No._____

IN THE SUPREME COURT

OF THE UNITED STATES

GREGORY LEE RODVELT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Devin D. Huseby
Assistant Federal Public Defender
15 Newtown St.
Medford, Oregon 97501
(541) 776-3630
Attorney for Petitioner

QUESTIONS PRESENTED

1. Is a federal employee "engaged in . . . the performance of official duties" to sustain a conviction under 18 U.S.C. § 111 when there is no statutory authority for the employee's actions?
2. When the district court inadvertently discloses privileged information to the government and the government utilizes that privileged information to gain a strategic advantage at trial, are a criminal defendant's Fifth and Sixth Amendment Rights violated?

PARTIES TO THE PROCEEDINGS

Gregory Lee Rodvelt was the defendant/appellant in the proceedings below.

The United States of America was the plaintiff/appellee in the proceedings below.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

Other

No._____

IN THE SUPREME COURT

OF THE UNITED STATES

GREGORY LEE RODVELT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals
For The Ninth Circuit

Gregory Lee Rodvelt respectfully requests that a writ of certiorari issue to review the mandate of the United States Court of Appeals for the Ninth Circuit entered on July 17, 2025, affirming the judgment of conviction.

Introduction

This direct criminal appeal presents two exceptionally important questions that call for this Court's intervention. First, the defendant in this case was convicted of violating, 18 U.S.C. § 111, which applies to an assault

on an officer who is "engaged in . . . the performance of official duties." The FBI agent was shot by a modified rat trap while assisting local law enforcement in clearing a property on behalf of a state court receiver. In affirming Mr. Rodvelt's conviction, neither the district court nor the Ninth Circuit have identified any statutory or other lawful authority for the FBI agent's presence on the property in question. Instead, the lower courts deferred to the individual agent's practice of assisting local law enforcement agencies to determine the scope of his employment rather than determining the scope of the FBI's statutory authority. "Both [the] power [of an executive agency] to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*." *City of Arlington*, 569 U.S. at 297. Deferring to executive branch agencies to determine the scope of their authority runs afoul of this Court's recent rejection of executive law-making in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). It also results in the anomalous situation of granting executive agencies more deference in the criminal context than in the civil regulatory context. This turns the rule that penal statutes are to be construed strictly on its head and raises significant concerns regarding federalism, separation of powers, and the intersection of federal and state law enforcement responsibilities. "If the

separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce. "*United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting).

Second, the district court gave the defendant no remedy after inadvertently revealing the defendant's ex parte pretrial testimony to the government, allowing the government to gain an unfair advantage at trial from the improperly leaked information about the defense. This testimony went to the heart of the defense strategy at trial. The defense contends the district court's disclosure of this information constitutes compelled testimony as Mr. Rodvelt did not consent to the disclosure to the government. Moreover, the government's active use of that information to gain a strategic advantage violated Mr. Rodvelt's constitutional rights. The Ninth Circuit determined that the inadvertent disclosure was voluntary, and that the government was blameless as they did not actively seek the information.

Opinions Below

The United States District Court for the District of Oregon denied Mr. Rodvelt's motion to dismiss or for the recusal and sequestration of the prosecution team by minute order on May 23, 2023, with a written order following on May 25, 2023. Appendix B at 1-4. The district court orally denied Mr. Rodvelt's first motion for judgment of acquittal and by minute order on

June 28, 2023. Appendix B at 5-6. The Ninth Circuit affirmed the rulings of the District Court in an unpublished opinion on February 13, 2025. Appendix A at 1-9. The Ninth Circuit denied panel rehearing and rehearing en banc on July 9, 2025. Appendix C at 1.

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Relevant Statutory and Constitutional Provisions

I. Constitutional Provisions

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

> No person 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[.]

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of counsel for his defence.

