No. 23-_____

In the Supreme Court of the United States

JOSHUA JAMES DUGGAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the exclusion of relevant evidence of an alternative perpetrator based on a trial court's conclusion it is too speculative violate a criminal defendant's constitutional right to present a complete defense?

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit

No. 22-2178

United States of America, *Plaintiff-Appellee,* v.
Joshua James Duggar, *Defendant-Appellant.*

Date of Final Opinion: August 7, 2023

Date of Rehearing Denial: September 28, 2023

U.S. District Court, Western District of Arkansas

No. 5:21-CR-50014

United States of America, *Plaintiff,* v.
Joshua James Duggar, *Defendant.*

Date of Final Judgment: May 27, 2022

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

OTHER DOCUMENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Joshua James Duggar petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit (App.1a-14a) is reported at 76 F.4th 788. The order denying rehearing *en banc* (App.75a) is unreported. The district court's order (App.27a-62a) denying Petitioner's motion for acquittal or, in the alternative, a new trial is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on August 7, 2023. A timely petition for rehearing *en banc* was denied on September 28, 2023. A timely application to extend the time to file a petition for a writ of certiorari was granted by Justice Kavanaugh on December 15, 2023, extending the time to file this petition until February 25, 2024. (Sup. Ct. No. 23A554). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Article III, § 2, cl. 3

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. amend. VI

> 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. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same 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.

INTRODUCTION

More than 50 years ago, this Court explained, "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). But that right rings hollow when a defendant seeks to introduce evidence that someone else committed the crime for which he is on trial, but the trial court prevents the jury from hearing it because the judge—not the jury—concludes the alternative perpetrator evidence is relevant but too speculative.

This case presents an important and recurring question that has divided the courts of appeal and that strikes at the heart of the Sixth Amendment: does the exclusion of relevant evidence of an alternative perpetrator based on a trial court's conclusion it is too speculative violate a criminal defendant's constitutional right to present a complete defense?

The text of the Constitution is clear. Article III, § 2, cl. 3, of the United States Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury[.]" The Sixth Amendment echoes: "In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury[.]"

And this Court has generally been steadfast in insisting that juries—not judges—make factual determinations that can result in stripping a defendant of liberty. Indeed, this Court recently held that the principle that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty" is a "*promise*" that "stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019) (emphasis added). Moreover, it is settled that the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984)). And the right to present a complete defense necessarily encompasses the right to introduce evidence and testimony that tends to "show that someone else committed the crime[.]" *Id.* at 327.

To that end, the Compulsory Process Clause of the Sixth Amendment "embodies a substantive right to present criminal defense evidence before a jury." *Taylor v. Illinois*, 484 U.S. 400, 422 (1988) (Brennan, J., dissenting). That Clause "necessarily encompasses the right to present witness testimony, for the right to compel a witness's presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness's testimony heard by the trier of fact." *Anderson v. Groose*, 106 F.3d 242, 246 (8th Cir. 1997) (citing *Taylor*, 484 U.S. at 407-09). It is the jury, not the judge, who must "decide where the truth lies." *Washington*, 388 U.S. at

19. "The Compulsory Process clause protects the presentation of the defendant's case from unwarranted interference by the government, be it in the form of an unnecessary evidentiary rule, a prosecutor's misconduct, or an arbitrary ruling by the trial judge." *Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 445 (3d Cir. 1992).

However, notwithstanding the overlapping textual guarantees of a trial by jury, the Sixth Amendment right to present a complete defense, and the Sixth Amendment right to compel and present defense witnesses and evidence to a jury, an exception has reared its head in some parts of the country: the courts of appeal are divided as to when evidence that the crime charged may have been committed by someone else may be presented to the jury.

In this case, the Eighth Circuit affirmed the district court's decision to effectively prohibit Mr. Duggar from calling a potential alternative perpetrator to the witness stand to introduce what the district court concluded would amount to "speculative"—*but relevant*—testimony that might confuse the jury. *See* App.4a.

