

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Imad Wadi— PETITIONER

vs.

United States of America— RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

CHARLES D. SWIFT
Counsel of Record
SUFIA M. KHALID
National Security Criminal Defense Center
Muslim Legal Fund of America
100 N. Central Expy., Suite 1010
Richardson, Texas 75080
Telephone: 972-914-2507
charlie.swift@mlfa.org

QUESTION PRESENTED

Whether due process permits a criminal conviction to stand where the government's testifying confidential informant destroyed potentially exculpatory evidence prior to trial in violation of the court's orders, and the trial court provided no adverse-inference instruction regarding spoliation, or any other remedy to mitigate the prejudice.

CORPORATE DISCLOSURE STATEMENT

Muslim Legal Fund of America, Inc. is a non-profit 501(c)(3) corporation with no parent corporation, and no publicly held company owns 10% or more of the organization's stock. *See* Supreme Court Rule 29.6.

PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Wadi*, No. 5:21-cr-00244-FB-1 (W.D. Tex. Feb. 29, 2024) (Dkt. No. 216) (entering judgement of conviction on February 29, 2024)
- *United States v. Wadi*, 153 F.4th 465, 470 (5th Cir. 2025) (Dkt. No. 147) (affirming conviction on August 29, 2025) (case number 24-50160)
- *United States v. Wadi*, No. 24-50160, 2025 LX 485412 (5th Cir. Sep. 26, 2025) (Dkt. No. 156) (denying Petition for Rehearing and Rehearing *En Banc* on September 26, 2025)

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The Fifth Circuit Court of Appeal's Order Denying Wadi's Timely Petition for Rehearing and Rehearing *En Banc* (Pet. App. 30a) can be found at *United States v. Wadi*, No. 24-50160, 2025 LX 485412 (5th Cir. Sep. 26, 2025). The Panel Opinion of the Fifth Circuit Court of Appeals (Pet. App. 12a) affirming the trial court is reported at *United States v. Wadi*, 153 F.4th 465, 470 (5th Cir. 2025).

The relevant orders and opinions of the Western District of Texas are as follows:

Order Entering Judgment of Conviction appears at Pet. App. 59a and is at *United States v. Wadi*, No. 5:21-cr-00244-FB-1 (W.D. Tex. Feb. 29, 2024) (Dkt. No. 216); Order Denying Wadi's Motion to Dismiss and reconsider Oral Rulings appears at Pet. App. 158a and is at *United States v. Wadi*, No. 5:21-cr-00244-FB-1 (W.D. Tex. May 15, 2023) (Dkt. No. 168); Order Granting Defendant's Motion to Order Hussain Baker's Appearance for the Show Cause Hearing and Further Orders appears at Pet. Sealed App. 50a and is available at *United States v. Wadi*, No. 5:21-cr-00244-FB-1 (W.D. Tex. Mar. 23, 2023) (Dkt. No. 111); Order to Show Cause appears at Pet. Sealed App. 57a and is at *United States v. Wadi*, No. 5:21-cr-00244-FB-1 (W.D. Tex. Mar. 16, 2023) (Dkt. No. 107); and Order Denying Defendant's Expert Witness Testimony

appears at Pet. App. 155a and is at *United States v. Wadi*, No. 5:21-cr-00244-FB-1 (W.D. Tex. Mar. 16, 2023) (Dkt. No. 169).

JURISDICTION

On August 29, 2025, the Fifth Circuit Court of Appeals filed a panel opinion affirming Wadi’s conviction and sentence. *See United States v. Wadi*, 153 F.4th 465, 470 (5th Cir. 2025); Pet. App. 12a. On September 26, 2025, the Fifth Circuit then denied Wadi’s timely Petition for Panel Rehearing and Rehearing on *En Banc* and a copy of the order appears at Pet. App. 30a. On October 3, 2025, the Fifth Circuit issued a mandate. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1). The defendant has filed this petition for writ of certiorari in a timely manner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides: “No person shall be ... nor be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

STATEMENT OF THE CASE

I. Factual Background.

a. Petitioner’s background and the lawful business idea that drew the government’s attention.

Petitioner, Mr. Imad Wadi, is an elderly United States citizen, originally from Syria, with no prior criminal history who was convicted of four federal offenses following a five-year FBI sting operation.¹ Prior to the government’s involvement, Petitioner had operated a lawful convenience store business. That business had

¹ The confidential informant began reporting on Wadi in 2016, ending in Wadi’s arrest in 2021.

recently failed and Petitioner—facing significant financial difficulties and the burden of loans and credit card debt—found himself working odd handyman jobs. Pet. App. 69a; 71a; 112a. As the father of six children, including two minors, Wadi was distraught over his financial situation. Pet. App. 70a. In the aftermath, he was working to pursue many lawful potential businesses, including an idea to start a halal beef export business with his longtime friend, Daniel Barodi (co-conspirator). Pet. App. 69a-70a.

The idea involved acquiring a slaughterhouse and exporting meat. Although financially unrealistic, the business concept itself was lawful. To explore financing options, Wadi approached Hussain Baker, a friend from his local mosque in San Antonio whom Wadi was led to believe had access to wealthy investors abroad. Pet. App. 131a; 139a. Unbeknownst to Wadi, Baker was a long-time confidential human source for the FBI with significant financial difficulties of his own.

b. The FBI's use of Baker as a confidential informant and his financial incentives.

Baker had worked as a confidential informant for the FBI for many years, including throughout the period relevant to this case and at least since 2007. Pet. App. 133a; Pet. Sealed App. 58a. He understood that the FBI paid informants in cash and that such payments could be concealed from creditors. Pet. App. 97a-99a. Baker also knew from experience that the FBI was willing to pay him substantial sums; in prior matters, he had received at least \$400,000. Pet. App. 117a, 133a; Pet. Sealed App. 58a.

At the time that he reported on Wadi, Baker himself was in significant financial distress. The record reflects a history of tax liabilities, multiple foreclosures, and repeated bankruptcy filings. Pet. Sealed App. 58a; Pet. App. 97a-99a, 117a-122a. He also failed to report FBI payments to the IRS on multiple occasions and had not filed federal tax returns during the years between Wadi's indictment and when Baker testified as a government witness (2019-2023). Pet. App. 97a-99a, 117a. Ultimately, Baker received approximately \$338,000 from the FBI for his role as a confidential source in the investigation of Wadi. Pet. App. 117a; Pet. Sealed App. 58a.

Despite the absence of illegal activity in Wadi's business proposal, Baker reported the halal meat venture to the FBI. At the FBI's direction, Baker continued to cultivate his relationship with Wadi, feigning interest in the business, traveling with him to Colombia to view a slaughterhouse facility, and then setting up a fake investor who imposed increasingly problematic conditions on their potential nine-million-dollar investment. Pet. App. 139a-140a.

c. The government's multi-year sting operation and the escalation of criminal proposals.

From March 2016 through June 2021, the FBI used Baker as an informant to exploit Wadi's financial vulnerability and to press him to accept conditions imposed by the government in exchange for funding. During this period, Wadi owed Baker (informant) money and had performed labor for him (ex. plumbing) in the past, creating a power imbalance. Pet. App. 101a-102a, 114a.

Baker (informant) introduced Wadi and Barodi (co-conspirator) to a purported investor referred to as "the Sheikh." Pet. App. 107a. The FBI invented the Sheikh—

in reality, he was represented by an undercover agent. Pet. App. 139a-140a. Baker (informant) and the undercover represented that the Sheikh had the resources to fund the business, but only if Wadi and Barodi agreed that a portion of the funds would be diverted to support Fateh al-Sham, a designated foreign terrorist organization.

