No. _____

In the
Supreme Court of the United States
October Term, 2017

BARRY SPENCER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

Barry Spencer ("petitioner" or "Mr. Spencer") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit that affirmed the judgment of the United States District Court for the District of Massachusetts.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the First Circuit is Appendix A to this petition. The order on the Petition for Rehearing is Exhibit B. The judgment of the United States District Court, District of Massachusetts, imposing sentence on Petitioner, is Appendix C.

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on August 23, 2017. The First Circuit denied the petition for rehearing on October 11, 2017. This

Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution: "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

A. Procedural History

On May 17, 2013, a complaint issued against Mr. Spencer for "knowingly and intentionally distributing cocaine and aiding and that distribution…" based on an incident that allegedly occurred on March 20, 2013. (A33). On June 26, 2013, a grand jury returned a single count Indictment against Mr. Spencer, alleging that he violated 21 U.S.C. § 841(a)(1) (distribution of cocaine) and 18 U.S.C. § 2 (aiding and abetting). (A43). On August 28, 2013, the grand jury returned a First Superseding Indictment which added a charge under 21 U.S.C. § 846 for conspiracy to distribute cocaine and also named a co-defendant, Michael Morrison. (A49). On March 26, 2014, a Second Superseding Indictment was returned against Mr. Spencer alone charging him with conspiracy to distribute cocaine base (Count One) and with distribution/possession with intent to distribute cocaine base/aiding and abetting (Count Two). (A149).

In June 2014, Mr. Spencer proceeded to a jury trial. (A16; D.E. 154). On June 19, 2014, after the jury indicated it was deadlocked and the district court gave an *Allen* charge, the district court declared a mistrial. (A16; D.E. 159)

Mr. Spencer was re-tried in April 2015. (A21; D.E. 219). On April 23, 2015, the jury returned a guilty verdict as to both counts. (A22; D.E. 224). On May 4, 2015, Mr. Spencer filed a renewed motion for a required finding of not guilty or, in the alternative, for a new trial. (A156). The motion was based, in part, on Mr. Spencer's claims of a violation under *Brady v. Maryland*, 373 U.S. 83 (1963),because a chemist called by the Government as a witness had changed a date on an analysis report and had testified that she had received a call telling her to change the report. (*Id.*).

On July 2, 2015, the district court held an evidentiary hearing on the *Brady* claim. (A262). After the evidentiary hearing, the court ordered the Government to produce a document referenced at the hearing. (A324). On October 8, 2015, the district court issued a memorandum of decision denying Mr. Spencer's motion for a new trial. (A371).

On January 20, 2016, Mr. Spencer was sentenced to sixty months prison time and "shall serve his sentence concurrent to any state sentence and shall receive credit for time served." (A282). Judgment entered on the docket. (A392). Mr. Spencer filed a timely notice of appeal on January 22, 2015. (A398). On August 23, 2017, the United States Court of Appeals for the First Circuit affirmed Mr. Spencer's conviction, *United States v. Spencer*, 873 F.3d 1 (1st Cir. 2017), and on October 11, 2017, it denied Mr. Spencer's petition for rehearing.

B. Facts Relevant To Resolution Of The Petition[1]

1. Facts Relevant To Vindictive Prosecution Claim

1 Matters contained in the Appendix at the First Circuit will be designated by A-page number. Citations to the trial transcripts will be by the date of the trial followed by the page number.

In the Affidavit of Boston Sgt. Det. Donald Keenan supporting the application for the Criminal Complaint, he discusses that members of the "D-4 DCU have been attacking street-level trafficking in and around various areas of Boston (some of which are outside District D-4)…" (A37). Sgt. Keenan averred that a member of his unit was assisting the District B-2 Drug Control Unit on March 20, 2013, in an undercover ("UC") capacity in the Egleston Square area of Roxbury. (A38). Sgt. Keenan stated that he provided an UC with $40 of prerecorded BPD buy money and that he and other officers went out on surveillance. (*Id.*) Sgt. Keenan claimed the UC interacted with Mr. Spencer whom Sgt. Keenan averred he "knew from prior drug arrests and who had sued me in connection with an earlier case in which [he] bought drugs from [Spencer] in an undercover capacity." (*Id.*)

On October 13, 2013, Mr. Spencer moved to compel the production of documents related to claims that his arrest and prosecution were vindictive. (A59). On the vindictive prosecution claim, Mr. Spencer sought discovery on the decision to "single him out for surveillance and prosecution" and information on the number of arrestees in the Boston for the first six months of 2013 who had two prior qualifying career offender convictions and were referred for prosecution to federal court. (A61). The Government opposed the motion. (A66).

At a hearing on November 8, 2013, the defense argued that Mr. Spencer had presented sufficient objective evidence of vindictive prosecution - - on the basis of his previously filed lawsuit against Sgt. Keenan - - to justify discovery. (A99). The Magistrate Judge denied the motion: "I just don't think that your showing reaches the level that's required by the First Circuit…" (A101). The district court later denied the discovery motion in a written order finding that the defendant failed to present adequate objective evidence for his motion. (A103-104).

2. Facts Relevant To First Mistrial

After testimony from officers involved in the March 20, 2013 undercover operation that resulted in Mr. Spencer's arrest, Claire Rimkus, a forensic scientist at the Massachusetts State Police Crime Lab, testified. (Tr. June 18, 2014, p. 5). Introduced into evidence was a drug analysis that she performed on the materials bought by the undercover on March 20, 2013, and which she determined to be cocaine base. (*Id.*, p. 29). On cross-examination, Ms. Rimkus acknowledged that at the time of the analysis, she still was undergoing training. (*Id.*, p. 30). Ms. Rimkus did not testify about changing any date on her report or having any interactions with either the Government or with Boston Police concerning this change.

On June 18, 2014, the jury was sent to deliberate at 11:49 a.m. On June 19, 2014, the jury sent a note to the district court: "Your Honor, we are still deadlocked. There is no compromise that can be made with the evidence we were given. It is also getting a little hostile." (Tr. June 19, 2014, p. 4). The district court gave additional instructions for the jurors to deliberate. (*Id.*, p. 8-11). The jury came back with a note signed by each individual juror: "Your honor, after reviewing all the evidence and the law you provided, we are still deadlocked. We do not believe that we will be able to make a unanimous decision on either count." (*Id.*, p. 11). The district court declared a mistrial. (*Id.*, p. 13).