This decision draws the Eighth Circuit squarely into conflict with the Ninth Circuit Court of Appeals, which has repeatedly held, "That the defense's theory may be speculative is not a valid reason to exclude evidence of third-party culpability." *United States v. Espinoza*, 880 F.3d 506, 517 (9th Cir. 2018). *See also United States v. Stever*, 603 F.3d 747, 754 (9th Cir. 2010) ("[T]he district court is not free to dismiss logically relevant evidence as speculative"); *United States v Vallejo*, 237 F.3d 1008, 1023 (9th Cir. 2001) ("Even if the defense theory is purely speculative, as the district court characterized it, the evidence would

be relevant"); *United States v. Crosby*, 75 F.3d 1343, 1349 (9th Cir. 1996) (If "the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt") (alterations in original) (quoting 1A John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 139 (Tillers rev. 1983)). The bottom line is that, in the Ninth Circuit, "it is the role of the jury to consider the evidence and determine whether it presents 'all kinds of fantasy possibilities,' as the district court concluded, or whether it presents legitimate alternative theories for how the crime occurred." *Vallejo,* 237 F.3d at 1023.

Thus, a defendant charged in the nine states and Guam that encompass the Ninth Circuit has a Constitutional right to present relevant evidence that someone else may have committed the crime charged even if a district court characterizes that evidence as "speculative." But for Mr. Duggar and every other defendant charged in six federal appellate circuits, that right does not exist.

In issuing the decision below, the Eighth Circuit joins the First, Second, Fourth, Fifth, and Tenth Circuits in concluding that a trial court may exclude so-called "speculative" evidence of third-party culpability without violating a defendant's constitutional right to present a complete defense to the jury. *See, e.g., DiBenedetto v. Hall*, 272 F.3d 1 (1st Cir. 2001); *Wade v. Mantello*, 333 F.3d 51 (2d Cir. 2003); *United States v. Lighty*, 616 F.3d 321 (4th Cir. 2010); *Caldwell v. Davis*, 757 F. App'x 336 (5th Cir. 2018); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir.

1998). (It appears the Third, Sixth, Seventh, Eleventh, and D.C. Circuits have not definitively weighed in.)

Thus, if this Court does not intervene, defendants charged in 25 states and Puerto Rico *do not* have the right to present relevant evidence that someone else committed the crime charged if a trial court characterizes that evidence as "speculative." And defendants charged in 9 states and Guam *do* have the right to present that same evidence to a jury. In the rest of the country, it will depend on which side of the circuit split a particular district court chooses to side in any given case.

This is far too important an issue for there to be a divergence based only on where venue lies for a particular federal criminal case. But as it stands, there is an acknowledged and deep split among the circuits as to when evidence of an alternative perpetrator may be excluded from trial for being too "speculative." This case presents the perfect vehicle to resolve the circuit split and to avoid further deviating decisions from lower courts on an issue that strikes at the heart of the right to a trial by jury and the opportunity to present a complete defense when charged with a crime.

This Court's review is also warranted because the question presented is of great significance. As this Court stated in *In re Winship*, 397 U.S. 358, 362 (1970), "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." This Court has explained, "The beyond a reasonable doubt standard is a requirement of due process[.]" *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). The Government "must prove every ingredient of an offense beyond a reasonable doubt, and . . . *it may not*

shift the burden of proof to the defendant[.]" *Patterson v. New York*, 432 U.S. 197, 215 (1977) (emphasis added). "As a result, in contested-identity cases, the Constitution requires that the prosecution prove that the defendant—and not somebody else—committed the act in question. Conversely, the defendant cannot be required to prove a third party's guilt to some defined threshold of probability." David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337, 397 (2016). But in six federal circuits, a criminal defendant must prove to a certain "non-speculative" degree that someone else committed the crime in order to introduce relevant evidence of a potential alternative perpetrator. This turns the constitutional guarantee of the right to a jury trial and the concomitant Sixth Amendment right to present a complete defense on its head.

Finally, review is warranted because the decision below is plainly incorrect. At trial, Mr. Duggar did not dispute that a crime had been committed, but maintained his innocence and did everything in his power to establish reasonable doubt by demonstrating that a specific alternative perpetrator may have been to blame. While requiring a defendant to come forward with some amorphous non-speculative evidence is unconstitutional, Mr. Duggar proffered to the district court concrete facts making clear that the potential that the crime had been committed by someone else was far from speculative. Courts should trust juries to decide what is, and is not, pure speculation. But in this case, it was the judge—not the jury—that made the ultimate decision.

Petitioner respectfully requests that this Court grant review.

STATEMENT OF THE CASE

A. Factual Background and Proceedings in the District Court

In May 2019, the United States Department of Homeland Security ("DHS HSI") identified an internet protocol (IP) address allegedly participating in the sharing of child pornography. DHS HSI subpoenaed the internet service provider and ultimately associated the IP address with Wholesale Motorcars, a used car business owned by Petitioner Joshua Duggar.