Over time, the FBI intensified the proposed conditions. By July 24, 2018, Baker informed Wadi that five percent of the nine to thirteen million dollars in funds would need to be used specifically to purchase weapons. Pet. App. 276a, 267a, 271a-273a. Wadi repeatedly expressed hesitation and proposed alternative humanitarian uses for the funds, including sending food and supplies to relatives. Pet. App. 256a-258a, 224a-226a; 266a-267a, 271a. Baker began to insist that cash transfers for weapons, not food aid or orphan aid, were required, and Wadi eventually obliged.

Complicating these discussions was confusion about the affiliations of Barodi's (co-conspirator) relatives in Syria. Subsequent recorded conversations and a WhatsApp video call confirmed that Barodi's relatives were associated with Ahrar al-Sham, not a designated foreign terrorist organization, and that their primary need was humanitarian assistance. Pet. App. 225a 233a-234a 256a-258a.

After June 2019, communications between Wadi and Baker largely ceased. Then, on June 17, 2020, when Baker asked Wadi, Wadi indicated that they were not backing out of the deal. Pet. App. 85a, 210a-211a. Another year passed and on June 15, 2021, federal agents arrested Wadi. Pet. App. 57a. Almost no communications

were produced to the defense for the two year-long gaps during the latter half of the investigation.

II. Procedural Background and Evidence Destruction.

a. Charges, trial, and the central role of Baker's communications.

A superseding indictment charged Wadi with conspiracy to kill or injure persons abroad in violation of 18 U.S.C. § 956; conspiracy to provide material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B; and conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A. The trial was in May 2023 in the Western District of Texas. The trial court's jurisdiction arose under 28 U.S.C. § 1331, since Wadi's case arose from violations of federal law.

Throughout the investigation, Baker used an iPhone to communicate with Wadi, Barodi, and others. Those communications formed the backbone of the government's case and were central to Wadi's entrapment defense. Pet. App. 141a.

Wadi's defense focused on entrapment and lack of predisposition. The defense argued that the alleged criminal conduct arose from the informant's repeated inducements at a time of Petitioner's financial vulnerability. Central to that defense were the informant's communications, particularly the contents of his cellphone. These communications documented the informant's representations, inducements, and role in shaping the transactions. They also bore on his credibility, including a documented history of fraud, bankruptcies, and tax noncompliance. Cellphones today are central to modern criminal cases, storing large volumes of data—including

communications, records, and other evidence critical to a defendant's ability to understand and present the truth.

Recognizing their importance, the district court issued subpoenas and preservation orders requiring Baker to retain and produce his cellphone and any prior devices containing communications with Wadi. Pet. Sealed App. 77a. Defense counsel moved again for Baker to comply. Pet. Sealed App. 60a. Baker again failed to comply. Pet. Sealed App. 52a.

The court then issued an Order to Show Cause directing Baker to produce the device at a future hearing and prohibiting any alteration or destruction, stating that “[Baker must] bring any cell phone or digital device he has used, including previous digital devices that are not currently in use, that contains communications with Mr. Wadi or any digital evidence related to Mr. Wadi’s case. Mr. Baker is ORDERED to not alter, tamper, manipulate, destroy, or change any settings on these devices.” See Pet. Sealed App. 50a, 57a.

b. Destruction of the informant’s cellphone in violation of court orders.

Despite these orders, Baker did not preserve his original iPhone nor did the government create a forensic copy of the phone during either the investigation or pretrial when the subpoena and court order to produce were issued. At a show-cause hearing on April 6, 2023, Baker admitted that he had traded in his old phone and obtained a new one *three days* before the hearing, vaguely explaining that “normally, whatever you have on your phone, it moves up to the new phone with iCloud or whatever.” Pet. App. 189a-190a, 179a.

The defense forensic expert explained that the loss of the original phone prevented recovery of deleted data and verification of whether the messages produced were complete or authentic. Dozens of unrecorded phone conversations were not presented in evidence (a fact that Baker himself corroborated), and the expert explained the defense had no way to verify if all the text messages had been turned over in their accurate form. Pet. App. 141a, 74a-75a; Pet. Sealed App. 45a.

The defense expert, after his examination of the new phone, further concluded that it was likely that the new phone's data had been tampered with, stating that:

[b]ased upon your examiner's training and experience . . . the device was either a new Apple iPhone that was being set up by restoring context from an Apple iTunes Backup, or it was a previously initiated phone that was wiped, reset, and restored from an existing Apple iTunes Backup. The result of this type of activity is a thwarting of the recovery of deleted artifacts. . . . The activity's date on this phone indicates manipulation of the data available for recovery despite court orders to the contrary.

Pet. Sealed App. 45a.

Searches of the replacement phone revealed little to no data corresponding to key terms central to the case, including references to the slaughterhouse, Barodi, and halal meat, despite years of communications on those subjects.

c. The trial court's refusal to provide any remedy.

Based on the destruction of evidence, the defense moved to dismiss the indictment and requested a spoliation or adverse-inference instruction. The district court denied all relief. *See* Pet. Sealed App. 1a; Pet. App. 158a. The court concluded by suggesting that Baker was not a government agent at the time he destroyed the phone and that the destruction did not constitute bad faith.

The court also prohibited cross-examination concerning Baker’s violation of the show-cause order. Thus, the jury was never informed that potentially exculpatory cellphone evidence had been destroyed by the government’s informant and key witness.

The jury convicted Wadi on all counts. On February 29, 2024, the district court entered written judgment imposing a 160-month sentence concurrent for the three counts of conviction. Pet. App. 1a.

On appeal, Wadi raised multiple constitutional and statutory challenges, including the destruction of evidence and the refusal to provide any remedial instruction. The Fifth Circuit affirmed, agreeing that Baker was not a government agent for due process purposes, that no bad faith occurred, and that the district court did not err in declining to provide any remedy. Pet. App. 12a.

Appellant filed a Motion for Rehearing and a Petition for Rehearing En Banc, both which were denied. Pet. App. 30a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT AND UNRESOLVED QUESTION ABOUT WHETHER DUE PROCESS PERMITS A CRIMINAL CONVICTION TO STAND AFTER THE UNREMEDIED BAD-FAITH DESTRUCTION OF POTENTIALLY EXCULPATORY EVIDENCE.

a. This court has recognized that the bad-faith destruction of potentially exculpatory evidence violates due process but has never decided what remedy the constitution requires.

“Due process guarantees that a criminal defendant will be treated with ‘that fundamental fairness essential to the very concept of justice.’” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). The preservation of critical trial

evidence is a core part of this guarantee. *See United States v. Perry*, 92 F.4th 500, 513 (4th Cir. 2024) (“Spoliation of evidence, or the destruction of or failure to preserve evidence, can be a due-process violation.”).

In *California v. Trombetta*, this Court held that the destruction of materially exculpatory evidence violates due process regardless of intent. 467 U.S. 479, 488–89 (1984). In *Arizona v. Youngblood*, the Court addressed a narrower category of evidence—evidence that is only “potentially useful”—and held that due process is violated when such evidence is destroyed in bad faith. 488 U.S. 51, 58 (1988).

The Court assumed that a finding of bad-faith destruction would have legal significance, but it expressly declined to decide what remedy due process requires. *See id.* at 61 (Stevens, J., concurring) (emphasizing that remedies are essential to preserving trial fairness). *Youngblood* therefore left unresolved a foundational question that has become increasingly consequential in modern criminal prosecutions: whether a criminal trial may proceed as if the destroyed evidence never existed.

As a result, lower courts have unevenly implemented *Youngblood*'s due-process protection. Although early cases recognized that the loss of evidence requires some remedial response, *see United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971), lower courts now diverge sharply on what remedy, if any, is required once a *Youngblood* violation occurs. *See McCarty v. Gilchrist*, 646 F.3d 1281, 1288 (10th Cir. 2011) (observing that “the appropriate remedy for a *Youngblood* violation has not been determined”). Some courts have suggested dismissal may be appropriate; others

have recognized adverse-inference instructions as a possible remedy. *Id.* (collecting cases); *United States v. Sivilla*, 714 F.3d 1168, 1173–74 (9th Cir. 2013) (recognizing adverse-inference instruction as a possible remedy). Many treat remedies as discretionary—even permitting trials to proceed with no instruction, no inference, and no acknowledgment of the evidence loss. And, critically, none have held that a *Youngblood* violation requires a remedy.