3. Facts Relevant To Second Trial Resulting In Conviction: Impermissible Evidence And Prosecutorial Comments And The Testimony Of Ms. Rimkus

On April 21, 2015, Mr. Spencer was re-tried after the mistrial. (A21; D.E. 219). At the beginning of the trial, the district court noted: "This case has been escalating. It started out as a single-defendant indictment for cocaine distribution. Then it came to the first superseding indictment including Mr. Morrison for cocaine distribution and aiding and abetting, and then came the second superseding indictment against this guy for cocaine base…I just want this case to go away." (Tr. April 21, 2015, p. 5).

The Government went on to note that there was no minimum mandatory involved because "We have a tenth of a gram because it's a small-level street dealer." (*Id.*, p. 8). The Court asked: "[W]hy is this a federal issue?" (*Id.*)

During its opening statement, the prosecutor began: "We will prove to you that Barry Spencer, that man sitting right there, is a drug dealer…" (*Id.*, p. 75).

Sgt. Keenan testified that on March 20, 2013, he was part of an operation called "Operation H" which was a "buy/walk operation." (*Id.*, p. 102). An undercover officer, Officer Casellas, was provided with "$40 of previously-photographed money." (*Id.*, p. 114). The operation "made [its] way to Egleston Square." (*Id.*, p. 127). Sgt. Keenan stated that upon entering the square, he saw Mr. Spencer at the bus stop. (*Id.*, p. 117). Sgt. Keenan testified that he was familiar with Mr. Spencer "from the neighborhood." (*Id.*, p. 118). Sgt. Keenan testified that, upon seeing Mr. Spencer, he made a decision "to deploy Officer Casellas." (*Id.*, p. 119). Sgt. Keenan observed Officer Casellas talking to Mr. Spencer and then later saw Officer Casellas near Mr. Spencer and another person identified later as Michael Morrison. (*Id.*, pp. 120-121). Sgt. Keenan testified that Officer Casellas and Mr. Morrison were speaking and Mr. Spencer was "looking up and down the street." (*Id.*, p. 121).

The Government asked Sgt. Keenan: "Now, let me ask you, based on your training and experience…is it unusual for drug dealers to work in tandem out on the street?" The defendant objected, but the Court allowed the question. (*Id.*, p. 126). Sgt. Keenan answered "Yes." (*Id.*, p. 127). The Government then asked, "Why do they do that?" (*Id.*). Sgt. Keenan responded: "They often do it because it's two - - one guy would often hold the drugs, one guy would hold the money, one guy may go out and gather the customers up while the person having the drugs doesn't have to expose himself as much, maybe to get more customers, but I've often seen people working together selling drugs." (*Id.*) The Government asked: "Happens all the time?" (*Id.*). Sgt. Keenan responded: "Yes." (*Id.*)

On cross examination, Sgt. Keenan acknowledged that the interactions that occurred on March 20, 2013, could have been recorded but were not. (Tr. April 22, 2015, p. 7). Sgt. Keenan testified that he never saw Mr. Spencer in possession of either cocaine or money on March 20. (*Id.*, p 10). Sgt. Keenan acknowledged that he saw Officer Casellas interacting with Mr. Morrison, and that Mr. Spencer was not focused on them. (*Id.*, p. 17). On redirect, Sgt. Keenan testified that it appeared to him that Mr. Spencer "was acting as a lookout." (Id., p. 26). The district court admonished him: "Well, not what your conclusion was, but what he was doing." (*Id.*) Sgt. Keenan replied, "He was looking around, up and down the street, looking around for things in the area." (*Id.*).

Officer Casellas testified that on March 20, 2013, he was working as an UC in the Egleston Square area and was provided $40 in buy money. (*Id.*, p. 33). Sgt. Keenan pointed out Mr. Spencer to Officer Casellas as they were driving. (*Id.*, p. 36). Officer Casellas approached Mr. Spencer, and "asked him if he was on." (*Id.*, p. 39). When asked what that meant, the defendant objected. (*Id.*). The judge allowed the question and Officer Casellas responded: "That's street terminology usually used by drug users and drug dealers to determine whether the person is actually selling drugs." (*Id.*).

Officer Casellas testified that Mr. Spencer "said he was always on…I understood that to mean that he's always selling." (Id., p. 40). Officer Casellas testified that he told Mr. Spencer that he was "looking to purchase crack cocaine" in the amount of $20. (*Id.*). Officer Casellas testified that Mr. Spencer said he was going to take care of him, and asked Officer Casellas to follow him. (*Id.*). They started walking but Officer Casellas testified that Mr. Spencer told him to go back and wait at the bus stop. (*Id.*) Officer Casellas testified that Mr. Spencer was gone five minutes, and then returned with Mr. Morrison. (*Id.*, p.41).

When asked what Mr. Spencer was doing upon the return, Officer Casellas testified that he "was scanning the area, looking at car as they drove by." (*Id.*, p. 43). The Government asked whether the officer had "seen that kind of activity in the past?" (*Id.*). The question was objected to and the objection sustained. (*Id.*). The Government then asked: "Well, did you have any understanding as to what he was doing?" (*Id.*) The defendant objected, but was overruled. (*Id.*). Officer Casellas: "Yes. He was doing counter-surveillance." (*Id.*). When asked to explain "counter-surveillance," Officer Casellas testified: "He is looking out for police driving by. Maybe - - there's a walk in that area. Maybe there's a police officer walking around there." (*Id.*). The defendant objected and moved to strike; the district court sustained the objection. (*Id.*)

Officer Casellas testified that Mr. Morrison pulled out a handful of bags of crack cocaine, and that he told Mr. Morrison he wanted $20 worth. (*Id.*, p. 44). Officer Casellas gave Mr. Morrison the $20 and received a plastic-wrapped, "pea size" bag containing a rock. (*Id.*). Officer Casellas said that Mr. Spencer asked him for his phone number, saying it was for future purchases, and that Officer Casellas gave him his undercover number. (*Id.*, p. 45). Officer Casellas testified that Mr. Spencer and Mr. Morrison then were stopped by other officers and were being photographed and that he recognized them from their recent interaction. (*Id.*, p. 48). He handed his purchase to Sgt. Keenan. (*Id.*, p. 49). Later, he identified Mr. Spencer from the photographs taken at the stop. (*Id.*, p. 50).