During the Government's pre-indictment investigation, law enforcement did not speak with former Wholesale Motorcars employee Caleb Williams or investigate him as a potential perpetrator (App.88a-91a), analyze any of Mr. Williams' devices (App.106a-107a), or consider that Mr. Williams, who regularly used the only device in this case that had child pornography on it, was tech savvy and sent Mr. Duggar a text message on May 7, 2019 offering to "watch the lot" during the following week, which was significant because the crimes in this case were committed by someone between May 14, 2019 and May 16, 2019. App.145a-149a. Mr. Williams was also a convicted sex offender. App.149a.

The Government's case-in-chief consisted of certain fact witnesses and one expert witness: James Fottrell ("Fottrell"), a computer forensics expert. The prosecution theory boiled down to a simple premise: Mr. Duggar

was physically present at the Wholesale Motorcars lot on certain dates and times close in proximity to the dates and times child pornography was downloaded. The evidence was undisputed that no trace of child pornography ever existed on any of Mr. Duggar's personal devices and that the only device on which child pornography was located was an HP desktop computer located in the office at Wholesale Motorcars that was utilized by numerous employees to sell vehicles and transact business.

During Mr. Duggar's case-in-chief, computer forensics expert Michelle Bush ("Bush") testified. She testified that her forensic examination revealed—contrary to the Government's theory—that the child pornography on the HP desktop could have been downloaded by a remote user of the computer. App.136a-137. She described that Universal Plug and Play ("UPnP") was enabled, meaning the computer was connected to a router that was the equivalent of a house with every door unlocked—something Bush had never seen in more than 500 forensic examinations. The Government's expert agreed this would make the network vulnerable.

Bush and Fottrell agreed every video at issue in this case was "streamed" and Fottrell admitted he could not rule out the possibility the videos were viewed on another device. App.98a. Bush testified the combination of UPnP and streaming was unique and that there is no good reason someone with regular access to a computer would use such methodology. App.140a-141a.

The Government had moved to "exclude third party guilt evidence" in advance of trial, but the district court denied the Government's motion, noting

Mr. Duggar "is entitled to create reasonable doubt in the jury's minds by pointing the finger at others who may have possibly committed the crimes." App.70a.

Accordingly, throughout trial, Mr. Duggar aimed to cast reasonable doubt on the Government's case by introducing evidence that other people had the access and opportunity to commit the crimes charged and to suggest that a more thorough investigation would have proved fruitful. Beginning with his opening statement, Mr. Duggar explained to the jury that law enforcement failed to consider anyone other than Mr. Duggar as the perpetrator of the crimes and entirely overlooked the possibility that the person who committed these crimes did not necessarily need to be physically present on the car lot. Mr. Duggar specifically noted in his opening statement that Caleb Williams worked at Wholesale Motorcars, regularly used the HP computer, was extremely tech savvy, and sent Mr. Duggar a text message on May 7, 2019 offering to "watch the lot" during the coming week. App.84a-85a.

Mr. Duggar adduced evidence that law enforcement failed to meaningfully investigate Mr. Williams as a potential perpetrator (App.87a-91a); that law enforcement never analyzed any of Mr. Williams' devices (App.106a-107a); presented evidence through both his expert and the Government's expert witness that the HP computer could have been accessed by someone not physically present at the car lot (App.97a-106a; 136a-142a); offered evidence through both experts that the images and videos found on the computer had been "streamed" as opposed to viewed locally by simply double-clicking the file (App.125a-135a; 107a-108a); introduced evidence that Mr. Williams regularly used the HP computer (App.92a-97a); notified

the district court that the Government had withheld critical evidence concerning Mr. Williams (App.109a-125a); and proffered that Mr. Duggar was prepared to introduce, through Williams, text messages between Mr. Williams and Mr. Duggar suggesting Mr. Williams' presence at the car lot around the relevant time period (App.146a). Further, Mr. Duggar proffered that if he were permitted to call Mr. Williams as a witness, Mr. Duggar would establish that Mr. Williams:

- previously worked at Wholesale Motorcars in various capacities;
- was listed on a March 27, 2019 sales contract as the salesperson at Wholesale Motorcars;
- would demonstrate familiarity with the HP computer and certain software on it;
- had involvement with non-business-related eBay sales and utilized the HP computer to print shipping labels;
- sent a text message to Mr. Duggar on May 7, 2019: "[s]hould be able to help you a couple days this week [happy face] watch the lot";
- spent the night one mile away from Wholesale Motorcars on May 9, 2019;
- took a photo of Mr. Duggar using a MacBook laptop in the Wholesale Motorcars office; and
- concealed all metadata on documents he provided to the Government in support of his denial that he was on the lot.