This failure to define a constitutional minimum remedy threatens to convert *Youngblood* into a right without a remedy. It results in defendants being left exposed to the full prejudice of evidence loss—an outcome difficult to reconcile with this Court’s repeated admonition that “[t]he touchstone of due process is protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

In short, this case squarely presents the unresolved question *Youngblood* left open: whether due process tolerates the complete absence of any remedial safeguard in a criminal case after a government agent’s bad-faith destruction of potentially exculpatory evidence.

b. The decision below permits courts to provide no remedial protection for the accused, effectively nullifying *Youngblood*’s due-process safeguard.

The decision below reflects a growing trend in which lower courts treat remedies for evidence destruction in criminal cases as discretionary regardless of the underlying facts. Under this approach, a court may conclude that evidence was destroyed, find a duty to preserve but decline to find bad faith under a narrow definition, and then refuse to provide any remedy. The result is a trial conducted

without the destroyed evidence and without any prejudice mitigation. *Youngblood's* bad-faith requirement was intended to distinguish innocent loss from constitutionally problematic misconduct—not to authorize intentional destruction without consequence. If courts may deny relief after deliberate evidence destruction, the due-process protection *Youngblood* recognized becomes purely theoretical.

This case illustrates the consequences of that gap. Here, the confidential informant and primary prosecution witness involved in Wadi's conviction disposed of his original Apple iPhone *three days* before a court hearing during which he had been ordered to produce the iPhone. Pet. App. 189a-190a, 179a; Pet. Sealed App. 57a; 50a. In response, defense counsel requested dismissal of the indictment, or alternatively, a spoliation instruction, but the court denied both requests. Pet. Sealed App. 1a.

The court's order had expressly stated that Baker must: "bring any cell phone or digital device he has used, including previous digital devices that are not currently in use that contains communications with Mr. Wadi or any digital evidence related to Mr. Wadi's case. Mr. Baker is ordered to not alter, tamper, manipulate, destroy, or change any settings on these devices." Pet. Sealed App. 50a-51a.

It is undisputed that the original iPhone was relevant to the trial issues, as confirmed by the court's subpoena order; indeed, the phone held all the communications Baker had had with Wadi over the course of five years. The jury was never informed that potentially exculpatory evidence had been destroyed.

The question presented is not whether dismissal is required. It is whether due process permits a criminal trial to proceed as if the destruction never occurred. *Youngblood* did not answer that question. This Court should.

c. Limiting or adverse-inference instruction is a minimal, non-intrusive remedy that preserves the jury’s role while protecting trial fairness.

Spoliation occurs when a party destructs or significantly and meaningful alters evidence. *See Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015); *see also United States v. Boxley*, 373 F.3d 759, 762 (6th Cir. 2004) (explaining that spoliation occurs when a party intentionally destructs evidence that is favorable or potentially favorable to the opposing party).

A limiting or adverse-inference instruction is among the least intrusive remedies available for evidence destruction. Such an instruction does not presume prejudice, does not mandate acquittal, and does not remove the case from the jury. It simply permits jurors to consider the evidentiary consequences of destruction they cannot otherwise evaluate. Defendants often raise these two claims—a *Youngblood* due process violation and lack of a spoliation instruction—together in the face of destructed evidence. *See United States v. Glenn*, 935 F.3d 313, 320 (5th Cir. 2019); *McVay v. State*, No. 01-19-00480-CR, 2020 Tex. App. LEXIS 9980, at *15 (Tex. App. Dec. 17, 2020); *United States v. Thomas*, No. 22-60271, 2023 U.S. App. LEXIS 3519, at *3 (5th Cir. Feb. 14, 2023).

Courts impose spoliation sanctions to “level the evidentiary playing field” and to account for evidence that can no longer be tested. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Although spoliation doctrine developed in civil

litigation, several courts have recognized its relevance in criminal cases. *See United States v. Valas*, 822 F.3d 228, 239 (5th Cir. 2016). Indeed, there is a circuit split on the question of whether a spoliation claim can be brought in the criminal context. *See United States v. Fey*, 89 F.4th 903, 914 (11th Cir. 2023). It is difficult to justify a regime in which criminal defendants—whose liberty is at stake—receive less protection than civil litigants when government actors destroy evidence.

Here, the trial court refused to give the requested limiting/adverse-inference instruction and provided no alternative remedy. The Fifth Circuit affirmed. Whether due process tolerates that result is an important and unresolved constitutional question warranting this Court’s review.

II. THE DECISION BELOW EFFECTIVELY ADOPTS A CATEGORICAL LEGAL RULE THAT ABSOLVES GOVERNMENT INFORMANT RESPONSIBILITY FOR EVIDENCE DESTRUCTION.

- a. This Court defines government agency functionally, based on participation in the investigation or prosecution, not by formal employment status or if the devices used to gather evidence were personal devices.**

This Court has consistently taken a functional approach to determining when an individual acts as a government agent for constitutional purposes. In *Massiah v. United States*, this Court held that a cooperating individual acted as a government agent when he deliberately elicited incriminating statements on the government’s behalf, even though he was not a government employee. 377 U.S. 201, 206 (1964). Similarly, in *United States v. Henry*, this Court emphasized that agency turns on whether the government intentionally created a situation likely to induce the challenged conduct. 447 U.S. 264, 274 (1980).

In *Kyles v. Whitley*, this Court held that the government’s constitutional obligations extend to the entire “prosecution team,” including police officers and others who act on the government’s behalf in developing the case. 514 U.S. 419, 437–38 (1995). This Court explained that constitutional accountability does not turn on formal titles or employment relationships, but on whether the individual functioned as part of the government’s effort to investigate and prosecute the defendant. That functional inquiry governs due process obligations relating to evidence preservation.

b. The Fifth Circuit’s ruling effectively replaced this Court’s functional test with a categorical employment-based or personal devices rule, not requiring a case-specific factual determination.

The court below did not apply a functional agency analysis here. Instead, it effectively adopted a categorical legal rule under which an informant ceases to be a government agent for due process purposes once they are no longer formally employed, or if they use their personal devices when collecting government evidence for several years. On this basis alone, because the informant was no longer formally working for the government and because he destroyed an iPhone in his possession, the court concluded that the government bore no constitutional responsibility for the destruction of evidence.

The court did not meaningfully consider the informant’s multi-year role in the investigation, that the FBI used the informant’s personal device to collect and produce evidence for years, the informant’s centrality to the prosecution’s case, or the informant’s continued cooperation and testimony at trial. Nor did it examine whether the government had created a relationship that made the destruction of evidence

foreseeable. Nor did it consider that the government never made a forensic copy of the phone despite it being a principal instrument of its investigation.

Instead, the decision of whether the informant was a government agent turned entirely on formalistic criterion: whether the informant was formally employed by the FBI *at the moment* he wiped his cellphone and whether his personal phone was private.

As the Supreme Court has expressly stated, constitutional protections are no less applicable in the context of informants. *See Hoffa v. United States*, 385 U.S. 293, 311 (1966) (“[t]his is not to say that a secret government informer is to the slightest degree more free from all relevant constitutional restrictions than is any other government agent.”). But the Fifth Circuit’s precedent in *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000), and now, this case, creates a rule that allows the government to avoid liability for evidence destruction when that destruction is committed by an informant agent using their “personal device”—an outcome that goes against decades of established precedent that guarantees defendants with evidence preservation.

