfully' means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law." *See*, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* B9.1A On or About; Knowingly; Willfully – Generally.

The trial court specifically precluded the defense from introducing evidence that others were never arrested or charged for the same conduct charged against Mr. Yang. *See*, *USA v. Yang*, No. 3:19-cr-00192-HES-LLL-1 (M.D. Fla.)(Docket Entry 282). However, the inquiry into Mr. Yang's subjective state of mind, *i.e.*, whether he acted willfully, was a determination to be made by the jury, and thus

the court erred by precluding the defense from introducing evidence relevant to that inquiry. *See*, *United States v. Ali*, 557 F.3d 715, 725-27 (6th Cir. 2009). More specifically, the fact that Mr. Yang had observed others provide Mr. Songtao with firearms without consequence was clearly relevant to the inquiry of whether Mr. Yang acted willfully, *i.e.*, with "intent to do something the law forbids," by providing firearms to Mr. Songtao, and thus was relevant admissible evidence. *See*, Fed. R. Evid. 401; 402. As the old saying goes, when in Rome do as the Romans do. For example, sticking with the Roman theme, undersigned counsel has been to Rome and thrown a coin in the Trevi Fountain. Undersigned counsel observed many others doing so and thus concluded doing so was legal. If doing so was in fact illegal, it could not be said that undersigned counsel willfully violated the law, as undersigned counsel did not intend to do something the law forbade. The same is true here. Because Mr. Yang had observed others openly provide Mr. Songtao with firearms without legal consequence, he could have agreed to do the same with the belief he was not violating the law based on the examples he had observed, and thus not acted with an intent to do something the law forbids, *i.e.*, not acted willfully. Accordingly, the evidence was relevant to Mr. Yang's defense and thus generally admissible. *See*, Fed. R. Evid. 401; 402.

Despite the clear relevancy of the evidence, the district court and the Eleventh Circuit concluded that it was inadmissible under Fed. R. Evid. 403, because the probative value of the evidence was purportedly outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay,

and wasting time. However, both courts were wrong to find the evidence subject to exclusion under Fed. R. Evid. 403, as Mr. Yang's constitutional right to present a complete defense trumps the Rules of Evidence.

There are compelling arguments that Fed. R. Evid. 403 is unconstitutional on its face and may never be applied in any case. *See*, Kenneth S. Klein, Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters, 47 U. RICH. L. REV. 1077 (2013) ("[W]hile the role of the jury as the exclusive fact finder is constitutionally enshrined, efficiency and accuracy as system goals are not constitutionally enshrined. Thus, FRE 403 explicitly premised on making trials more efficient and accurate-is unconstitutional.")(footnotes omitted). However, regardless of the facial unconstitutionality of Fed. R. Evid. 403, this much is clear: the Constitution prohibits a district court from excluding relevant evidence under Rule 403 where doing so prevents a criminal defendant from raising a complete defense. *See*, *Holmes*, 547 U.S. at 324–25, 126 S. Ct. at 1731 ("the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citing, *Crane*, 476 U.S. at 690, 106 S. Ct. 2142)(quoting *Trombetta,* 467 U.S. at 485, 104 S.Ct. 2528)); *Hanson*, 738 F.3d at 163 ("[R]ules of evidence must yield to a defendant's constitutional right to present a defense when the rules 'infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.'")(quoting, *Holmes,* 547 U.S. at 324, 126 S.Ct. 1727 (internal quotation marks and alterations omitted);

(citing, *Rock,* 483 U.S. at 55, 107 S.Ct. 2704 ("[A] state rule of evidence ... may not be applied mechanistically to defeat the ends of justice.")).

There can be no doubt presenting a complete defense is "a weighty interest of the accused," accordingly, whether Rule 403 may be constitutionally applied in such a manner as to deprive a criminal defendant of his right to present a complete defense hinges upon whether doing so is "arbitrary or disproportionate to the purposes [the rule was designed to serve]." *Holmes,* 547 U.S. at 324, 126 S.Ct. 1727. At a bare minimum exclusion is disproportionate to the purposes to be served by Rule 403, and, as such, Rule 403 may never be invoked to exclude evidence where doing so would deprive a criminal defendant of his right to present a complete defense.

More specifically, "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 733, 145 L. Ed. 2d 727 (2000)(citing, *Richardson v. Marsh,* 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). Accordingly, Rule 403's exclusionary rule is disproportionate to the purpose to be served by the rule, *i.e.*, preventing undue prejudice, confusion of the issues, etc. For instance, there is no reason the court could not have permitted Mr. Yang to introduce evidence that he observed others provide Mr. Songtao with firearms without consequence in support of his willfulness defense, and simply instructed the jury that selective prosecution was not an applicable defense in Mr. Yang's case. Presumably the jury would have been able to follow such a simple instruction,

which would have then prevented any undue prejudice or confusion of the issues without depriving Mr. Yang of his right to present a complete defense.

Given that juror's are presumed to follow the court's instructions, there simply is no justification for excluding evidence, rather than providing a limiting instruction, where exclusion of the evidence would infringe upon a defendant's right to present a complete defense. Accordingly, this Court should establish that applying the rule to exclude evidence in such a circumstance is unconstitutional.