App.145a-149a. The Government responded, "[T]he only obvious reason why the defense is wanting to call him is because he's a sex offender." App.149a.

Mr. Duggar attempted to call Mr. Williams—whom Mr. Duggar served with a trial subpoena and who was physically present at the district court pursuant to that subpoena—to testify. App.143a-155a.

However, the district court ruled that Mr. Duggar would only be permitted to ask Mr. Williams whether he was present on the car lot on May 13 through May 16 and if he ever "remoted in" to the office machine. App.152a-153a. The district court ruled that if "he wasn't present on the lot" and "assuming he testifies that he's never remoted in, that's as far as you are going to get and the Court would find in that instance under 403 that the 609 conviction that you have discussed should not be allowed, because at that point, the primary purpose or objective of calling the witness will have failed, and the Court is not going to allow speculative testimony that he was the alternative perpetrator." App.153a.

In reaching this conclusion, the district court cited *Holmes v. South Carolina*, 547 U.S. 319 (2006), reading directly from the opinion:

> The critical inquiry concerns the strength of the prosecution's case. If the prosecution's case is strong enough, the evidence of third-party guilt is excluded, even if that evidence, if viewed independently, would have great probative value, and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

App.151a.

After the ruling that Mr. Duggar would not be permitted to adduce "speculative" testimony that Mr. Williams was a viable alternative perpetrator and

that his responses could not be impeached with his prior conviction, Mr. Duggar was forced to choose not to "call Caleb Williams for the very limited purpose that the Court would allow us to." App.154a.

The jury ultimately returned a verdict of guilty. App.81a-82a. Mr. Duggar timely filed a motion for a new trial, explaining that the portion of *Holmes* the district court relied upon was an explanation of what this Court concluded was an *unconstitutional* rule—*not* its holding.

Recognizing its error, the district court claimed in its Order denying Mr. Duggar's motion for a new trial to have "highlighted several passages from one of the relevant cases—*Holmes v. South Carolina*—and inadvertently read the wrong passage into the record during the sidebar conference." App.50a. But the record reveals the district court's statement at sidebar was not an isolated misreading of *Holmes*—it was the second time the district court mistakenly relied on that portion of *Holmes* in deciding to preclude Mr. Duggar from presenting a complete defense.

The day before the sidebar, the district court held an on-the-record in-chambers conference during which the issue was discussed. There, the district court explained it would consider "this concept that the greater the strength of the evidence of the government pointing to the defendant relative to the strength of this nexus, that that weighs into part of the Court's analysis as to whether it will include or permit or exclude that." App.121a. The district court noted, "I have no idea what Caleb Williams is going to say, so I'm not going to say that Caleb Williams can't be called as a witness. But I am going to say that I will not let him testify to anything speculative." App.121a.

The district court then concluded: "if he says he wasn't there, you can't talk about what happened." App.121a.

Thus, the record reveals the district court consistently applied the unconstitutional standard invalidated by *Holmes* in deciding Mr. Duggar would be effectively precluded from calling a necessary witness and presenting a complete defense.

Attempting to distance itself from its misunderstanding of, and misplaced reliance on, *Holmes*, the district court claims to have reached its decision to limit Mr. Duggar's ability to present a complete defense on the notion that evidence of Mr. Williams' access and opportunity to commit the crimes was too "speculative." App.51a-52a. The district court then denied Mr. Duggar's motion. App.27a-62a.

On May 27, 2022, the district court entered its Judgment, sentencing Mr. Duggar to 151 months' imprisonment on Count One and dismissing Count Two. App.15a-26a.

B. Proceedings in the Eighth Circuit

Mr. Duggar timely appealed. On appeal, as relevant here, Mr. Duggar argued the district court violated his constitutional right to present a complete defense by effectively precluding him from calling and, if necessary, impeaching Mr. Williams at trial. Mr. Duggar argued the district court's ruling constituted an arbitrary ruling in violation of Mr. Duggar's constitutional rights and was based, in large part, on the district court's misunderstanding of this Court's decision in *Holmes*.