II. Statutory Provisions

18 U.S.C. § 111 provides, in relevant part:

> **(a)In General.**—Whoever—
> **(1)** forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or

Statement of the Case

Petitioner Gregory Rodvelt was federally charged and convicted following a jury trial for assaulting a federal employee, in violation of 18 U.S.C. § 111(a)(1), (b) (Count 1), and using and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c)(1)(A)(iii) (Count 2). Mr. Rodvelt had been in a long-running state-court civil dispute regarding ownership of a rural property. The charges at issue here arose when a modified rat trap rigged on the property was inadvertently triggered, discharging a .410-bore shotgun shell loaded with birdshot, one pellet of which entered an FBI agent's leg, causing a minor injury. Mr. Rodvelt sought a judgment of acquittal on both charges, arguing that the FBI agent was not engaged in "official duties" when he was injured because no statutory authority allowed the officer to assist local authorities in a non-criminal, state matter. Mr. Rodvelt also sought dismissal or other remedies when the district court inadvertently revealed his ex parte pretrial testimony to the government, giving the prosecution an unfair trial advantage. As to both motions, the district court denied relief and the Ninth Circuit affirmed.

A. The Government Never Established that the FBI Agent's Actions were Statutorily Authorized.

In 2014, Gregory Rodvelt acquired title to a piece of rural property located on Dreamhill Drive, in Williams, Oregon (the Dreamhill Property). Two years later, a state court in Oregon entered a default judgment against Mr. Rodvelt in a civil lawsuit and ordered that the Dreamhill Property be sold. Mr. Rodvelt, unaware of the judgment, continued to reside at the Dreamhill Property.

In August 2018, the state civil court appointed a receiver to sell the Dreamhill Property. As the receiver prepared to sell the property, Mr. Rodvelt began to take actions to protect it. At the end of August 2018, the receiver visited the Dreamhill Property with a private investigator whose tires were punctured by a spike strip Mr. Rodvelt had placed on the driveway.

On September 3, 2018, Mr. Rodvelt left the Dreamhill Property for Arizona. Before leaving, he set up several items to discourage intruders. For instance, he parked a disabled van in front of the lower gate and placed a small animal snap trap under the van's hood and set a round hot tub to roll down the driveway like the stone in Indiana Jones if the upper gate were opened.

Mr. Rodvelt also rigged a rat trap to fire a .410 shotgun shell containing bird shot along the floor when triggered by an attached fishing line. Mr. Rodvelt testified the line was baited with meat in order to kill "varmints." He placed this device inside the house. A defense expert testified that the modified rat trap constituted "a fairly ineffective firearm" that would produce pellet velocities approximately one third as fast as a standard shotgun.

According to testimony at trial, after the investigator's tires were disabled, the receiver called the Josephine County Sheriff's Office to seek professional assistance in clearing the property of potential hazards. The Sheriff's Office declined to assist the receiver because "it was a civil matter." As a result, the investigator referred the receiver to a retired Oregon State Police (OSP) bomb technician, who contacted an active duty OSP bomb technician. An OSP supervisor approved a sweep of the property as "a public safety function" to assist with the "disposal of explosives and other hazards." A majority of calls that OSP bomb technicians handle are, like this one, "not to investigate a crime but to mitigate or address a harm."

According to national standards, bomb technicians in the United States are trained to work in pairs. There were three bomb technicians on the OSP

team but they wanted a fourth in order to have two pairs. They asked FBI Special Agent Bomb Technician Sellers to assist and he agreed.

On September 7, 2018, at 4:15 a.m., Agent Sellers notified his superiors that he was going to the Dreamhill Property to "assist OSP." The local FBI office "had no prior notice that he was going to be in the territory" and had no prior knowledge about Mr. Rodvelt or the Dreamhill Property. There was no active federal or state investigation. At that point, it was solely a state civil matter. In the notification email, in the place to denote which "FBI ongoing case" he was working on, Agent Sellers wrote "Unknown."