In its opinion below, the Fifth Circuit stated that the district court “would have been within its discretion to refuse [a spoliation instruction] . . . given the lack of evidence specifically that the Government destroyed data.” It then cited to *Wise*, 221 F.3d at 156, seemingly establishing a rule that government informants act as private actors when they destroy evidence in their possession, regardless of how critical the evidence may be to the defendant’s case. But the Fifth Circuit did not even consider

Baker's conduct or relationship with the prosecution; instead, it seemed to have made a categorical legal premise that Baker acted as a private actor and destructed private property. *See* Pet. App. 27a.

Through its decisions in *Wise* and now, *Wadi*, the Fifth Circuit departed from this Court's functional approach by adopting a categorical rule under which an informant or cooperating witness ceases to be a government agent for due process purposes when they are either "private owners" of the destructed property (such as in *Wise*) or no longer considered to be working for the government (such as in *Wadi*). Neither the district nor the appellate court considered indicia of agency or weighed competing inferences; they found that Baker acting as a private actor was legally dispositive and thereby removed the conduct at issue from constitutional scrutiny altogether. Under such a rule, the government bears no constitutional responsibility for the destruction of evidence by a key prosecution witness, even when that witness remains integral to the prosecution's case.

c. The Fifth Circuit's legal rule conflicts with this Court's precedent and artificially narrows due process protections.

The categorical rule adopted below cannot be reconciled with the general doctrine around agency law. Because there is no unified standard across the federal circuits governing spoliation in the criminal context, and more specifically, when a former government informant destroys evidence in the face of a court order, the Supreme Court should address this situation. Indeed, there is caselaw suggesting that the government should be liable for the acts of former informants who serve as witnesses and play an integral role in a defendant's conviction and trial.

Generally, in other contexts, courts engage in a fact-specific analysis to determine whether a government informant qualifies as a government actor. *Ghandi v. Police Dep't*, 823 F.2d 959, 963-64 (6th Cir. 1987) (“We have no doubt that paid government informants often are found to be government actors. . . . Nonetheless, we believe courts must look to all the facts to determine whether a paid government informant ‘may fairly be said to be a [government] actor . . . because he has acted together with or has obtained significant aid from [government] officials, or because his conduct is otherwise chargeable to the State.’”) (internal citations omitted). Factors that courts consider include state employment and the government financially compensating the informant for his or her services. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982) (explaining that “state employment is generally sufficient to render the defendant a state actor under our analysis.”). Compensation by the state, however, is not always necessary to deem an informant an agent of the state. *See Randolph v. California*, 380 F.3d 1133, 1144 (9th Cir. 2004) (explaining that “[w]e hold that an explicit agreement to compensate Moore is not necessary.”). Instead, in determining whether an informant is an agent in the Sixth Amendment context, the inquiry lies in the “cooperation” between the two parties. *Id.* (“There is sufficient undisputed evidence to show that the State made a conscious decision to obtain Moore's cooperation and that Moore consciously decided to provide that cooperation. That cooperation rendered Moore an agent of the State.”). In other words, it “is the relationship between the informant and the State” that is dispositive when “determining whether an informant is acting as an agent of the state.” *Id.*

Similarly, to determine whether a party has become an “instrument or agent” in the Fourth Amendment context, courts such as the Fifth Circuit and Ninth Circuit have asked whether “the government knew of or acquiesced in the intrusive conduct” and whether “the party performing the search intended to assist law enforcement efforts or to further his own end.” *United States v. Jenkins*, 46 F.3d 447, 460 (5th Cir. 1995) (citing to *United States v. Bazan*, 807 F.2d 1200, 1203 (5th Cir. 1986)). Nothing in these cases, or *Massiah*, *Henry*, or *Kyles*, suggests that agency turns on whether employment was ongoing at the *precise moment* of the constitutional violation. To the contrary, these cases emphasize functional participation, ongoing cooperation, and integration into the government’s evidentiary effort. By focusing on formalistic definitions of a “private” actor and “private” ownership of the item destroyed, the decision below creates a doctrinal anomaly: individuals who were recruited, compensated, and relied upon by the government for years may shed constitutional status at the moment it matters most, even while continuing to serve as key witnesses at trial.

This allows the government to disclaim responsibility for evidence destruction by having informants use personal devices that the FBI never creates a forensic image of and by structuring informant relationships in a way that avoids formal employment after the investigation, all the while, still allowing the government to rely on and benefit from the informant as a key witness. Such a regime undermines the functional trial safeguards this Court has required.

- d. The agency ruling was outcome-determinative because it categorically foreclosed any constitutional remedy.**

The agency determination below was not merely classificatory. It was outcome-determinative. By concluding that the government informant and witness who destroyed the evidence was not a government agent, the court categorically foreclosed any constitutional remedy for the destruction—including a limiting or adverse-inference instruction.

In response to the government's inability to produce the government informant's original iPhone and the data on it, defense counsel requested dismissal of the indictment, a reconsideration of denying the defense expert's testimony on the lost iPhone data, or a spoliation instruction, but the court denied all requests. Pet. Sealed App. 1a; Pet. App. 158a. The defense sought such an instruction to permit the jury to consider the loss of evidence when evaluating the informant's testimony. The trial court denied that request, relying on the conclusion that the informant was not a government agent. The court of appeals affirmed.

Instead of creating and applying an incorrect legal standard, had the Fifth Circuit applied this Court's functional agency analysis, it would have clearly deemed Baker a government agent and allowed for further analysis to determine an appropriate remedy. Baker worked for the government from at least 2007 to 2023 as a Confidential Human Source (CHS). Pet. Sealed App. 58a. There is no question that Baker entered into a financial agreement with the government. Pet. Sealed App. 58a; Pet. App. 199a, 95a-97a. Based on FBI records, between 2007 and 2023, Baker was compensated \$493,756.00 in salary and \$27,909.56 for expenses. Pet. Sealed App. 58a. Over the course of seven years, including between 2016 and Wadi's arrest in

2021, Baker served as an informant on Wadi and was paid \$338,000.00 for his services and \$9,973.36 for expenses over a seven-year period. Pet. Sealed App. 58a; Pet. App. 117a, 95a-97a. Throughout the course of his communications with Wadi, he played a critical role in assisting the FBI to entrap and ultimately convict Wadi. At the request of the FBI, he was the sole executor of the FBI's fake investment scheme: he connected Wadi with a fake investor and aggressively manipulated him to agree to the slaughterhouse deal. Pet. App. 143a ("It was the FBI actually plan"), 105a ("I didn't write the script. . . . The FBI wrote the script. I just helped."). These facts indicate that Baker "cooperated" with the government and acted hand-in-hand with the FBI—the relationship between the two parties through which the FBI asked Baker to carry out its investigatory plans reflects that Baker operated as an agent of the FBI. *See Randolph*, 380 F.3d at 1144; *Ghandi*, 823 F.2d at 963-64.

The fact that Baker was not formally serving as an informant for the government prior to the trial when he destructed the original iPhone, does not change the analysis. Baker was still a government agent at that time because he was serving as a government witness during trial. *States v. Fort*, 478 F.3d 1099, 1103 (9th Cir. 2007) (in the context of criminal discovery under Rule 16, the Ninth Circuit found that "the term 'government agent' includes non-federal personnel whose work contributes to a federal criminal 'case.'" (internal quotation marks and citation omitted); *State v. Gordon*, 497 A.2d 965 (Conn. 1985) (indicating that a witness for the by proxy is a government agent); *United States v. Hinkson*, No. CR-04-127-S-RCT, 2005 U.S. Dist. LEXIS 2387, at *12 (D. Idaho Jan. 9, 2005) ("An explicit agreement

to compensate a witness is not necessary to show that a witness is a government agent.”).