The decision below correctly acknowledges that, in excluding Mr. Duggar's evidence of an alternative

perpetrator, "the district court slipped up along the way" by discussing "'the strength of the prosecution's case' as a factor weighing against the admission of alternative-perpetrator evidence." App.5a. However, the decision below concluded the error was harmless as "[t]he district court later clarified that it had actually 'relied on' the weaknesses in *Duggar*'s evidence and the risk of confusion, not the strength of the government's case." App.6a (emphasis in original).

The decision below then concluded the district court's decision to exclude "speculative" testimony of a potential alternative perpetrator was not error because "[t]he right to present a complete defense, in other words, does not trump a district court's discretion to keep out confusing or misleading evidence, even if it would be helpful to the defense." App.5a. In other words, the decision below affirmed the district court's decision to limit Mr. Duggar's ability to present evidence, not because the evidence was irrelevant, but because the evidence—according to the district court—was too weak and speculative, which might have confused the jury.

Mr. Duggar sought rehearing *en banc* but was denied. App.75a. Mr. Duggar timely petitions for review from this Court.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS A PERFECT VEHICLE TO RESOLVE THE CIRCUIT SPLIT

The courts of appeal expressly disagree on an important and recurring question that strikes at the heart of the Sixth Amendment: does the exclusion of relevant evidence of an alternative perpetrator based on a trial court's conclusion it is too speculative violate a criminal defendant's constitutional right to present a complete defense? Had he been federally prosecuted in one of the nine states or Guam that encompass the Ninth Circuit, Mr. Duggar's conviction would have been reversed.

In *Espinoza*, the Ninth Circuit reversed a conviction where the district court excluded evidence of an alternative perpetrator due to the judge's conclusion that the defense theory was "all speculation." *United States v. Espinoza*, 880 F.3d 506, 517 (9th Cir. 2018). There, the defendant—charged with importation of methamphetamine—had

> sought to present evidence from which the jury could conclude that her next-door neighbor knew she frequently traveled to the United States; knew that her car was parked on the street; knew how to obtain methamphetamine; was unable to drive across the border himself because of a prior deportation; set up Urias Espinoza as a "blind mule" to transport the methamphetamine into the United States; and then fled his home after he discovered that Urias Espinoza had been arrested.

Id. at 510. The district court excluded the evidence "on the ground that the defense's theory of what happened was too speculative." *Id.*

On appeal, the Ninth Circuit noted that the excluded evidence would have aided the defendant in demonstrating that her neighbor had the opportunity, motive, and knowledge to use her as a "blind mule." *Id.* at 517. Concluding that reversal was warranted, the court explained, "[t]hat the defense's theory may be speculative is not a valid reason to exclude evidence of third-party culpability." *Id.* And the Ninth Circuit has unfailingly applied this same rationale whenever confronted with this issue.

In *Vallejo*, the Ninth Circuit reversed a conviction where evidence of an alternative perpetrator was excluded, explaining:

> Even if the defense theory is purely speculative, as the district court characterized it, the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore:
>
> [I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.
>
> Accordingly, it is the role of the jury to consider the evidence and determine whether it presents "all kinds of fantasy possibilities," as the district court concluded, or whether it

> presents legitimate alternative theories for how the crime occurred.

United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001) (internal citations omitted).

Stated simply, the Ninth Circuit flatly rejects the notion that a defendant must establish, without resort to some speculation, that the crime charged was committed by someone else. *See, e.g., United States v. Stever*, 603 F.3d 747, 754 (9th Cir. 2010) ("the district court is not free to dismiss logically relevant evidence as speculative"); *United States v. Crosby*, 75 F.3d 1343, 1347-48 (9th Cir. 1996) ("The excluded evidence could thus have caused the jury to develop a reasonable doubt by suggesting that someone other than the defendant was in a position to have beaten [the victim], that a competent investigation might have identified that person, and that [the victim] was lying when she pointed the finger at Crosby").

Conversely, the First, Second, Fourth, Fifth, Eighth, and Tenth Circuits conclude that so-called "speculative" evidence of third-party culpability may be excluded without violating a defendant's constitutional right to present a complete defense.

In *DiBenedetto v. Hall*, the First Circuit concluded, "Evidence that tends to prove a person other than the defendant committed a crime is relevant, but there must be evidence that there is a connection between the other perpetrators and the crime, not mere speculation on the part of the defendant." 272 F.3d 1, 8 (1st Cir. 2001).