At the Dreamhill Property, the four bomb technicians swept the property for potential hazards, discovering and disabling several of the traps Mr. Rodvelt had set. None of the traps found posed a risk to human life, and one bomb technician testified that he thought the hot tub was "comical." When the bomb technicians entered the home, one bumped a wheelchair, which triggered the modified rat trap, discharging a single pellet of birdshot into Agent Sellers' leg. Agent Sellers went to the hospital to have the wound cleaned before stopping for snacks and returning to the Dreamhill Property.

After the close of the government's evidence during trial, the defense moved for judgment based on the fact Agent Sellers had not been engaged in his official duties as his decision to assist local law enforcement in a civil

matter did not fall within the FBI's enabling statutes and there was no other basis in law for his presence on the property. The district court rejected the motion orally. Appendix B at 11, 19. The defense renewed that motion at the conclusion of trial and it was again rejected. Appendix B at 5. The district court did not identify any statutory authority for Agent Sellers' actions.

On appeal to the Ninth Circuit, the panel affirmed the denial of Mr. Rodvelt's motion for judgment of acquittal. Appendix A at 1-9. The opinion did not reach the defense argument that Agent Sellers was acting outside the scope of his statutory authority. The panel instead reasoned that he was engaged in official duties because the mission was not a personal frolic. The panel referenced witness testimony that FBI bomb technicians regularly work with state law enforcement on "public safety missions" and that the agent had previously worked with state law enforcement on similar missions. Appendix A at 3.

B. The District Court's Inadvertent Disclosure of Mr. Rodvelt's Ex Parte Pretrial Testimony Gave the Government an Unfair Advantage at Trial.

During a hearing on Mr. Rodvelt's speedy trial motion, the district court properly allowed Mr. Rodvelt to testify ex parte so he would not have to sacrifice his Fifth and Sixth Amendment rights in order to pursue that motion. In his testimony, Mr. Rodvelt admitted to setting the shotgun shell

trap, but stated that he had baited the fishing line attached to the trap with meat in order to kill "varmints," not to target humans.

The district court later held a pretrial conference to resolve evidentiary issues, during which the district court disclosed portions of Mr. Rodvelt's pretrial testimony. For instance, the judge revealed that Mr. Rodvelt had testified that the modified rat trap was intended to target animals, not people:

> [I]n prior hearings, Mr. Rodvelt kind of shrugged off the danger of the device at issue as nothing more than a device to deter rats or other vermin. I mean, really, the manual and some of these other items show an interest well beyond, you know, the extermination of pests.
>
> * * *
>
> If his intent is at issue – you know, the traps being set for instance, for vermin, as he's testified in the past – then past attempts to set similar traps aimed at people would become relevant.

The judge also revealed to the government that, based on Mr. Rodvelt's pretrial testimony, the theory of the defense would not focus on identity:

> [I]t's really unclear to me whether the identity of who set the traps in Oregon is really at issue. I mean, I suspect it's not, given Mr. Rodvelt has made numerous admissions.

The judge further commented on Mr. Rodvelt's confidential testimony:

> And part of this is the reality that, in the past, Mr. Rodvelt has stated these are just animal traps. But, clearly, the statements and some of the evidence that the Government then is required to

> introduce really does go towards his intent towards humans and towards defending the property not against animals, against something else.

The government indicated that the district court's revelations changed its "assumptions" about the defense strategy: "[We] underst[and] the Court's thought that identity may not be an issue" but the "assumption throughout this case has been that identity is very much at issue." In response, the district court re-emphasized that an identity defense would not be consistent with Mr. Rodvelt's ex parte testimony stating that "my feeling was there were going to be enough statements by Rodvelt to cancel any idea that, you know, this is somebody else who set the traps."