The Fifth Circuit created a categorical legal rule relying on its decision in *Wise*. *Wise* concerned a spoliation claim involving an FBI informant, Cain. *Wise*, 221 F.3d at 144-47. The defendant argued that the FBI did not seize Cain’s computer, despite the computer possessing potentially relevant information, and that this led to Cain installing a new program on the computer which wiped the computer’s hard drive. *Id.* at 156. The court found no bad faith on the part of the government, explaining that “the government did not destroy Cain's computer; in fact, the computer was not even in the government's custody. The fact is that Cain, the private owner of the computer at issue, made a personal decision to install a new program. As a result, some data in the computer vanished or became irretrievable.” *Id.* But as aforementioned, this analysis creates a categorical rule that is at odds with this Court’s functional agency doctrine and ultimately forecloses any remedy.

And, in reality, *Wise* is distinguishable from this case. Most notably, it did not address due process claims arising from evidence spoliation or the availability of remedial safeguards following evidence destruction.

In *Wise*, the court based its ruling on the fact that the computer was not in the government’s custody and that that implied Cain was a private owner of the computer. But, here, the government regularly had access to Baker’s iPhone during the investigation and needed to frequently collect digital evidence from it. At the time it was in the custody of the government to collect and transfer evidence, the FBI

should have made a forensic copy of the iPhone, which it failed to do despite FBI policy.² Unlike Cain’s computer, Baker’s iPhone was a primary tool of the FBI’s investigation on Wadi as he used it to communicate with all the primary actors in the case, including the FBI. Pet. App. 143a.

Second, Baker had been working for the FBI as a CHS informant even before his role in Wadi’s case. In contrast, Cain began as a self-initiated informant; he approached the FBI with information about the defendant; it was only later in the course of the case that he became a “paid government informer.” *Wise*, 221 F.3d. at 144, 146, n.7; *Thomas v. Cox*, 708 F.2d 132, 135 (4th Cir. 1983) (a self-initiated informant who was "motivated by conscience" in initiating contact with FBI and had no prior arrangement with the government was not a government agent). Baker was not motivated by “conscience,” like Cain was, but rather, was enlisted by the FBI to craft a scheme for the purpose of convicting Wadi. Baker also had a personal stake in the outcome of Wadi’s case: he was in financial debt and was therefore likely reliant on compensation from the FBI.

Most strikingly, this case is distinguishable from *Wise* because the district court ordered Baker and the government, via a formal court order, *not to destruct*

² Digital evidence “must be stored and secured and/or sealed to prevent data or evidentiary loss, cross-transfer contamination, or other deleterious change.” Imaging is “the act of making a bit-for-bit copy of the original [digital evidence] to serve as an accurate reproduction of the original [digital evidence].” Department of Justice, Office of the Inspector General, Investigation and Review of the Federal Bureau of Investigation’s Handling of Allegations (July 2021) 13-14, <https://oig.justice.gov/sites/default/files/reports/21-093.pdf> ; See also Council of the Inspectors General on Integrity and Efficiency, The Attorney General’s Guidelines Regarding the Use of Confidential Informants (May 30, 2002), <https://www.ignet.gov/sites/default/files/files/invprg1211apph.pdf>.

Baker’s original devices and to present them at a show cause hearing. Pet. Sealed App. 50a. In *Wise*, Cain had no notice that the computer was relevant to the trial; he accidentally wiped data on his computer when installing a routine software update. But, here, there are more suspicious facts. Baker went out of his way to get a new iPhone *despite being ordered not to do exactly that*. One does not accidentally acquire a new iPhone, transfer data from the original iPhone to the new one, and then “dispose” of the original iPhone—all under the threat of court sanctions. Baker deliberately concealed evidence: this is an extent of deception not present in *Wise*.

This case’s expansion of *Wise* converts a fact-bound precedent into a categorical rule with constitutional consequences. This case thus presents a recurring legal question with consequences that extend well beyond the particular facts here: whether courts may disclaim government responsibility for evidence destruction by adopting formalistic agency rules that operate to immunize such conduct from constitutional scrutiny. Resolving this question does not require the Court to revisit factual findings about intent, credibility, or prejudice. It requires only clarification of the legal standard governing when due process protections apply to individuals acting on the government’s behalf in criminal prosecutions.

**III. THE FIFTH CIRCUIT’S DEFINITION OF “BAD FAITH”
CONFLICTS WITH *YOUNGBLOOD*, SHIELDS DELIBERATE
VIOLATIONS OF THE GOVERNMENT’S PRESERVATION
OBLIGATION AND FORECLOSES ANY DUE PROCESS OR
SPOILIATION REMEDY.**

- a. This Court has defined “bad faith” functionally, permitting inference from objective circumstances rather than requiring proof of subjective animus.**

This Court’s decision in *Youngblood* held that the destruction of potentially exculpatory evidence violates due process when undertaken in bad faith. The Court did not define bad faith as requiring personal hostility toward the defendant or an express admission of intent to suppress favorable evidence. Rather, *Youngblood* framed bad faith as a functional inquiry tied to the government’s knowledge of the evidence’s potential value and its conduct in relation to preservation obligations. *See Youngblood*, 488 U.S. at 58.

Subsequent decisions confirm that bad faith may be inferred from objective circumstances. *See Illinois v. Fisher*, 540 U.S. 544, 547–48 (2004); *Trombetta*, 467 U.S. at 488. This Court has emphasized that constitutionally adequate preservation turns on whether the government acted in good faith pursuant to reasonable procedures. *Trombetta*, 467 U.S. at 488.

b. Lower courts routinely infer bad faith from deliberate violations of known preservation obligations, both under *Youngblood* and in applying the spoliation doctrine.

In practice, courts apply the same functional inquiry under both the *Youngblood* due process doctrine and the spoliation doctrine; both doctrines require a bad faith showing. *See Glenn*, 935 F.3d at 320. Although the standards for bad faith in the due process and spoliation claims are framed differently, in application, courts seem to apply the same analysis for bad faith under both claims. *See e.g., id.* (“To receive a spoliation instruction, Glenn had to show that the Government acted in bad faith or with bad conduct. . . . As we noted above [in the due process analysis], he has not done so.”); *Thomas*, No. 22-60271, 2023 U.S. App. LEXIS 3519, at *3.

i. Bad Faith standard under *Youngblood*.

Federal courts applying *Youngblood* have long recognized that bad faith may be inferred when evidence is destroyed despite known preservation duties. A defendant establishes a due process violation by showing: (1) bad faith in failing to preserve evidence; (2) apparent potential exculpatory value before destruction; and (3) the unavailability of comparable evidence by other means. *See United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996).

Although courts often focus on the bad-faith prong, they have repeatedly held that bad faith may be inferred where officials had notice of the evidence’s relevance and deliberately failed to preserve it. *See United States v. McQueary*, No. 23-5087, 2024 U.S. App. LEXIS 26869, at *5 (10th Cir. Oct. 24, 2024); *Winkle v. Rogers*, 82 F.4th 370, 376 (5th Cir. 2023).

Violations of court orders and subpoenas are among the strongest objective indicators of bad faith. Courts routinely treat the violation of explicit preservation orders as compelling evidence of bad faith. *See Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *Kellar v. Union Pac. R.R. Co.*, No. 21-02045, 2024 U.S. Dist. LEXIS 147950, at *53 (E.D. La. July 26, 2024). This is for good reason. A court order eliminates ambiguity about relevance, duty, and notice. When evidence is destroyed after such an order, the inference of intentional misconduct is at its apex. Deliberate acts taken in defiance of court-ordered preservation cannot and should not plausibly be characterized as negligence, oversight, or routine practice.

ii. Bad faith standard under the spoliation doctrine.

Courts applying spoliation doctrine—often in parallel with *Youngblood*—have reached similar conclusions. Bad faith exists where evidence is destroyed “for the

purpose of hiding adverse evidence” or rendered inaccessible despite preservation obligations. *Guzman*, 804 F.3d at 713; *United States v. Braswell*, 704 F. App’x 528, 536 (6th Cir. 2017).