In *Wade v. Mantello*, the Second Circuit explained, "The potential for speculation into theories of third-

party culpability to open the door to tangential testimony raises serious concerns[.]" 333 F.3d 51, 61 (2d Cir. 2003).

In *United States v. Lighty*, the Fourth Circuit noted, "When determining whether evidence of an alternative perpetrator should be admitted at trial, courts have found that such evidence 'is relevant, but there must be evidence' of a 'connection between the other perpetrators and the crime, not mere speculation on the part of the defendant.'" 616 F.3d 321, 358 (4th Cir. 2010) (quoting *DiBenedetto*, 272 F.3d at 8).

In *Caldwell v. Davis*, the Fifth Circuit explained, "[B]ecause evidence of an alternative perpetrator is often 'remote and lack[s a] connection with the crime,' it 'may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial.'" 757 F. App'x 336, 340 (5th Cir. 2018) (quoting *Holmes*, 547 U.S. at 327).

In *United States v. McVeigh*, the Tenth Circuit noted,

> [C]ourts must be sensitive to the special problems presented by "alternative perpetrator" evidence. Although there is no doubt that a defendant has a right to attempt to establish his innocence by showing that someone else did the crime, a defendant still must show that his proffered evidence on the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between

> the crime charged and the asserted "alternative perpetrator." It is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime.

153 F.3d 1166, 1191 (10th Cir. 1998) (citation omitted).

And with the decision below, the Eighth Circuit concluded the district court's decision to exclude "speculative" testimony of a potential alternative perpetrator was not error because "[t]he right to present a complete defense, in other words, does not trump a district court's discretion to keep out confusing or misleading evidence, even if it would be helpful to the defense." App.5a.

In the circuits where a criminal defendant does not have the right to present evidence that someone else committed the crime charged if a district court concludes the evidence is relevant but too speculative, the burden has effectively shifted to the defendant to convince the district court the evidence is compelling. But that is plainly unconstitutional. *See, e.g., Patterson*, 432 U.S. at 215 (the prosecution "must prove every ingredient of an offense beyond a reasonable doubt, and . . . *it may not shift the burden of proof* to the defendant[.]") (emphasis added).

This Court should intervene to address the clear, deep, and entrenched circuit split on this issue that strikes at the heart of a criminal defendant's Sixth Amendment rights. If this Court does not intervene, defendants federally charged in 25 states and Puerto Rico *do not* have the right to present relevant evidence that someone else committed the crime charged if a trial court characterizes that evidence as "speculative."

Defendants charged in 9 states and Guam *do* have the right to present that same evidence to a jury. And in the rest of the country, it will depend on which side of the circuit split a particular district court chooses to side in any given federal criminal case. That the circuit split is well delineated and that several circuits have not yet chimed in underscores that this Court's intervention is warranted. This case presents an excellent opportunity for resolving this issue.

More than 25 years have elapsed since the courts first split from one another—*see McVeigh*, 153 F.3d at 1191 (10th Cir. 1998), and *Crosby*, 75 F.3d at 1349 (9th Cir. 1996)—and no court on either side of the circuit split has indicated a willingness to switch sides. Thus, as to this fundamental issue of profound constitutional importance, only this Court's intervention can end the impasse.

II. THE QUESTION PRESENTED IS IMPORTANT

This is a circuit split that affects core constitutional rights: the right to a trial by jury, the right to present a complete defense at that trial, the right to compel witnesses and have the jury consider the testimony of those witnesses, and the right to have a jury, not a judge, make factual determinations relevant to a finding of guilt. And on a more fundamental level, this is a circuit split that continues to inflict actual harm on actual people.

One side of the circuit split reflects a fundamental distrust of juries. But "the Constitution itself long ago made the decision that juries are to be trusted." *Jackson v. Denno*, 378 U.S. 368, 405 (1964) (Black, J., dissenting). And this Court's recent jurisprudence has consistently corrected course where, as here, lower

courts have attempted to take power away from juries and give that power to judges. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), for example, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Thirteen years later, this Court extended the *Apprendi* rule to any fact that increases a statutory minimum sentence. *Alleyne v. United States*, 570 U.S. 99, 103 (2013). And writing for a plurality in *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019), Justice Gorsuch emphasized that "any increase in a defendant's authorized punishment contingent on the finding of a fact requires a jury and proof beyond a reasonable doubt no matter what the government chooses to call the exercise" (internal quotations omitted).