On cross-examination, Officer Casellas acknowledged that the interactions with Mr. Spencer were not audiotaped. (*Id.*, p. 51). Officer Casellas also testified that - - despite previous testimony that Mr. Spencer said "Michael Morrison" would take care of him - - Mr. Spencer really just said "he." (*Id.*, p. 57). Officer Casellas testified on cross-examination that he did not receive any drugs from Mr. Spencer. (*Id.*, p. 62). Officer Casellas also testified that on May 3, 2013, he bought more crack cocaine from Mr. Morrison - - Mr. Spencer was not there. (*Id.*, pp. 62-63).

Boston Police Officer Walsh, who was conducting surveillance, testified that he saw Officer Casellas, Mr. Spencer and Mr. Morrison at the bus stop in Egleston Square. (*Id.*, p. 72). Officer Walsh acknowledged that he did not videotape the interaction he testified he saw. (*Id.*, p. 84).

Officer Flaherty testified that he was also conducting surveillance of Officer Castella on March 20, 2013. (*Id.*, p. 89). After receiving notification that a buy had occurred, he returned to his station at area B-2 and set up "a cc number." (*Id.*, p. 90). He testified that Sgt. Keenan gave him drugs and he put them in a small plastic bag. (*Id.*, p. 92). An "evidence management team" placed a sticker on the drugs. (*Id.*, p. 94). Officer Flaherty testified as to certain reports that he prepared. (*Id.*, pp. 95-96). The district court then instructed the jury:

> "[I]magine if you had a bag of flour that was the subject of this transaction. The only way that the government can really prove that the bag of flour that was involved in the transaction on March 20th, 2013 is the same as here is by proving what we call the chain of custody. It has to prove that it went from the officer who got it to another officer who kept it who gave it to another officer who then logged it in.
>
> There will be testimony by the next witness, the chemist, to show that this was, in fact, crack cocaine and then it has to go again through a chain of custody to her and then back to the police officer and the police station and ultimately into the courtroom.

> And so, you have to be very sure that whatever the substance on March 20th, 2013 was is crack cocaine and the only way you can be sure of that is by continuing on with this chain of custody.

(*Id.*, p. 97).

Officer Flaherty testified that "evidence management" picks up the drugs and puts them in a drug depository. (*Id.*, p. 99). Evidence management is responsible for transporting the evidence to the laboratory. (*Id.*). On cross examination, the officer admitted that even though he claimed that his preliminary testing revealed the drugs from the March 20 interaction were "crack," the initial and superseding indictment only charged "cocaine" and not "crack cocaine." (*Id.*, pp. 104-105).

The final witness was Ms. Rimkus. (*Id.*, p. 107). Ms. Rimkus testified that she received a sample from the Boston Police labeled "130-14-540." (*Id.*, p. 117). She testified that she conducted various tests on the sample and determined that it was cocaine base. (*Id.*, p. 130). She prepared a certificate of her analysis (Exhibit 10) and testified that she believed "it to be accurate." (*Id.*). Defendant objected to the admission of Exhibit 10 on the basis that there was "a similar report that was dated September 26th and I haven't heard any explanation why there's another one." (*Id.*, p. 131). The judge admitted the certification based on Ms. Rimkus' testimony.

On cross-examination, Ms. Rimkus testified that she had performed the test in September 2013. (*Id.*, p. 130). She had prepared an initial report in the case but it was not submitted. (*Id.*, p. 135). The initial report dated September 26, 2013 was "the report I initially prepared after the testing and then it was discovered that the Boston Police had essentially given me the wrong date of the incident when they submitted the evidence. I then prepared a corrected report. The only difference on that report being a different date of incident." (*Id.*). The date of the "incident" on the initial report was May 26, 2013. (Id.) Although the analysis was done in September 2013, the date of the certificate admitted (Exhibit 10) was April 4, 2014, which Ms. Rimkus testified was the mistake of the BPD. (*Id.*). When asked whether she knew whether Boston Police gave her the correct sample at all, Ms. Rimkus testified: "I only know the information they supply me with when they submit the evidence." (*Id.*, p. 136).

The Government's closing began: "A couple of days ago I stood before you and told you that the government would prove to you over the course of this trial that Barry Spencer is a drug dealer." (Tr. April 23, 2015, p. 6). He soon thereafter stated: "I submit to you that Barry Spencer is a drug dealer…" (*Id.*) Closing out his argument, the prosecutor said: "Use your common sense. You know it when you see it. And what you saw here is, based on all the evidence that's presented, a drug dealer, Barry Spencer, helping another drug dealer, Michael Morrison, in order to sell crack cocaine." (*Id.*, p. 21).

After closing arguments and jury instructions, defense counsel told the Court that the defendant "has a problem with the fact that the first drug analysis was dated on May 28th [sic] as opposed to the day of the actual incident." (Tr. April 23, 2015, p. 59). The defendant also renewed his motion for judgment of acquittal. (*Id.*, p. 60). The jurors were discharged to deliberate at 10:40 a.m. (*Id.*, p. 61).

At 1:18 p.m., the jurors came back with a question: "Dear Judge: With respect to the certificate of drug analysis, we possess a copy of the, quote, 'corrected, end quote, certificate. Is there a signed, slash, notarized copy of the original?" (*Id.*, p. 62). The district court responded to the jurors that the original certificate was not in evidence. (*Id.*)

The jurors at 2:34 p.m. asked for clarification of the terms "distribution" and "aiding and abetting" on which the judge instructed them further. (*Id.*, p. 64). At 3:30 p.m., the jurors asked to "read the statement slash testimony from Detective Casallas, if possible." (*Id.,* p. 65). The district court replied that a transcript of his testimony had not yet been prepared. (*Id.*). At 4:03 p.m., the jury returned the guilty verdict. (*Id.*).

4. Facts Relevant To Post-Trial *Brady* Proceedings

On May 14, 2015, the defendant filed a pro se "Renewed Motion for Required Finding Of Not Guilty Or, In the Alternative For a New Trial." (A156). One basis for the motion was that the Government had not revealed that Ms. Rimkus' certificate of analysis had been changed to "correct" the alleged incident date, and that this information was exculpatory and also could be used as impeachment evidence. (Id.). In its Reply to this Motion, the Government referenced and attached an April 9, 2014 memorandum that it sent to the defense "attaching the corrected Drug Certification and explaining that the original certificate contained a clerical error regarding the date of the underlying sale." (A170).