The Sixth Circuit has elaborated that the spoliating party must act with “the purpose of rendering [the evidence] inaccessible or useless.” *Braswell*, 704 F. App’x at 536 (internal citation and quotation marks omitted). Moreover, a moving party has a stronger claim for spoliation when the destructing party had notice of the relevance of the evidence and thus had a duty to preserve the evidence. *Winkle*, 82 F.4th at 376; *see also McQueary*, No. 23-5087, 2024 U.S. App. LEXIS 26869, at *5 (10th Cir. Oct. 24, 2024) (in a due process argument, “the Court held that the government has a duty to preserve ‘evidence that might be expected to play a significant role in the suspect’s defense.’”) (*citing to Trombetta* 467 U.S. at 488).

In fact, some courts have gone so far as to state that if a destructing party had an obligation to preserve evidence but intentionally destroyed it anyway then there can be an “inference that the evidence would have been unfavorable to the party responsible for its destruction.” *Kronisch*, 150 F.3d at 126 (internal citations omitted).³

³ And, in applying this standard, appellate courts have found a lack of bad faith in limited and specific factual situations that are not present in this case—such as when evidence was destroyed as a result of routine maintenance procedures, when there was no showing that the government directly tampered with evidence, when evidence was lost based on a logistical misunderstanding, or when the destructed evidence was a result of administrative error. *See e.g., Braswell*, 704 F. App’x at 536 (Sixth Circuit agreeing with district court that there was no bad faith where the police officer had not tampered with evidence, but instead that the lost evidence was due to “shoddy police work.”); *Jobson*, 102 F.3d at 218 (records destroyed as a result of routine department policy); *United States v. Hofstetter*, 31 F.4th 396, 430 (6th Cir. 2022) (no showing of bad faith when “the files were destroyed as part of a standard, state-mandated file closure process.”); *McNealy*, 625 F.3d at 870 (stating that “[t]he original computer was destroyed as a result of miscommunication between divisions of the

c. The Fifth Circuit did not merely apply *Youngblood* to the facts—it adopted a restrictive legal rule that excludes deliberate violations of the government’s preservation obligations and was outcome-determinative.

The Fifth Circuit did not resolve this case by weighing competing inferences about intent. Instead, it effectively adopted a narrow legal conception of bad faith under which deliberate evidence destruction—even in violation of express court preservation orders—does not qualify absent proof of subjective animus or an express purpose to suppress exculpatory material.

In this case, the government’s confidential human source, Baker, had been ordered via a court subpoena order two times to turn in all digital evidence of his communications with Wadi. Pet. Sealed App. 77a, 60a. On both occasions, Baker failed to comply, leading the court to issue a show cause order *expressly* stating that “Mr. Baker bring any cell phone or digital device he has used, including previous digital devices that are not currently in use, that contains communications with Mr. Wadi or any digital evidence related to Mr. Wadi’s case. Mr. Baker is ordered to not alter, tamper, manipulate, destroy, or change any settings on these devices.” Pet. Sealed App. 50a; 57a. Despite this clear notice and mandate, Baker admitted to the court that he traded in the original iPhone but vaguely claimed that whatever he had on his original phone had “mov[ed] up to the new phone with iCloud or whatever.”

federal government, not as a result of bad faith.”); *Valas*, 822 F.3d at 239 (government technician accidentally wiped data on phone from removing its data chip after multiple attempts to access phone); *Glenn*, 935 F.3d at 320 (no bad faith because when “overwriting of data occurred when [FBI computer scientist], after several failed attempts to image the laptop, tried a different imaging method and inadvertently triggered an automatic update that had already been installed on Glenn’s computer, thereby erasing data on Glenn’s hard drive.”).

Pet. App. 179a, 189a-190a (Baker telling the court that “Your Honor, when I got this one, I traded the old one and then got this one, which is—normally, whatever you have on your phone, it moves up to the new phone with iCloud or whatever.”).

It is undisputed that Baker and the government were on express notice to preserve the original iPhone and had a duty to preserve it. *See Winkle*, 82 F.4th at 376; *McQueary*, No. 23-5087, 2024 U.S. App. LEXIS 26869, at *5. As mentioned earlier, FBI policy requires it to make forensic copies of relevant digital evidence; it is undisputed that no forensic image was made of Baker’s phone at any time.⁴ *United States v. McNealy*, 625 F.3d 858, 870 (5th Cir. 2010) (finding of no bad faith where the government did create forensic images of the computer).

i. Evidence deletion in violation of a court order is usually considered bad faith warranting spoliation sanctions.

⁴ The FBI has a Field Evidence Management Policy Guide that applies generally to the collection, handling, and documenting of evidence, as well as a Digital Evidence Policy Guide that specifically applies to digital evidence. All FBI personnel, including agents, who handle digital evidence during the course of their duties must ensure that all digital evidence is handled, marked, and has a content review in accordance with relevant policies. Digital evidence “must be stored and secured and/or sealed to prevent data or evidentiary loss, cross-transfer contamination, or other deleterious change.” Imaging is “the act of making a bit-for-bit copy of the original [digital evidence] to serve as an accurate reproduction of the original [digital evidence].” Department of Justice, Office of the Inspector General, Investigation and Review of the Federal Bureau of Investigation’s Handling of Allegations (July 2021) 13-14, <https://oig.justice.gov/sites/default/files/reports/21-093.pdf>. The document continues to explain that “[a]ccording to the FBI’s Field Evidence Management Policy Guide, evidence must be documented into the FBI Central Recordkeeping System no later than 10 calendar days after receipt. Similarly, the Digital Evidence Policy Guide states that, ‘Undocumented, “off the record” searches or reviews of [digital evidence] are not permitted.’ FBI personnel must document all reviews and searches of [digital evidence] from the point of the receipt of [the digital evidence] through completion of the search. . . .The documentation must be serialized to the investigative case file. Such documentation must identify, at a minimum, the general nature and manner in which the search of the media was conducted, major steps taken during the search, and forensic tools employed during the search. The documentation must contain specific information detailed in the Digital Evidence Policy Guide, including the name of the reviewer, the location where the review was completed, and a report of the responsive content found. *Id.* at 13-14. *See also* Federal Bureau of Investigations, Digital Evidence Policy Guide 14-21, <https://vault.fbi.gov/digital-evidence-policy-guide/%20Digital%20Evidence%20Policy%20Guide%20Part%2001%20%28Final%29/view>.

As the defense counsel’s examiner found, “[t]he result [Baker’s actions] is a thwarting of the recovery of deleted artifacts. . . . The activity’s date on this phone indicates manipulation of the data available for recovery despite court orders to the contrary.” Pet. Sealed App. 45a.

Baker’s destruction of the first iPhone—and potential manipulation of the data on that phone—was a violation of a court order. Typically, spoliation sanctions are issued for such evidence deletion arising out of violation of a court order. *See Kellar*, No. 21-02045, 2024 U.S. Dist. LEXIS 147950, at *53 (“[T]his Court finds that the cases. . . in which terminating sanctions were issued [because of a finding of bad faith in evidence deletion] largely involved the violation of a court order.”). Violating a court order cannot be dismissed away as “accidental” or a case of governmental “oversight, error, ineptitude, or carelessness;” Baker’s destruction and alteration of the iPhone was “intentional misconduct.” *See Thomas*, No. 22-60271, 2023 U.S. App. LEXIS 3519, at *2.