That principle—that a jury is the unambiguous finder of fact in a federal criminal case—cannot be squared with the premise that a criminal defendant may not introduce relevant evidence to a jury that someone else may have committed the crime charged unless he convinces a trial judge the evidence is not speculative. But a defendant has no burden of proof.

Juries are to be trusted. And if a defense theory really is too speculative, it will be rejected by the jury. But that is, at its core, a question for the jury, *not* the judge. And it is not just any question:

> [I]n a criminal case where the occurrence of the crime is conceded and the defendant claims that he is not the perpetrator, the question of 'who did it' is the central, indeed the only issue, in the case. Evidence tending

> to show that a person other than the defendant committed the crime is always relevant to that central question. To suggest that such evidence *confuses* the issues is so illogical that it warrants an automatic reversal where a court excludes third-party guilt evidence on this basis.

Schwartz & Metcalf, *supra*, at 370 (emphasis in original).

Ultimately, there are few principles so deeply embedded within federal criminal law as the right to present relevant evidence that may establish that someone other than the person on trial committed the crime charged—and to have a jury, not the judge, weigh that evidence. As Justices Gorsuch, Ginsburg, Sotomayor and Kagan recently reinforced in the plurality opinion in *Haymond*, "one of the Constitution's most vital protections against arbitrary government" is that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." 139 S. Ct. at 2373. And as emphasized in the dissenting opinion in *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting), "[w]hen this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy." Thus, "depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged—can never be harmless." *Id.* (emphasis in original).

Now, a defendant charged in six circuits has the burden of establishing to a trial judge that evidence someone else committed the crime charged is both

relevant and non-speculative. And this case illustrates just how high that bar is. At trial, Mr. Duggar was prepared to adduce evidence clearly establishing the perpetrator did not have to be physically present at the car lot to commit the crime charged (App.97a-106a; 136a-142a), that Mr. Williams regularly used the computer at issue (App.92a-97a), that Mr. Williams formerly worked at Wholesale Motorcars and was familiar with the computer at issue including by using it for non-business-related purposes (App.145a-149a), that Mr. Williams sent a text message offering to "watch the lot" close to the relevant timeframe at issue (*id*.), that Mr. Williams spent the night one mile away from Wholesale Motorcars on May 9, 2019 (*id*.), and that Mr. Williams concealed all metadata on documents he provided to law enforcement in this case (*id*.). On top of all of that, there was no dispute that Mr. Williams was "a sex offender." App.149a. But that was not enough to get the evidence before the jury.

Because the constitutional right to present a complete defense to a jury is fundamentally at stake and because the courts of appeal are divided, the question presented by this case is an important one that this Court should tackle head on.

III. THE DECISION BELOW WAS WRONGLY DECIDED

Consistent with the Ninth Circuit, the Eighth Circuit should have concluded there is no requirement that a defendant present "'substantial evidence' establishing a link between the third-party and the crime" as a "threshold requirement for the admissibility of third-party culpability evidence." *Espinoza*, 880 F.3d at 517. "[I]t is the role of the jury, [and not the district court] to consider the evidence and determine whether it presents all kinds of fantasy possibilities . . . or

whether it presents legitimate alternative theories for how the crime occurred." *Id.* (quoting *Vallejo,* 237 F.3d at 1023).

But even if preventing a defendant from introducing "speculative" testimony concerning an alternative perpetrator can be squared with the Constitution, the evidence Mr. Duggar sought to present to the jury in this case was anything but speculative.

Mr. Duggar's expert testified that the child pornography on the HP desktop could have been downloaded by a remote user of the computer. App.136a-137. Both experts agreed every video at issue in this case was "streamed" and the Government's expert admitted he could not rule out the possibility the videos were viewed on another device. App.98a.