On May 19, 2015, the district court held a hearing on the motion. After arguing his position, the trial prosecutor asserted: "there was absolutely nothing untoward about asking them – the lab – if I called the Boston Police Department and told them to change the date…" (A223). The court interjected: "Wait a minute. You called them to tell them to change the date." (A224). The prosecutor asserted: "I told them there was a clerical error in the drug certificate." (Id.) In arguing against the allowance of the motion, the trial prosecutor asserted:

> So, the date of the drugs was based on the date of the drugs and all of the documentation that was generated the drugs - - at the time that the drugs were entered into evidence in the Boston evidence management system, and that's why as soon as I made that phone call, I sent an email to them telling them about the fact that there was a clerical error on the drugs, because the drug lab would have no basis for knowing one way or the other…if I called the Boston Police Department and told them to change the date, that would - - God knows, that would be wrong, and I would never do that, but the evidence as to where those drugs came from, came from the Boston Police Department, not from the State Police Crime Lab, which all they do is take the drugs in and test them, and all she was saying was these are the drugs I got in this case. These are the drugs, I tested,

> and this is an amount of crack cocaine and cocaine base, and the authenticity of that exhibit came exclusively from the officers who were involved and put it into the system. And that's what happened. That's why I did what I did and, quite frankly, if I had it to do over again, I would do exactly the same thing, which is ask them to correct it and disclose to the defense that I did it and that it was corrected and that's exactly what I did in this case." (A225-26).

The district court issued an order on June 4, 2015, in which it outlined that Mr. Spencer's first trial resulted in a mistrial and his second trial resulted in a conviction after five and a half hours of deliberation. (A229). The court noted that in cross-examination at the second trial, it "became clear [Ms. Rimkus] had actually prepared two reports – one that incorrectly listed Spencer's arrest date as the date the drugs were purchased, and another showing the correct purchase date." (*Id.*). "The jury paid attention to this evidentiary issue, asking for a copy of the original, uncorrected report during its deliberations." (A230).

The court stated at the May 19, 2015 hearing, the trial prosecutor "told the court that he personally called the chemist and asked her to revise her report. This was clearly news to defendant and his counsel, who had no knowledge of the AUSA's involvement in altering what would become a trial exhibit. The government's own filings showed that the only disclosure made to the defense was a three-line memorandum transmitting an 'updated certification…that corrected a clerical error. Docket #232-1." (A230).

The court stated: "That the government did not disclose its involvement in revising a key exhibit until after the second jury trial is troubling. To determine whether this conduct rises to the level of a *Brady* violation, the court will hold an evidentiary hearing…" (A230). Following the initial hearing, Mr. Spencer moved to dismiss the indictment. (A230). The Government filed a response to the Court's order in which it claimed that no *Brady* violation had occurred. (A238).

On July 2, 2015, the district court held an evidentiary hearing on the *Brady* issue. At this hearing, Ms. Rimkus testified. (A266) The original drug certificate was introduced into evidence. (A269). According to Ms. Rimkus, the "date of incident" is the "date that the police took ownership of the evidence. So the date on which it was seized or purchased." (A269-70). After completing the report, she received a call from the trial prosecutor in which he said "he thought that the incident date on the certificate was inaccurate." (A270). In response to Mr. Wortman's call, Ms. Rimkus called the "Boston Police Department's drug repository to confirm the date of the incident." (A272). She did not recall to whom she spoke. (*Id.*) But she gave that person "the cc number, the Boston Police incident number, and inquired as to what the date of incident in their record was, and they told me that the date of the incident was March 20th." (*Id.*). Ms. Rimkus then issued a "corrected report." (A273).

According to notes prepared by Ms. Rimkus, on April 3, 2014: "[c]onversation with AUSA John Wortman indicated that incident date provided on the SP-295 is incorrect. Called BPD evidence unit, who confirmed that the incident date for cc number 130164540 is 3/20/2014. Changed incident date in LIMS and issued corrected report." (A276). Ms. Rimkus' notes also indicated that she faxed a copy of the (original) certificate to Mr. Wortman on November 19, 2013. (A279).

On cross-examination, Ms. Rimkus acknowledged that she had not spoken with Officer Flaherty who initially submitted the drugs for analysis. (A284). She testified that she did not resubmit the drugs. (A284). She testified that she did not resubmit the drugs so that they could be returned with appropriate forms; the "protocol" was simply to "make a phone call and talk to somebody that [she didn't] know." (A285). Ms. Rimkus testified: she did not know why the sample had a May 26 date; did not know that Mr. Morrison had been arrested in May 2016; and did not know what happened with that sample. (A296-97). She also did not know "if any other samples [were] mixed up out of that whole operation that were grabbed in May, if that was switched with this sample right here." (A297).

At the hearing, the defense argued that this chain of custody issue was important to the jury – in fact, it had asked a specific question about it. (A302). The Government argued that the person at the drug depository simply put the wrong date on a form. (A306). The court noted that "errors like that raise doubts…And that's the issue. That's the issue for the defendant and that's the issue that the defendant was not fully able to develop at trial because he didn't know about it." (A307). The Government argued that the evidence relating to the change in the certificate was not material, and the "only thing that did not come out at trial was, in fact, that it was Mr. Wortman who made the phone call." (A310).

Defense counsel countered that "what really might have made a difference with the jury when this came up is, had I known, you know, that Mr. Wortman called Ms. Rimkus and said, Gee, you have the wrong date here, I mean, that might have created more doubt because there clearly was an issue, as you know, in the jury's mind about the chain of custody and, you know, that may well have made a difference to them." (A310-311). The defendant added that the chemist's notes also were not turned over to the defense prior to trial. (A311).

After the hearing, the Government moved to file a post-hearing memorandum. (A313). On July 10, 2015, the district court judge issued an order in which it stated that it was not convinced that a *Brady* violation did not occur, and ordered the Government to turn over the email that the prosecutor referenced in the May hearing to the effect that he emailed BPD after calling Ms. Rimkus. (A324).