Following the pretrial conference, the defense moved to dismiss the indictment based on the Fifth and Sixth Amendment violations caused by the disclosure, or in the alternative, to sequester the prosecution team. The district court had properly allowed Mr. Rodvelt to testify ex parte in support of a speedy trial motion so he would not have to sacrifice his Fifth and Sixth Amendment Rights in order to pursue the motion. *Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding that a defendant must receive immunity for testimony offered in pursuit of a pretrial constitutional right because "we find it intolerable that one constitutional right should have to be surrendered in order to assert another."). The defense argued that when the district court

disclosed Mr. Rodvelt's ex parte statements, those statements became compelled testimony as it was provided to the government without his consent and violated his Fifth and Sixth Amendment rights. In particular, the defense contended that under *Kastigar*, 406 U.S. at 460, the government bore the burden of proving no use or derivative use of the protected statements, which "is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." The district court denied that motion, holding that it was the court, rather than the government, that made the inadvertent disclosure and that the disclosures were not prejudicial. The case proceeded to trial with the same prosecution team as was present at the pretrial conference.

During trial, the government plainly acknowledged that it had shifted its trial strategy after learning the confidential information about Mr. Rodvelt's defense: "So once the Court denied the Defense motion [to dismiss based on the disclosures], and certainly after opening, we absolutely did a lot of shifting. And we're continuing to shift, with witnesses, what we're focusing on. So that's absolutely the case."

With respect to the defense argument that Mr. Rodvelt's Fifth and Sixth Amendment rights had been violated, the Ninth Circuit panel reasoned

that there was no Fifth Amendment violation because Mr. Rodvelt voluntarily provided the ex parte testimony to the district court and the Sixth Amendment was not violated because the prosecution passively received the confidential disclosures. Appendix A at 6-7.

Reasons for Granting the Petition

This Court should grant the writ of certiorari to resolve two issues of exceptional importance on which circuit authority has gone astray and has not adhered to this Court's clear mandates.

First, the statutory text of 18 U.S.C. § 111 applies only when a federal officer or employee is assaulted "while engaged in or on account of the performance of *official duties*." As a matter of straightforward statutory interpretation, a federal employee is not engaged in "official duties" unless their actions are within the limited statutory authority granted to federal agencies. The Ninth Circuit in this case and other circuits have interpreted § 111 to require only that the federal employee's actions be related to his agency's overall mission and that he not be engaged in a personal frolic. But that interpretation is not faithful to the statute's text and improperly expands criminal liability in cases where federal employees are acting without statutory authority. This Court should reaffirm that strict

construction of penal statutes is required, especially in a case like this that raises concerns with separation of powers, federalism, and lenity.

Second, this Court should hold that a defendant's constitutional rights are violated when the district court discloses confidential defense strategy to the government and the government then uses that information to gain a strategic advantage.

A. The Court Should Grant the Writ to Uphold the Plain Meaning of 18 U.S.C. § 111 and Affirm that Courts, Not the Executive Branch, Determines the Scope of Agency Authority.

A conviction under 18 U.S.C. § 111, requires that the federal employee assaulted be "engaged in . . .the performance of official duties." In *Feola*, 420 U.S. at 677 n.9, this Court explained that the statute was designed to protect federal functions and not just federal employees. Accordingly, based on the statute's plain meaning, a federal agent or employee is not engaged in "official duties" when their actions are not within the statutory powers that have been granted to the agency they work for. Unfortunately, lower courts have instead been focusing on whether the employee is engaged in a personal frolic. That focus is incomplete and it improperly expands the statute's criminal reach beyond its plain meaning.

In this case, the Ninth Circuit did not determine what statutory powers had been granted to the FBI or whether there was statutory authority for Agent Sellers' actions. Official duties are necessarily statutorily authorized duties for executive agencies do not have power to act without statutory authorization. *City of Arlington*, 569 U.S. at 297.