"The Framers of our Constitution considered the right to a trial by jury to be more than just a fundamental right—it was an essential safeguard against tyranny." Krista M. Pikus, We the People: Juries, Not Judges, Should be the Gatekeepers of Expert Evidence, 90 Notre Dame L. Rev. 453 (2014) (citing, ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES875–77 (Paul Finkelman ed., 2013) (discussing the history and purpose of the right to a trial by jury). That safeguard stands for naught if the government by motion, or a judge by decree, may effectively decide what defense a criminal defendant is permitted to present to a jury through exclusion under Rule 403. There is a worrying and "increasing trend in the law of taking decision making power away from the jury and placing it into the hands of the judge," Pikus, 90 Notre Dame L. Rev. 453 (citing, Adam Liptak, Cases Keep Flowing In, but the Jury Pool Is Idle, N.Y. TIMES, Apr. 30, 2007, http://www.nytimes.com/2007/04/30/us/30bar.html?pagewanted=all&_r=0 (recognizing arguments from legal scholars that summary judgment violates the Seventh Amendment because it takes the jury's power to decide and gives it to the

judge), which is precisely what exclusion under Rule 403 does, *i.e.*, through exclusion a judge usurps the jury's role of evaluating *all* relevant evidence bearing on the defendant's guilt and determining for itself the matter of the defendant's guilt or innocence. Even before the drafting of the Constitution our founding fathers recognized that it was a jury's function to evaluate *all* relevant evidence – along with guiding instructions from a judge – and determine a defendant's guilt or innocence for itself. *See*, John Adams' Diary Notes on the Right of Juries: 1771. Feby. 12, found at https://founders.archives.gov/documents/Adams/05-01-02-0005-0005-0004. Accordingly to insure both the jury's inherent right to consider all relevant evidence while determining a defendant's guilt or innocence, and the accused's right to present a complete defense are respected and maintained, it is imperative that this Court establish that where the invocation of Rule 403 would prevent a criminal defendant from presenting a complete defense, exclusion is constitutionally prohibited.

Consequently, this Court should grant review, establish that where the invocation of Rule 403 would prevent a criminal defendant from presenting a complete defense, exclusion is constitutionally prohibited, and remand Mr. Yang's case for a new trial.

## CONCLUSION

For the reasons stated above, this Court should grant Mr. Yang's Petition for Writ of Certiorari and establish that where the invocation of Fed. R. Evid. 403 would prevent a criminal defendant from presenting a complete defense, exclusion is constitutionally prohibited, and remand Mr. Yang's case for a new trial.

.

Respectfully Submitted,

Dane K. Chase, Esq.
Florida Bar No. 0076448
Chase Law Florida, P.A.
111 2nd Ave Ne
Suite 334
Direct: (727) 350-0361
Email: dane@chaselawfloridapa.com
CJA Counsel for Petitioner

## INDEX TO APPENDIX

Decision of the 11th Circuit Court of Appeal ..... Appendix A

Order Denying Petition for Panel Rehearing ..... Appendix B

# APPENDIX A

[DO NOT PUBLISH]

In the

# United States Court of Appeals

## For the Eleventh Circuit

---

No. 22-11030

Non-Argument Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*versus*

FAN YANG,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:19-cr-00192-HES-LLL-1

---

Before WILSON, LUCK, and BLACK, Circuit Judges.

PER CURIAM:

Fan Yang appeals his convictions for conspiring to violate federal firearms laws, making false statements to a federally licensed firearms dealer, and making a false statement within the executive branch's jurisdiction. He asserts the district court reversibly erred by precluding his willfulness defense and presentation of evidence thereof. After review,[1] we affirm.

The district court did not preclude Yang's willfulness defense—it allowed evidence and argument regarding Yang's willfulness defense. Rather, the district court precluded evidence of selective prosecution related to Yang's willfulness defense. The district court issued a detailed order denying in part and granting in part the Government's motion in limine, detailing how Yang's proffered evidence could be used in a willfulness defense, and the evidence that would be precluded as evidence of selective prosecution. "A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996); *see also United States v. Jones*, 52 F.3d 924, 927 (11th Cir. 1995)

[1] We review a district court's grant of a government's motion in limine for abuse of discretion. *United States v. Thompson*, 25 F.3d 1558, 1563 (11th Cir. 1994). "Generally, courts should not prohibit a defendant from presenting a theory of defense to the jury." *Id.* at 1564.

("[S]elective prosecution is a defect in the institution of the prosecution that has no bearing on the determination of factual guilt.").

The district court did not abuse its discretion in granting in part the Government's motion in limine to preclude evidence and argument regarding selective prosecution. Because a selective prosecution claim is not a defense on the merits and is not a matter for the jury to decide, the district court did not improperly apply the law or err in its conclusion of law. *See United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006) ("An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." (quotation marks omitted)); *Armstrong*, 517 U.S. at 463. Selective prosecution remains a claim to hold the institutions of the legal system accountable for misconduct and has "no bearing on the determination of factual guilt"; therefore, the district court properly prohibited the evidence and argument of selective prosecution in Yang's criminal jury trial. *Jones*, 52 F.3d at 927; *see also Armstrong*, 517 U.S. at 463. Thus, we affirm.

**AFFIRMED.**

# APPENDIX B

In the

# United States Court of Appeals

## For the Eleventh Circuit

---

No. 22-11030

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*versus*

FAN YANG,

Defendant-Appellant.

---

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:19-cr-00192-HES-LLL-1

---

Before WILSON, LUCK, and BLACK, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.