On July 30, 2015, the Government submitted a responsive document. (A327). In it, it pointed to an email from Ms. Rimkus to Mr. Wortman in which she states that she was working on a "corrected report re: the incident date…" (A328). The Government stated that the prosecutor "misspoke" at the May hearing. (A328). The Government acknowledged that there were "three" pieces of information that the defendant did not have until after his second trial: the contact from the AUSA, Ms. Rimkus' contacting BPD and speaking to a person unknown and changing the date and the notes of the chemist. (A330). Of course, as shown in the response itself the emails between the prosecutor and Ms. Rimkus also were not produced until after the second trial. The Government acknowledged that it had a duty to disclose both exculpatory and impeachment evidence favorable to the defense. (A332), but claimed that there was no *Brady* violation. The defendant objected to the Government's submission. (A358).

On October 5, 2015, the district court issued a Memorandum of Decision. It began:

> Over two years ago, Boston Police officers arrested Barry Spencer.
> The charge: two months before his arrest, he allegedly was the lookout for a $20 sale of .15 grams of cocaine. Somehow, this case, which arose from a city-level investigation, found its way to federal court. The government ultimately indicted Mr. Spencer for distributing and conspiring to distribute cocaine base, and he was tried to a jury in June 2014. After deliberating for two days, the jury declared itself to be deadlocked. In an unsolicited letter to the court next week, one of the jurors explained that "the total case…seemed unfair. Unjust. Wrong.' Docket # 161. But the government persisted. The second trial, in April 2015, resulted in a guilty verdict on both counts after the jury deliberated for five and a half hours."

(A371).

The court discussed the procedural history of the case and found that "defendant has not shown a reasonable probability that the result of the trial would have been different had the government disclosed the information about the correction prior thereto. This order, however, does not imply approval of the government's conduct in this case." (A373).

The court found: "On September 17, 2013, after the First but before the Second Superseding Indictment, the Boston Police submitted the substance that Mr. Morrison had sold to the undercover officer to the State Drug Lab for certification. The sample was delivered by an unidentified officer along with a tracking form, called an SP295. The SP295 indicates that the sample was the result of a 'Seizure' that occurred on '5/26/13" at 4:17 AM. Docket # 258-1 at 6. This raised two problems: first, the sample was not obtained by a seizure, but rather a 'purchase,' which was another option on the form; and second, it was obtained on March 20, 2013, not May 26, which was the date of Mr. Spencer's arrest." (A375-76).

The court found that on September 26, 2013, Ms. Rimkus issued a Certificate of Drug Analysis which, "like the SP295, stated that the 'date of incident' for the substance that had been analyzed was May 26, 2013…" (A376.). The district court noted that apparently, while preparing for trial, the trial prosecutor "called Ms. Rimkus to inform her of his belief that the date of incident on the Certificate of Drug Analysis was wrong." (A376). Ms. Rimkus then called BPD's evidence unit to "confirm the incident date…The person who picked up her call told her the correct date was March 20, 2013. This unnamed source did not tell her where the new, purportedly 'correct' information came from and did not send her any documentary evidence to support the correction." (A377). According to Ms. Rimkus' contemporaneous notes of the call, the correct incident date was March 20, <u>2014</u>. (A377, n. 6).

The next day, Ms. Rimkus sent the AUSA the email referenced above that the lab was working on writing a corrected report…" Later that day, she mailed the new Certificate to the AUSA showing a March 20, 2013 incident date. "The AUSA forwarded the corrected certificate to defendant and his counsel on April 9, 2014, describing it as 'an update[d] certification from the State Police Lab that corrected a clerical error regarding the date of the underlying purchase." (A377)

The district court found that at that point in time, "defendant and his counsel…did not know about the call from the AUSA to Ms. Rimkus, nor did they know about her call to the BPD. They did not have her official call log reflecting these conversations, and they did not have copies of her emails with the AUSA. The only explanation they had for the two Certificates was the AUSA's statement that there had been a 'clerical error' in the report." (A377).

The court noted that the first trial resulted in a deadlocked jury and subsequent mistrial. (A378). The district court then provided details of the cross-examination of Ms. Rimkus by defense counsel at the second trial. (A378-79). The court found that about three hours after deliberating, the jury sent a question "asking, '[w]ith respect to the certificate of drug analysis, we possess a copy of the, 'corrected' certificate. Is there a signed/notarized copy of the original?" (A378).

The court noted that in the initial May 2015 hearing on the *Brady* motion, the defendant claimed that "someone called Ms. Rimkus and told her to alter her Certificate of Drug Analysis, but he did not know where the call came from or who placed it. That is, until the AUSA responded…" to the effect that he had made the call and then sent an email. (A380-81).

The court found that the "revelations in the AUSA's narrative were troubling. First, it was troubling that the AUSA might have directed the alteration of a Certificate of Drug Analysis based only on his view of chain of custody. Second, even if the AUSA merely instructed Ms. Rimkus to look into the suspected error, his indication that he also emailed the Boston Police Department suggested impropriety in the handling of the evidence. And finally, after a cursory review of the relevant documents, it became clear that the AUSA's characterization of the error as 'typographical' or 'clerical' was not entirely accurate…[these] errors are generally understood to be obvious mistakes for which the correction is immediately apparent from the document itself, but a viewer of the uncorrected Certificate would have no way of knowing that any error existed, let alone how to correct it. Taken with the AUSA's indignant assurances that he 'would do exactly the same thing again,' I deemed it appropriate to hold a through evidentiary hearing…" (A381-82) (citations omitted).

The court noted that in the leadup to the hearing, the Government produced a "Case Conversation Log Report" on June 16, 2015 – two months after the second trial ended. (A382). At that time, the government did not produce the aforementioned emails between the prosecutor and Ms. Rimkus. (A382).

The district court detailed Ms. Rimkus' testimony at the evidentiary hearing. The court found it "troubling that the drug lab apparently did not require documentation before changing a sworn report. But more troubling was the absence of any testimony about the AUSA's communications with the Boston Police Department after his call to Ms. Rimkus…" (A383). The court found that the Government, after searching emails and finding none to BPD, stated that the prosecutor "misspoke" at the May 2015 hearing. (A384).