The FBI has narrow statutory authority to assist state and local law enforcement. *See* 28 U.S.C. § 540 (authority to assist state and local law enforcement in investigating killings of state or local law enforcement officers); § 540A (investigate crimes against travelers); 28 U.S.C. § 540B (investigate serial killers); and the National Security Act of 1947 endows the intelligence elements of the FBI to assist state and local law enforcement in matters involving counterterrorism and national security. Because Agent Sellers' assistance to state officers in a purely civil matter did not comport with that authority, he was not engaged in "official duties" as required by 18 U.S.C. § 111. The Ninth Circuit did not analyze, in any way, whether Agent Sellers' actions were statutorily authorized.

Instead, the Ninth Circuit determined that Agent Sellers had previously assisted state law enforcement on numerous occasions and that, as a matter of practice, FBI bomb technicians help local law enforcement on public safety missions. Because Agent Sellers was not engaged in a "personal

frolic," the panel reasoned he was therefore engaged in official duties. Appendix A at 3.

The panel's reasoning was incomplete because the determination that an officer was not on a personal frolic does not answer the question of whether his actions fell within the agency's statutory authority. The personal frolic standard has been incorporated into the commentary to the Ninth Circuit's model instruction 8.1 and notes that the test for whether an employee is engaged in "official duties" is "'whether the employee is acting within the scope of his employment, that is, whether the officer's actions fall within his agency's overall mission, in contrast to engaging in a personal frolic of his own.'" (quoting *United States v. Ornelas*, 906 F.3d 1138, 1149 (9th Cir. 2018)). The personal frolic standard makes its first appearance in the Ninth Circuit in a dissent. *United States v. Kartman*, 417 F.2d 893, 899 (9th Cir. 1969) (Carter, J. dissenting). In that case, the "personal frolic" test came after the dissenting judge already determined that the employee was engaged in "good faith action, *under color of authority*" rather than a "personal frolic" of his own. *Id.* (emphasis added). The use of the "personal frolic" standard answers only one part of the statutory analysis by confirming that the employee was not on personal business. But, when the personal frolic test is divorced from an analysis of whether the conduct was also within the

agency's statutory authority, it leaves the power to determine the scope of the federal criminal statute in the hands of the individual federal employee rather than with Congress and the judiciary.

Every Circuit has upheld a test based not on enabling statutes and statutory authority but on the overall mission of the agency and the personal frolic standard. As explained in *United States v. Troy*, 583 F.3d 20, 24–25 (1st Cir. 2009), the official duties test "turns on whether the federal officer is 'acting within the scope of what [he] is employed to do ... or is engaging in a personal frolic of his own.'"(quoting *United States v. Streich*, 759 F.2d 579, 584 (7th Cir. 1985), *cert. denied*, 474 U.S. 860 (1985) (quoting *United States v. Heliczer*, 373 F.2d 241, 245 (2d Cir. 1967), *cert. denied*, 388 U.S. 917 (1967)); *see also United States v. Juvenile Female,* 566 F.3d 943, 949–50 (9th Cir. 2009); *United States v. Colbert*, 70 F.3d 1263, 1995 WL 703546, at *1 (4th Cir. 1995); *United States v. Street*, 66 F.3d 969, 978 (8th Cir. 1995); *United States v. Clemons*, 32 F.3d 1504, 1507 (11th Cir. 1994), *cert. denied*, 514 U.S. 1086 (1995); *Lopez*, 710 F.2d at 1074; *United States v. Cunningham*, 509 F.2d 961, 964 (D.C. Cir. 1975); *United States v. Linn*, 438 F.2d 456, 458 (10th Cir. 1971); *Arwood v. United States*, 134 F.2d 1007 (6th Cir. 1943), *cert. denied*, 319 U.S. 776 (1943). That standard is incomplete and imprecise. The FBI's overall mission, or what an FBI agent is "employed to do," can be interpreted

to include many actions aimed at promoting the safety and security of the American people. An FBI agent's actions to promote safety are not a frolic. However, that does not mean the agent's actions fall within the scope of the FBI's enabling statutes. In this case, Agent Sellers was doing what he "is employed to do" in-so-far as he was working as a bomb technician, but that does not mean he was working as a bomb technician in a statutorily authorized investigation.