Throughout trial, Mr. Duggar attempted to cast reasonable doubt on the Government's case by adducing evidence that other people had the access and opportunity to commit the crimes charged and to suggest that a more thorough investigation would have proved fruitful. Mr. Duggar adduced evidence that law enforcement failed to meaningfully investigate Mr. Williams as a potential perpetrator (App.87a-91a); that law enforcement never analyzed any of Mr. Williams' devices (App.106a-107a); presented evidence through both his expert and the Government's expert witness that the HP computer could have been accessed by someone not physically present at the car lot (App.97a-106a; 136a-142a); offered evidence through both experts that the images and videos found on the computer had been "streamed" as opposed to viewed locally by simply double-clicking the file (App.125a-135a; 107a-108a); introduced evidence that Mr. Williams regularly used the HP computer (App.92a-97a); notified

the district court that the Government had withheld critical evidence concerning Mr. Williams (App.109a-125a); and proffered that Mr. Duggar was prepared to introduce, through Mr. Williams, text messages suggesting Mr. Williams' presence at the car lot around the relevant time period (App.146a). On top of all of that, Mr. Duggar proffered that he would establish through Mr. Williams' testimony that Mr. Williams:

- had worked at Wholesale Motorcars in various capacities;
- would demonstrate familiarity with the HP computer and the software on it;
- had utilized the HP computer to print shipping labels;
- sent a text message to Duggar on May 7, 2019: "[s]hould be able to help you a couple days this week, happy face, watch the lot";
- spent the night one mile away from Wholesale Motorcars on May 9, 2019;
- took a photo of Mr. Duggar using a MacBook laptop in the Wholesale Motorcars office; and
- concealed all metadata on documents he provided to the Government in support of his denial that he was on the lot.

App.145a-149a.

The bottom line is that this was not mere speculation. This was concrete evidence from which a jury could conclude that the Government had failed to prove Mr. Duggar guilty beyond a reasonable doubt. This would not have confused the jury; it would have provided the jury a more complete picture and caused

the jury to question the strength of the Government's case as to the core question at issue: who committed the crime charged? And had he been charged with the same crime in a district court situated within the Ninth Circuit, Mr. Duggar would have unquestionably been entitled to introduce this evidence at trial.

In this case, the Eighth Circuit had to overcome two hurdles to affirm the conviction: *first*, it had to find the district court did not plainly violate this Court's precedent in *Holmes*; and *second*, it had to come down on the side of a deepening circuit split that permits judges to withhold relevant alternative perpetrator evidence from a jury if the judge characterizes it as too speculative.

In *Holmes*, this Court found an evidentiary rule unconstitutional which focused on "the strength of the prosecution's case[.]" *Id.* at 329. In this case, the district court prevented Mr. Duggar from introducing alternative-perpetrator evidence, explaining at sidebar when Mr. Duggar sought to call a witness to the stand:

> *The critical inquiry concerns the strength of the prosecution's case*. If the prosecution's case is strong enough, the evidence of third-party guilt is excluded, even if that evidence, if viewed independently, would have great probative value, and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

App.151a (emphasis added). The rule this Court found unconstitutional in *Holmes* is the very rule on which the district court relied in making its decision in this case.

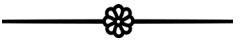
But in analyzing this issue, the Eighth Circuit concluded the "district court later clarified that it had actually 'relied on' the weaknesses in *Duggar*'s evidence and the risk of confusion, not the strength of the government's case." App.6a (emphasis in original). In coming to this conclusion, the decision below ignored entirely that the district court's statement was *not* an isolated misreading of *Holmes* but was the second instance in which the district court misconstrued *Holmes*. The day before, during an on-the-record in-chambers conference where this issue was addressed, the district court explained it would consider "this concept that the greater the strength of the evidence of the government pointing to the defendant relative to the strength of this nexus, that that weighs into part of the Court's analysis as to whether it will include or permit or exclude that." App.121a.

The decision below nevertheless concluded the district court did not do precisely what the district court twice contemporaneously explained it was doing—and the Eighth Circuit concluded "the district court slipped up along the way" but that "any error was harmless." App.5a-6a.

In doing so, the decision below deepened a circuit split as to the admissibility of alternative perpetrator evidence that is unambiguously relevant but that a trial judge determines is too speculative.

This case presents the perfect opportunity to clarify the law, to resolve the longstanding circuit split, and to give meaning to this Court's precedent that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Holmes*, 547 U.S. at 324 (quoting *Crane*, 476 U.S. at 690), and that this includes "the right to

present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies[,]" *Washington*, 388 U.S. at 19. By intervening in this case, this Court can and should decide a criminal defendant has a constitutional right to present evidence to a jury that someone else may have committed the crime charged—even if the trial court determines that evidence is speculative. After all, "it is the role of the jury to consider the evidence and determine whether it presents . . . legitimate alternative theories for how the crime occurred." *Vallejo,* 237 F.3d at 1023.



CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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