The Court set out the legal standard for determining whether *Brady* would require a new trial, namely requiring that a defendant show a reasonable probability that had the government disclosed the information prior to trial, the result of the proceeding would be different. (A385). The district court specifically found that the "call log is favorable to defendant…both the AUSA's close involvement in the Certificate's preparation and the questionable recordkeeping within the State Drug Lab and the BPD may well have called Ms. Rimkus' conclusions into doubt. It has particular relevance given the jury's question about chain of custody, the proof of which depended largely on the documentation implicated in the instant motion." (A385). The court found that the government had a duty to make this evidence available to the defense because "Ms. Rimkus was acting as a member or agent of the prosecution team." (A387-88).

The court went on to find, however, that the defendant's argument on prejudice "fails, but only by the narrowest of margins." (A389). The court found that the cc number assigned by the State Police was on the evidence sent to Ms. Rimkus at the lab. (A389). "Regardless of the date on the SP295, that control number associates the sample purchased from Mr. Morrison on March 20, 2013 with the sample that tested positive for crack cocaine at the lab. Even if defendant had been able to cast doubt on the SP295 and incident date on the corrected Certificate of Drug Analysis, no reasonable jury could have concluded, in light of the control number records, that the chain of custody was broken…" (A389)

The district court also found that "there is little doubt that evidence regarding the AUSA's involvement in the preparation of the corrected Certificate of Drug Analysis would have been favorable to the defendant. For example, it might have been used to paint Ms. Rimkus as sloppy, at best, or a pawn of the prosecution, at worst." (A390). The court found that there was "no question that the government suppressed them by failing to tell the defense the full story about why the Certificate was corrected." The court ultimately found again that the government "could have relied only upon the control number to show the chain of custody and integrity of Miss Rimkus' results. No reasonable jury could have doubted that the sample delivered to Ms. Rimkus was the same one purchased from Mr. Morrison on March 20, 2013." (A390)

REASONS FOR GRANTING THE PETITION

This Court should grant Mr. Spencer's petition because the First Circuit ignored the teachings of this Court as it relates to Fifth Amendment violations resulting from the withholding of exculpatory information from a criminal defendant and the resulting prejudice. It also should grant the petition to resolve an issue that has resulted in a circuit split as to whether police officers should be allowed to testify as "experts" without being designated as such. Finally, this Court should grant the petition to address the standard to which a criminal defendant is held when he seeks discovery on a vindictive prosecution claim.

A. This Court Should Grant The Petition Because The First Circuit's Opinion Ignores This Court's Precedent As To The Requirement For A New Trial When A *Brady* Violation Is Found

The district court specifically (and correctly) found that Rimkus' call log "is favorable to defendant…both the AUSA's close involvement in the Certificate's preparation and the questionable recordkeeping within the State Drug Lab and the BPD *may well have called Ms. Rimkus' conclusions into doubt. It has particular relevance given the jury's question about chain of custody*, the proof of which depended largely on the documentation implicated in the instant motion." (A385) (emphasis added). Moreover, on the issue of the AUSA's involvement in having the drug certificate altered, the district court found: "there is little doubt that evidence regarding the AUSA's involvement in the preparation of the corrected Certificate of Drug Analysis would have been favorable to the defendant. For example, it *might have been used to paint Ms. Rimkus as sloppy, as best, or a pawn of the prosecution, at worst*." (A390) (emphasis added).

Despite the above, both the district court and the First Circuit found that Mr. Spencer had not established the prejudice prong of a *Brady* violation. In order to establish prejudice, a defendant who has been denied exculpatory evidence needs to show "a reasonable probability that had the government disclosed the evidence prior to trial, the result of the proceeding would have been different." *United States v. Flores-Rivera*, 787 F.3d 1, 15-16 (1st Cir. 2015) (internal quotations and citation omitted). Importantly, the defendant need not show that it is more likely than not that an acquittal would have resulted, but instead: "Answering that question requires that we determine whether a trial held in the absence of such evidence can be described as a trial that can produce a verdict worthy of confidence. This somewhat Delphic 'undermine confidence' formula suggests that reversal might be warranted in some cases even if there is less than an even chance that the evidence would produce an acquittal." *Id.* at 16 (internal quotations and citations omitted).

In this case, the district court found that the prejudice prong failed, "but only by the narrowest of margins." (A389). But it is difficult to imagine how Mr. Spencer was not prejudiced where the district court specifically found that the withheld evidence may have called Ms. Rimkus' "conclusions into doubt" (A385) and "might have been used to paint Ms. Rimkus as sloppy, as best, or a pawn of the prosecution, at worst." (A390). In a prosecution where the Government needed to establish both chain of custody and that the material allegedly seized was in fact crack cocaine, the district court's findings which strongly cast doubt on both the process and conclusion indeed establish the "undermining confidence" standard. If prejudice cannot be established where not only the process but the ultimate conclusion are cast into doubt, then there really is no meaning to the standard.

The district court and ultimately the First Circuit, *Spencer*, 873 F.3d at 11, found that the control number on the evidence means that no reasonable jury could have concluded that the chain of custody was broken or that the sample supplied to Ms. Rimkus was not the same one purchased from Mr. Morrison. (A389-390). But placing "infallibility" on a control number usurps the invaluable role of the jury in making the ultimate conclusions on the evidence. For example, the jury itself had to evaluate the credibility of several testifying officers to determine whether indeed the package was: (a) purchased by the undercover officer Casella from Mr. Morrison; (b) given to Detective Keenan; (c) delivered by Detective Keenan to Officer Flaherty; (d) assigned a control number on that day by Officer Flaherty; (e) was never removed or changed between March 20, 2013 and September 2013 when it was allegedly tested by Ms. Rimkus. Where defense counsel effectively had attacked the credibility of the officers and the lack of evidence implicating Mr. Spencer (no video, no exchange of money, no drugs exchanged by Mr. Spencer, no arrest on the day of the alleged incident), the jury also could conclude that the "control number" was also insufficient to establish that the alleged materials were indeed crack cocaine.

There are additional factors that further establish a lack of confidence in the outcome. First, a jury on the same basic testimony was unable to reach a verdict at the first trial and obviously the Government's case troubled at least one juror who specifically wrote to the district court. If Mr. Spencer were allowed to impeach Ms. Rimkus at that trial, the result likely would have been different and he would have been acquitted.