This is not to say that federal agents acting outside the scope of their authority are fair game for assault. They are entitled to the same considerable dignity and protection afforded to all citizens of the United States, as provided by federal, state, and local law. But the government is not entitled to invoke special protections for federal agents "engaged in . . . the performance of official duties," or the federal punishments for those who assault them, absent an authorized federal function.

The Ninth Circuit also looked to the agency's established practice to conclude that Agent Sellers was engaged in "official duties." But this Court has long held that agency practice, no matter how well established, cannot modify or defeat the language in a statute. *Webster v. Luther*, 163 U.S. 331, 342 (1896); *United States v. Alger*, 152 U.S. 384, 397 (1894) (where the

meaning of a statute is "clear, no practice inconsistent with that meaning can have any effect"). Neither Agent Sellers' opinion that he was acting within the scope of his authority nor his practice of assisting state law enforcement matters in the least in determining whether his actions fell within the scope of the FBI's authority.

It is not within a federal employee's purview to expand Congressional authority or to "say what the law is." *Loper Bright Enters.*, 603 U.S. at 369 (quoting *Marbury v. Madison*, 5 U.S. 137 at 177 (1803)). After filing the defense's opening brief in the Ninth Circuit, this Court issued its decision in *Loper Bright*. In the course of abrogating administrative deference under *Chevron*,[1] this Court resolved once and for all that, in construing criminal statutes, courts should not defer to administrative agencies but instead judges should independently apply the "traditional tools of statutory construction." *Loper Bright*, 603 U.S. at 396-97. The Court rejected implicit delegations of authority to agencies, recognizing that interpreting statutes "may fall more naturally into a judge's bailiwick" than an agency's. *Id.* at 401 (citing *Kisor v. Wilkie*, 588 U.S. 558, 578 (2019)). Agent Sellers may have believed he was working in his official capacity. He may have helped state

[1] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

and local law enforcement in the past, even routinely.[2] Neither the frequency with which he helped state officials nor his belief that it was a part of his official duties is evidence that his actions accorded with Congress's grant of statutory authority to the FBI, as required to constitute his "official duties" under § 111. Under the Ninth Circuit's reasoning, *ultra vires* executive action would be legitimized provided the executive agency acts outside Congressional authority with sufficient regularity. Such a position is incompatible with the separation of powers.

By construing § 111(a) to allow a federal agent's unilateral and *ultra vires* involvement in a state civil matter to become part of the agent's "official duties," the Ninth Circuit effectively expanded the scope of executive authority as well as the scope of the criminal laws written by Congress. This raises a host of separation of powers and federalism concerns. "By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power." *Nichols*, 784 F.3d at 670(Gorsuch, J., dissenting). "If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the

---

[2] Notably, the record did not indicate the precise circumstances of prior assistance, some or all of which may have involved overlapping federal jurisdiction falling under the FBI's statutory authority.

crimes he gets to enforce." *Id.* at 668 "No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington*, 569 U.S. at 297(emphasis in original). Now, as at the time of our founding, it is critical that our judiciary zealously protect the separation of powers and constrain executive authority to its statutory limits.