Indeed, the circumstances were suspicious surrounding the destruction of the original iPhone and suggest potential manipulation of the iPhone data when transferring it to a new phone—Baker switched phones a *few days* before the show cause hearing, suggesting an intent to bypass presenting certain data at the hearing. Pet. App. 179a; *Folino v. Hines*, Civil Action No. 17-1584, 2018 U.S. Dist. LEXIS 193564, at *8-9 (W.D. Pa. Nov. 14, 2018) (“[T]he timing of the destruction of the data on the Devices . . . evinces bad faith.”); *Burris v. JPMorgan Chase & Co.*, 566 F. Supp. 3d 995, 1017 (D. Ariz. 2021) (“The temporal proximity between Plaintiff’s acts and

key discovery events provides further circumstantial evidence of intent.”); *Colonies Partners L.P. v. Cty. of San Bernardino*, No. 5:18-cv-00420-JGB (SHK), 2020 U.S. Dist. LEXIS 56922, at *24 (C.D. Cal. Feb. 27, 2020) (“Courts also consider the timing of the document loss when evaluating intent.”).

This timing taken together with the fact that the phone in question was a significant instrument of the investigation—Baker had used the original iPhone for over five years in communicating with Wadi, Barodi, and other agents—indicates that Baker’s decision to destroy the evidence was related to Wadi’s trial and Baker’s role in his conviction. *See United States v. Folad*, 877 F.3d 250, 253 (6th Cir. 2017) (no bad faith when the third party’s “decision had nothing to do with this investigation or this prosecution.”).

In summary, had it not applied the incorrect legal standard, the lower court would have found bad faith was “apparent from the record.” *Thomas*, No. 22-60271, 2023 U.S. App. LEXIS 3519, at *3; *Blanco River, L.L.C. v. Green*, 457 F. App’x 431, 438 (5th Cir. 2012) (“We have said that ‘[w]hen bad faith is patent from the record and specific findings are unnecessary to understand the misconduct giving rise to the sanction, the necessary finding of ‘bad faith’ may be inferred.”). Baker’s actions indicate bad faith both under the due process and spoliation standards.

ii. Had the Fifth Circuit proceeded to the remaining elements of the due process analysis based on spoliation it would have found those elements are satisfied on the record below.

Had the Fifth Circuit applied the correct legal standard, Baker’s deletion would warrant analysis of the remaining factors of the due process test. Those

remaining factors are satisfied on the record below. The evidence on the iPhone was “potentially useful” and otherwise unavailable to the defendant. *Jobson*, 102 F.3d at 218. As reflected in the defense expert’s report, data on the original iPhone could have contained important conversations related to related to a number of relevant search terms to defense counsel such as “Daniel Ahmed Barodi” and “slaughterhouse,” all which oddly resulted in zero hits in Baker’s new phone, despite being frequent topics of discussion between Baker and Wadi. Pet. Sealed App. 40a-44a. If anything, Baker’s urgency in disposing of his iPhone three days before the show cause hearing, when he had not done so during the five years of the investigation or the almost two years pretrial, also suggests exculpatory evidence was on the phone. *See Perry*, 92 F.4th at 514 (*Youngblood* says that bad faith requires that the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.) (internal quotation marks and citation omitted).

In summary, the Fifth circuit introduced an incorrect and narrow bad faith standard that suggests a focus on an actor’s state of mind only, excluding clear circumstances surrounding the destruction that meet this Court’s bad faith standard (i.e., evidence deletion in direct contravention of multiple court orders).

But, because the court found no bad faith under its restrictive standard, it refused to provide any remedy, including dismissal, or an adverse inference limiting instruction. The jury was never informed of the evidence loss or its potential significance. The court’s finding effectively prevented the jury from considering the consequences of the informant’s evidence destruction at all.

IV. REFUSAL TO PROVIDE ANY REMEDY FOR A GOVERNMENT INFORMANT'S DESTRUCTION OF PHONE EVIDENCE RAISES AN IMPORTANT DUE PROCESS AND SPOILIATION QUESTION.

- a. This case provides a well-preserved, ideal vehicle to answer the unresolved constitutional question on the constitutional minimum for remedies for bad faith evidence destruction.**

Review in this case does not require this Court to second-guess factual findings or to reassess credibility determinations. The relevant facts—namely, the existence of the government's evidence preservation obligations and the intentional destruction of evidence—are not disputed. What is disputed is whether those facts are legally sufficient to support a finding of bad faith under *Youngblood* and spoliation doctrine. That question is legal in nature and recurring in criminal prosecutions. If deliberate violations of evidence preservation orders do not qualify as bad faith, then *Youngblood's* constitutional safeguard is substantially narrowed in a manner this Court has never endorsed. The spoliation doctrine's applicability in criminal cases is similarly narrowed. Clarifying the legal standard would provide guidance to lower courts and prevent further erosion of *Youngblood* and the spoliation doctrine.

It requires only that the Court clarify whether due process permits courts to provide no remedial response whatsoever after the bad-faith destruction of potentially exculpatory evidence. The issue was squarely presented, preserved, and decided below.

i. Wadi preserved his request for a spoliation instruction.

The Fifth Circuit stated in its opinion that “[t]he district court denied Wadi’s motion to dismiss and did not rule on Wadi’s alternative request for a spoliation instruction. At trial, Wadi never renewed his request for such an instruction.” Pet.

App. 26a. This is incorrect. Wadi did renew his request in a written motion on the first day of trial, the judge issued a clear and final written order denying it, and consequently, Wadi was not required to renew his request again.

On May 14, 2023, defense counsel filed a single motion that included a motion to dismiss the indictment, a motion to reconsider the court's denial of expert testimony, and a request for the court to admit the spoliation evidence and provide a spoliation instruction, all which were based on the destruction of Baker's original iPhone. Pet. Sealed App. 1a. On May 15, 2023, during a pretrial hearing on the morning of the first day of trial, the parties met with the district judge again to discuss defendant's motion; defendant renewed all three arguments from its motion. Pet. App. 161a-167a. Later, that same day, the district judge filed an order denying the entirety of defendant's motion stating that: "Defendant Imad Wadi's motion to reconsider and to dismiss is DENIED," and entered a docket entry that stated that Doc. 166 (defendant's motion including all three requests) was denied. Pet. Sealed App. 160a.

In such a circumstance, "when a party objects and explains his objection, he need not keep objecting to preserve an issue for appeal if 'it was evident in the circumstances that renewal of the objection would be futile because the court had clearly manifested its intention to reject the objection.'" See *United States v. Phillips*, 155 F.4th 102, 116 (2d Cir. 2025); *United States v. Prodoehl*, 791 F. App'x 527, 531 (6th Cir. 2019); *Sturgis v. Columbia Steel Fabricators, Inc.*, No. 90-55584, 1992 U.S. App. LEXIS 20932, at *7-8 (9th Cir. Sep. 4, 1992); see also Fed. R. Evid. 103(b) (to

preserve appeal, party does not need to renew an objection once court rules definitively on record before or during trial). In any case, putting aside his claim for a spoliation instruction, by filing his pre-trial motion requesting any remedy on the basis of spoliation, Wadi's due process claim remains preserved. *United States v. Holt*, No. 24-7044, 2025 LX 575662, at *10 n.3 (10th Cir. Dec. 16, 2025) ("The government suggests that we should review only for plain error because Holt failed to request an adverse-inference instruction. . . . But Holt . . . alleges a due-process violation . . . And because Holt adequately preserved his due-process claim by filing a pretrial spoliation motion, we reject the government's preservation argument.").

Even if defense counsel did not preserve the issue, the court was in plain error to not give a remedy for the spoliation. *See United States v. Espinoza*, 684 F.3d 766, 778 (8th Cir. 2012). Wadi has shown that failing to find bad faith was an error that "was plain, affected [Wadi's] substantial rights, and seriously affected the fairness, integrity, or public reputation of judicial proceedings" by depriving him of a right to due process, an ability to inform the jury of the lost evidence, and to mount a defense taking into consideration all the evidence. *Id.*

b. Lower courts are deeply divided on whether and how spoliation doctrine applies in criminal cases.