Second, Ms. Rimkus' testimony itself established serious deficiencies in the lab's alleged "protocol." Upon receiving the call from the AUSA, she called an (unnamed and unidentified) person in the BPD evidence unit to "verify" the AUSA's claim that the original report was wrong. (A276). She testified that she did not send the alleged drugs back to BPD to be resubmitted with "corrected" forms and that the "protocol" was simply "to make a phone call and talk to somebody that [she didn't] know." (A285). Moreover, Mr. Morrison (the pleading co-defendant) had been arrested alone in May 2013, on a crack distribution case by the same undercover team, and she did not know "if any other samples [were] mixed up out of that whole operation that were grabbed in May, if that was switched with this sample right here." (A297).

Third, the jurors themselves considered the chain of evidence issue important. After about three hours of deliberations at the second trial, the jury sent out a question: "With respect to the certificate of drug analysis, we possess a copy of the 'corrected' certificate. Is there a signed/notarized copy of the original?" (A379). If the jurors knew that the material was submitted with a form with a different "incident date" and that the chemist changed her initial report at the behest of the AUSA with no real fact-checking, it simply would - - as the district court found - - call into question both her "conclusions" and her credibility where she could be viewed as either "sloppy" or a "pawn" of the Government.

In short, the mere fact that the "control number" on the package was the same as another alleged report generated by the BPD does not establish the infallibility of the chain of custody and/or results. It was within the jurors' province - - at both trials - - to determine whether they could rely on the officers and Ms. Rimkus. The withheld evidence undermines the confidence in the outcome of the trial and thus Mr. Spencer's conviction cannot stand.

The First Circuit's failure to find that prejudice ensued here flies in the face of this Court's opinion in *Kyles v. Whitley*, 514 U.S. 419 (1995). In that case, this Court reversed a murder conviction where the prosecution had not provided various pieces of information to the defendant. This Court discussed the government's failure to disclose inconsistent statements made to the police and to the prosecutor himself by a certain informant named "Beanie" who did not testify at trial. Despite Beanie not testifying at all, this Court found: "Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. By the State's own admission, Beanie was essential to its investigation and, indeed, 'made the case' against Kyles." *Id.* (emphasis added).

Here, Ms. Rimkus was the only witness who could make the case against Mr. Spencer in identifying the substance allegedly seized by Mr. Morrison as cocaine. The withheld information would have allowed Mr. Spencer to significantly question the chain of custody of the alleged drugs. Moreover, as in *Kyles*, and as found by the district court, the prosecutor's involvement in the changing of the drug certificate could have cast doubt on the reliability of Ms. Rimkus' findings and in fact also called into question "the thoroughness and even good faith of the investigation, as well." *Id. See also United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) (failing to disclose that police reports which contained an "identical error to a critical piece of evidence certainly raises the opportunity to attack the thoroughness, even good faith, of the investigation."). Being able to impeach Ms. Rimkus in this regard was especially important in light of Mr. Spencer's theory that the police engaged in sloppy and bad faith investigative techniques. A continuation of this sloppiness and lack of good faith could have caused the jury to question whether there was any valid evidence against Mr. Spencer <u>at all</u>. Indeed, a juror after the first mistrial specifically wrote to the judge to categorize the case as "unfair. Unjust. Wrong." Add. 18).

The undisclosed conversation between the prosecutor and chemist, if disclosed, also would have helped Mr. Spencer attack the credentials of a novice chemist who apparently found it sufficient to merely call the Boston Police and talk to an "unknown" person and then change the date on the drug certificate without any further investigation or follow-up. Mr. Rimkus' credentials could have been far more effectively on cross-examination had the Government revealed what occurred. *Cf. McCormick v. Parker*, 821 F.2d 1240 (10th Cir. 2016) (state had a duty to disclose that a witness misrepresented her certifications even when the prosecution had no notice of such).

In these circumstances, the First Circuit's failure to acknowledge the prejudice established by Mr. Spencer and to grant him a new trial in the circumstances should be addressed and remedied by this Court. Failure to do so results in a violation of Mr. Spencer's Fifth Amendment rights to due process.

B. This Court Should Grant The Petition To Resolve A Circuit Split Concerning Whether Police Officers May Provide The Jury With "Expert" Testimony Without Being Qualified As Such

As asserted above, the evidence against Mr. Spencer was quite sparse. There was no evidence that he himself possessed drugs on the day of the alleged incident or solicited Officer Casellas (or anyone else for that matter). There was no video or audio of the alleged transaction. Even on Officer Casellas' testimony, Mr. Spencer simply could have told Mr. Morrison of a potential "customer," not implicating Mr. Spencer as a criminal.

To combat this lack of evidence that tended to establish Mr. Spencer's innocence, the Government was allowed, over objection, to introduce the officers' interpretation of events as opposed to the basic facts. Officer Keenan's testimony that he's "often seen people working together selling drugs" and that it "happens all the time" was irrelevant to Mr. Spencer's case. Because of the lack of direct evidence, the jury was allowed to convict Mr. Spencer simply based on observations by Detective Keenan in other cases. Similarly, allowing Officer Casellas to testify to his interpretation of the terminology of being "on" was unfairly prejudicial because it allowed the jury to assume that Mr. Spencer's response meant he himself knew the meaning of "on" as it related to selling drugs instead of just relating the facts. Finally, stating that Mr.

Spencer was engaged in "counter-surveillance" while merely standing at a bus stop and looking away usurped the role of the jury who could have evaluated just the factual testimony without the officer's prejudicial gloss.

None of the testifying officers were qualified as experts. Nevertheless, the Appeals Court held that these officers were allowed to give "opinion" testimony pursuant to Fed.R.Evid. 701. *Spencer*, 873 F.3d at 14. That rule allows a non-expert witness to testify as to her opinion if that opinion is: "(a) rationally based on the witness' perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."

Rule 701 does not apply to the testimony admitted in error here. First, all of the objected to testimony was not "rationally based on the witness's perception." Instead it went beyond perception of the events in question and was "general" testimony based on the officers' experience in investigating drug transactions. Second, the officers were allowed to testify to their years of experience in investigating drug transactions which set them up as having "specialized knowledge within the scope of Rule 702." Indeed, the Government argued that the officers needed to testify about "tandem drug deals," "counter-surveillance" and "the 'on' jargon" because the jurors themselves apparently would not be expected to know the meaning of these things.