The Ninth Circuit's interpretation of § 111 also gives the statute unwarranted reach into purely local matters in contravention of the clear statement rule. Congress must speak clearly for a federal criminal law to intrude on local matters. *Bond*, 572 U.S. at 848. The constitutional structure affords the federal government limited powers, reserving the rest for the states and the people. *Bond*, 572 U.S. at 848. "Because our constitutional structure leaves local criminal activity primarily to the States," this Court "generally decline[s] to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach." *Id.; see also McDonnell v. United States*, 579 U.S. 550 (2016) (rejecting the government's "boundless interpretation" of the "official act" element of the federal bribery statute in light of "significant federalism concerns" that supported a narrower reading); *Sekhar v. United States*, 570 U.S. 729, 737

(2013) (holding that "property" under the Hobbs Act did not include a state employee's non-binding recommendation for a state agency to invest in a particular fund); *Cleveland v. United States*, 531 U.S. 12 (2000) (declining to extend the "property" element of the mail fraud statute to licenses held by the state in the absence of clear statutory language). *Kansas v. Garcia*, 589 U.S. 191, 212 (2020) ("From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today."). As relevant here, the legislative history of § 111 indicates that Congress' focus was on protecting federal actors *engaged in federal functions*. *Feola*, 420 U.S. at 677 n.9. But the Ninth Circuit has expanded it, without a clear statement, to reach circumstances in which a federal officer intrudes without authorization in a state civil matter.

This Court should grant the petition because, in looking at whether Agent Sellers was engaged in a "personal frolic," the Ninth Circuit ignored an important statutory element of 18 U.S.C. § 111—the federal employee is not engaged in "official duties" unless he or she is performing statutorily authorized federal functions. The Ninth Circuit is not the only circuit to lose focus on the enabling statutes of federal agencies when analyzing § 111. This Court should, in a criminal case, make clear what was announced in *Loper*

Bright, that the courts, not the executive agency, determine the scope of the law.

B. This Court Should Grant the Petition to Hold that a Criminal Defendant's Constitutional Rights are Violated when a Court Discloses Defense Strategy to the Government and the Government Utilizes that Information.

Mr. Rodvelt's Fifth and Sixth Amendment rights were violated when the district court inadvertently revealed his ex parte testimony to the prosecution. The Ninth Circuit's rejection of this claim was based on faulty logic and ignored Supreme Court precedent. First, when a defendant's statements provided under seal on an ex parte basis are provided to the government without his consent, those statements are compelled in violation of the Fifth Amendment. The panel in this case considered Mr. Rodvelt's ex parte testimony voluntary because it was provided *to the district court* without compulsion. The problem, however, is that Mr. Rodvelt did not voluntarily provide the statements *to the government*; he testified at the speedy trial hearing *only* with the court's guarantee that his statements would be protected from disclosure.

This Court has recognized that a defendant need not sacrifice one constitutional right to pursue another. *Simmons*, 390 U.S. at 394 ("[W]e find it intolerable that one constitutional right should have to be surrendered in

order to assert another."). For that reason, a defendant must receive immunity for testimony offered in pursuit of a pretrial constitutional right. *Id.* When Mr. Rodvelt's protected statements were provided to the government without his voluntary consent, they were compelled.

This case is much like the use immunity cases such as *Kastigar v. United States*, 406 U.S. 441 (1972), in which proof of an initial constitutional violation shifts the burden to the government to prove that it has not relied on the ill-gotten information. As the Ninth Circuit has explained:

> *Kastigar* . . . established a burden-shifting analysis that protects a criminal defendant against a violation of the Fifth Amendment by putting the burden of proof on the government that it did not use the privileged information. In the analogous context of protecting a defendant against a violation of the Sixth Amendment, we believe that the *Kastigar* analysis should also apply. The particular proof that will satisfy the government's "heavy burden," *Kastigar,* 406 U.S. at 462, 92 S.Ct. 1653, will vary from case to case, and we therefore cannot be specific as to precisely what evidence the government must bring forward. The general nature of the government's burden, however, is clear. As the Court stated in *Kastigar,* the mere assertion by the government of "the integrity and good faith of the prosecuting authorities" is not enough. *Id.* at 460, 92 S.Ct. 1653. Rather, the government must present evidence, and must show by a preponderance of that evidence, that "all of the evidence it proposes to use," and all of its trial strategy, were "derived from legitimate independent sources." *Id.* In the absence of such an evidentiary showing by the government, the defendant has suffered prejudice.