As mentioned above, a limiting or adverse-inference instruction is among the least intrusive remedies available to address evidence spoliation. Such an instruction does not require dismissal, does not presume prejudice, and does not remove the case from the jury. It merely permits jurors to consider the fact of evidence destruction when evaluating the remaining proof. Yet despite the familiarity and modesty of this

remedy, its constitutional status in criminal cases remains unresolved. This case presents an opportunity for the Court to clarify whether due process tolerates the complete absence of such a safeguard after intentional evidence destruction.

If adverse-inference instructions are appropriate to protect fairness in civil disputes between private parties, it is difficult to justify a regime in which criminal defendants receive less protection when the government or its agents destroy evidence. In criminal cases, the imbalance is greater than in civil cases: the government controls the investigation, the evidence, and the charging decision, while the defendant's liberty is at stake. The refusal to provide even a limiting instruction in such circumstances raises serious due process concerns.

The federal courts of appeals have acknowledged uncertainty—and disagreement—about whether spoliation doctrine applies in criminal cases and, if so, under what standard. Some courts permit spoliation instructions in criminal cases upon a showing of bad faith. *See Sivilla*, 714 F.3d at 1173–74; *Valas*, 822 F.3d at 239. Others have suggested that spoliation principles may apply without a showing of bad faith in certain circumstances. *See Fey*, 89 F.4th at 914 (identifying a circuit split with some circuits allowing for criminal spoliation sanctions on a showing of bad faith, but recognizing that the First Circuit has stated that some situations of spoliation in the criminal context may not require bad faith); *Braswell*, 704 F. App'x at 536 (acknowledging that there is an intra-circuit split in the Ninth Circuit on whether spoliation requires bad faith).

It should not stand that in the civil context parties are provided a spoliation remedy for bad faith destruction of evidence, and in the criminal context a defendant faces a charge for obstruction of justice under 18 U.S.C. § 1519 if they delete relevant evidence (especially in violation of a court order), but in a context where the stakes are much higher, the government remains shielded from sanction when it engages in this conduct.

The Supreme Court should provide guidance on the spoliation doctrine as it is a straightforward and unintrusive remedy to protect criminal defendant's right to due process and a fair trial in the face of evidence destruction; and this Court has never resolved whether criminal defendants are entitled to at least the same protection against evidentiary distortion as civil litigants. The absence of guidance has produced inconsistent results and left trial courts without a constitutional baseline.

c. Allowing destruction of evidence through government informants to go unremedied undermines the truth-seeking function of criminal adjudication and incentivizes the destruction of evidence through informants' devices.

The Due Process Clause protects not only against wrongful convictions but against procedures that distort the truth-seeking function of trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles*, 514 U.S. at 439.

When evidence is destroyed, the factfinder is deprived of relevant information. When evidence is destroyed and the jury is not informed of that destruction, the distortion is compounded.

Such a regime creates perverse incentives. If the destruction of evidence carries no remedial consequence—so long as courts define bad faith narrowly or disclaim agency relationships—then evidence preservation becomes effectively optional. This case illustrates that risk. The refusal to provide even a minimal remedial instruction insulated the destruction of evidence from scrutiny and shifted the full burden of uncertainty onto the defendant.

By adopting a narrow and formal agency rule below, the government benefits from informant cooperation while avoiding constitutional accountability for misconduct related to evidence preservation. Informants may remain central to the prosecution’s case—testifying at trial and providing critical evidence—while their actions are treated as private conduct for due process purposes.

This landscape also creates perverse incentives. Under the rule applied below, evidence destruction occurring after formal compensation ends—but before trial and in violation of preservation obligations—falls outside constitutional scrutiny, even when the informant remains a key government witness.

Whether due process tolerates such a rule, particularly in an era where informants and cooperating witnesses play an increasingly significant role in criminal investigations, is an important question of federal law.

d. Modern criminal investigations routinely depend on cellphones as key sources of critical evidence, often representing the core source of “truth” in a case.

A growing body of empirical research and law enforcement acknowledgment confirms that digital evidence—and in particular cellphone data—is now central to criminal investigations across offense types.

A recent survey of prosecutors and investigators found that digital evidence is essential in modern prosecutions and affects how cases are charged and resolved, with cellphone data often at the core of that evidence. Digital evidence can shape timelines, show communications, and support or contradict key factual elements. *See* Christa M. Miller, A Survey of Prosecutors and Investigators Using Digital Evidence: A Starting Point (Dec. 30, 2022).

Cellphones are not ancillary evidence; they are often the heart of the factual record. Mobile device forensics routinely recovers not just call logs, but texts, images, videos, GPS location, email synopses, social media interactions, and more— data that can point investigators (and juries) toward the truth about motive, relationships, and conduct. *See* Wikipedia, Mobile Device Forensics, https://en.wikipedia.org/wiki/Mobile_device_forensics.

The U.S. Department of Justice and the FBI have emphasized the critical role of cellphone-resident electronic evidence in investigations. For example, an FBI director’s testimony on mobile device encryption highlights how important phone data can be in securing convictions, with her stating that: “We are seeing more and more cases where we believe significant evidence resides on a phone, a tablet, or a laptop—evidence that may be the *difference between an offender being convicted or acquitted...*” and reinforcing that reliable access to such data is “imperative to ensuring public safety.” *See* Amy Hess, Statement Before the House Oversight and Government Reform Committee, Subcommittee on Information Technology (Apr. 29,

2015), <https://archives.fbi.gov/archives/news/testimony/encryption-and-cyber-security-for-mobile-electronic-communication-devices>.

Cellphone evidence has also played a determinative role in identifying suspects, reconstructing criminal networks, and corroborating or contesting key testimonial evidence—making preservation of such evidence central to the *truth-finding function* of criminal trials. See Becky Lewis, Dept. of Justice, Cell Phone Forensics Play Key Role in Gathering Intelligence (Jan. 2015), <https://ojp.gov/ncjrs/virtual-library/abstracts/cell-phone-forensics-play-key-role-gathering-intelligence>.

The ubiquity of digital evidence in criminal investigations reflects a world in which smartphones are indispensable to both the prosecution and the defense. Its destruction is therefore not a mere technicality but a substantive loss that can deprive a defendant—and the fact-finder—of the actual truth.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Charles D. Swift

March 4th, 2026

CHARLES D. SWIFT

Counsel of Record

SUFIA M. KHALID

National Security Criminal Defense Center

Muslim Legal Fund of America

100 N. Central Expy., Suite 1010

Richardson, Texas 75080

Telephone: 972-914-2507

charlie.swift@mlfa.org
Attorney for Petitioner

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Imad Wadi— PETITIONER

vs.

United States of America— RESPONDENT

CERTIFICATE OF SERVICE

I, CHARLES D. SWIFT, do swear or declare that on this date March 4th, 2026, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*, PETITION FOR A WRIT OF CERTIORARI, and MOTION TO FILE DOCUMENTS UNDER SEAL on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

D. John Sauer, Solicitor General of the United States

Room 5616, Department of Justice

950 Pennsylvania Ave., N.W., Washington D.C. 20530-0001

Telephone No.: 202-514-2203

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 4th, 2026.

/s/ Charles D. Swift

March 4th, 2026

CHARLES D. SWIFT
Muslim Legal Fund of America
100 N. Central Expy., Suite 1010
Richardson, Texas 75080
Telephone: 972-914-2507
charlie.swift@mlfa.org

Attorney for Petitioner

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I further declare that on MARCH 4th, 2026, I originally mailed, as required by Supreme Court Rule 39, an original and ten copies of the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI with Appendix and MOTION TO FILE DOCUMENTS UNDER SEAL with Sealed

Appendix, to this Court.

/s/ Charles D. Swift

March 4th, 2026

CHARLES D. SWIFT

Muslim Legal Fund of America

100 N. Central Expy., Suite 1010

Richardson, Texas 75080

Telephone: 972-914-2507

charlie.swift@mlfa.org

Attorney for Petitioner