As Judge Lipez pointed out in the concurrence in *United States v. Valdivia*, 680 F.3d 33, 60 (1st Cir. 2012) (footnote omitted):

> As the Seventh Circuit has aptly noted, the explicit language of Rule 702 sets forth a bright line rule. If a witness has acquired "specialized knowledge" on the basis of "knowledge, skill, experience, training or education," and presents that knowledge to a jury "in the form of an opinion or otherwise," that witness is testifying as an expert witness, Fed.R.Evid. 702, who is subject to the disclosure requirements for expert testimony. In the absence of such disclosure, opposing counsel are denied an opportunity

> to secure their own experts or immerse themselves in the area of expertise and develop a meaningful cross-examination. The result may be the presentation of expert testimony by a lay witness whose reliability is not meaningfully tested.

The Seventh Circuit has explicitly rejected the reasoning of the First Circuit that was set out in *United States v. Ayala-Pizarro*, 407 F.3d 25, 28-29 (1st Cir. 2005), and cited by the First Circuit in its opinion in Mr. Spencer's case. "First, we note that the Advisory Committee Notes to Rule 701 themselves cite with approval *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir.1997), for the proposition that law enforcement testimony that particular conduct is consistent with drug trafficking should be viewed as expert testimony within Rule 702, because to view it as lay testimony 'subverts' the disclosure requirements for expert testimony. Fed.R.Evid. 701 (Advisory Committee's Note). We also conclude that *Ayala-Pizarro* confuses the Note's reference to the kind of "particularized knowledge" that a lay person may have of the value of their own business with the kind of "specialized knowledge" that brings testimony within Rule 702. The business owner has knowledge of his own business *in the particular;* a narcotics officer who draws on his broad experience, acquired from his observations outside of this particular case, relies on his *specialized* knowledge of drug trafficking to draw conclusions about the particular case. Finally, under the First Circuit's reading of the Rules in *Ayala-Pizarro*, a substantial argument could be made that anyone who acquires broad knowledge of a topic through *direct experience* would qualify as a lay witness; Rule 702 itself, however, specifically defines a witness' qualification as an *expert* to arise because of "knowledge, skill, *experience*, training or education." Fed.R.Evid. 702 (emphasis added)." *United States v. Oriedo*, 498 F.3d 593, 603 n. 10 (7th Cir. 2007). *See also United States v. Garcia*, 413 F.3d 201(2nd Cir. 2005) (agent's testimony that defendant was a "partner" of a drug associate not admissible under Rule 701).

The prejudice in this case by allowing in this *sub rosa* "expert testimony" is apparent. In a weak case against Mr. Spencer (indeed on in which the first jurors could not reach a verdict), the Government filled in the interstices with objected-to testimony that Mr. Spencer's non-criminal activities were the workings of a "drug dealer." The prejudice was further magnified in the prosecutor's opening and closing arguments that Mr. Spencer was indeed a "drug dealer." *See United States v. Richards*, 719 F.3d 746 (7th Cir. 2013) (prosecutor's repeated references to the defendant as a "drug dealer" violated Fed. R. Evid. 404(b) by improperly suggesting that the defendant had a propensity to deal drugs.) In combination, the objected-to "expert" testimony and considered with the unfair prosecutorial comments establish that Mr. Spencer has been unfairly prejudiced and should receive a new trial.

C. This Court Should Grant The Petition To Clarify What Showing A Criminal Defendant Must Make To Obtain Discovery On A Vindictive Prosecution Claim

The First Circuit found, quoting from *United States v. Bucci*, 582 F.3d 108, 113 (1st Cir. 2009), that Mr. Spencer was required to "advance some evidence tending to establish [a] vindictive prosecution claim" before he was entitled to discovery on the issue. *Spencer*, 870 F.3d at 16. *Bucci*, 582 F.3d at 113, itself derived this standard from this Court's opinion in *United States v. Armstrong*, 517 U.S. 456, 468 (1996).

It is clear even from the First Circuit's own opinion that Mr. Spencer did advance some evidence when seeking discovery on his vindictive prosecution claim. Mr. Spencer had filed a lawsuit against Detective Keenan in 2006. (A60). Of all potential cases, Mr. Spencer believed that his referral for federal prosecution (in this $20 alleged "deal") was motivated by his having filed the lawsuit against Detective Keenan and other officers in which he alleged the detective had "assaulted, unlawfully searched and arrested without probable cause." (*Id.*). Mr. Spencer asserted, based on grand jury testimony, that it was Detective Keenan who directed the undercover officer to approach Mr. Spencer on March 20, 2013. (*Id.*).

According to the prosecutor, he was "advised of the pendency of the suit by Sgt. Det. Keenan after the USAO agreed to adopt the case in the meeting with the Suffolk County District Attorney's Office but prior to the case being charged." (A61-62). But that representation does not explain why the Suffolk County District Attorney's Office - - presumably handling very many larger "drug distribution" cases - - decided to refer Mr. Spencer's very minor case, with weak evidence, for federal prosecution. Having presented "some" evidence that his referral for federal prosecution was motivated as a way to "punish" him for his previous lawsuit, the magistrate judge and/or district court should have allowed the discovery requested by Mr. Spencer.

Moreover, although the magistrate judge and district court did not have the benefit of the district court's findings on the *Brady* violation, those findings lend credence to Mr. Spencer's allegations that he was specifically targeted for federal prosecution based on his prior lawsuit. It seems inexplicable that the Government would be so motivated not to reveal exculpatory evidence and to pursue a costly second trial after a hung jury in a $20 crack case. Indeed, as the district court later found:

> Somehow, this case, which arose from a city-level investigation, found its way to federal court. The government ultimately indicted Mr. Spencer for distributing and conspiring to distribute cocaine base, and he was tried to a jury in June 2014. After deliberating for two days, the jury declared itself to be deadlocked. In an unsolicited letter to the court next week, one of the jurors explained that "the total case…seemed unfair. Unjust. Wrong.' Docket # 161. *But the government persisted*….(A371) (emphasis added).

The First Circuit conflates the prosecutor's representation that he was motivated by reasons other than the vindictiveness of the officer that had been sued with the requirement that

Mr. Spencer produce some evidence. *Spencer*, 873 F.3d at 16-17. This Court should grant the petition to address that issue and clarify that Mr. Spencer made a sufficient showing.

CONCLUSION

For the reasons set forth above, the petitioner, Barry Spencer, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

BARRY SPENCER

By his counsel,

/s/Karen A. Pickett

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