United States v. Danielson, 325 F.3d 1054, 1072 (9th Cir. 2003).

In this case, Mr. Rodvelt provided testimony under a functional grant of immunity—the promise of ex parte treatment—yet the government nevertheless obtained that testimony. Under the reasoning of *Kastigar*, the government's receipt of his protected testimony establishes a prima facie case that Mr. Rodvelt's rights were violated, which shifts the burden to the government to establish lack of prejudice.

The Ninth Circuit did not employ this burden shifting analysis based on the technicality that it was the district court that provided the information to the government rather than the government actively seeking it. The Ninth Circuit reasoned that because the government's receipt of the confidential information was passive, Mr. Rodvelt's Sixth Amendment rights were not violated.[3] The problem is that the government actively *used* the privileged information to alter their trial strategy, becoming an active participant in the violation of Mr. Rodvelt's Sixth Amendment rights. *Williams v. Woodford*, 384 F.3d 567, 585 (9th Cir. 2004) (noting that substantial prejudice can result from "the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution

[3] To the extent this Court's precedent does not reach this unusual factual scenario, that loophole must be closed. Whether a defendant receives a fair trial should not depend on whether it is the court, the government, or a combination of the two that violates his rights.

an unfair advantage at trial"). The government plainly acknowledged "shifting" its strategy after the pretrial motion in which it improperly learned of Mr. Rodvelt's defense, admitting that "once the Court denied the Defense motion [to dismiss based on the disclosures] . . . we absolutely did a lot of shifting. And we're continuing to shift, with witnesses, what we're focusing on. So that's absolutely the case."

As Justice Sotomayor explained in a case where the prosecution obtained privileged information between two trials of the same defendant, the use of privileged information, regardless of how it is obtained, implicates the Sixth Amendment:

> Prosecutors wield an immense amount of power, and they do so in the name of the State itself. That unique privilege comes with the exceptional responsibility to ensure that the criminal justice system indeed serves the ends of justice. Prosecutors fall short of this task, and therefore do a grave disservice to the people in whose name they litigate, when they permit themselves to enjoy unfair trial advantages at defendants' expense. Here, regardless of the reason for their acquisition of Kaur's privileged information, and regardless of whatever minimum conduct was required of them by the Sixth Amendment, the prosecutors should have recused themselves from participating in Kaur's second trial as a matter of professional conscience.

Kaur v. Maryland, 141 S. Ct. 5, 7 (2020) (Sotomayor, J., on denial of certiorari). Here, the government's choice to proceed with the same

prosecution team and use the privileged information to their advantage violated Mr. Rodvelt's constitutional rights.

Using "information derived from compelled testimony" for "interpreting evidence, planning-cross examination, and otherwise generally planning trial strategy" establishes prejudice, regardless of how the confidential information is obtained. *Danielson*, 325 F.3d at 1072 (quotation and citation omitted); *Williams*, 384 F.3d at 585(noting that substantial prejudice can result from "the prosecution's use of confidential information pertaining to defense plans and strategy, and from other actions designed to give the prosecution an unfair advantage at trial"). Strategy shifts like those acknowledged by the government after the pretrial hearing can undermine the integrity of a trial.

It is impossible to know how much Mr. Rodvelt was prejudiced through the use of information obtained in violation of his Fifth and Sixth Amendment rights because the government was never held to its burden under *Kastigar*. The government never provided an accounting of the ways in which their trial strategy shifted, other than acknowledging it had in fact shifted. This Court should grant to writ to uphold the Fifth and Sixth Amendment when it is the judiciary that is disclosing confidential defense

strategy and require that the government uphold its obligation to ensure it does not enjoy an unfair advantage at trial.

Conclusion

For the foregoing reasons, the Court should grant the writ of certiorari.

Date: October 3rd, 2025

Devin D. Huseby
Attorney for Appellant