

No. 09-5391

IN THE
Supreme Court of the United States

KRISTER SVEN EVERTSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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The decision of the court of appeals warrants this Court's review because it misinterprets important aspects of the Resource Conservation and Recovery Act (RCRA), conflicts with decisions from other federal appellate courts, and upholds criminal liability in a case in which the government concedes that well-stored hazardous materials never posed a threat to public health and safety.

The United States seeks to minimize the importance of the decision by suggesting that the case is really about whether the jury instructions given by the trial judge constituted plain error. As the petition thoroughly explained, the hopelessly muddled jury instructions did, indeed, constitute plain error. But the case is about much more than that. If the decision below is allowed to stand, defendants

in the Ninth Circuit face potential criminal liability under standards that relieve prosecutors of significant portions of their burden of proof in RCRA cases. The Ninth Circuit did not, as the United States alleges, simply uphold the conviction based on application of the plain error standard. Rather, it affirmatively endorsed an interpretation of RCRA that defers to Environmental Protection Agency findings regarding whether a particular substance is a “hazardous waste” and relieves prosecutors of the burden of demonstrating that a defendant alleged to have abandoned hazardous material has done so knowingly.

Although RCRA was adopted more than 30 years ago, the Court has never granted review in a case involving a criminal conviction under the statute. The result has been widespread confusion regarding the meaning of several of its more important terms. Petitioner respectfully submits that this case, in which that confusion essentially deprived the jury of any meaningful opportunity to determine whether Petitioner really intended to abandon his valuable property, provides the Court with an ideal opportunity to clear up the confusion.

A. Review Is Warranted Because the Ninth Circuit Misinterpreted RCRA in a Manner that Relieves Prosecutors of Their Burden of Establishing That the Materials Were Knowingly Abandoned

Petitioner Krister Evertson was convicted under 42 U.S.C. § 6928(d)(2)(A), which makes it a felony for any person to “knowingly treat[], store[], or dispose of any hazardous waste identified or listed under [RCRA] . . . without a permit.” As explained in the petition, Mr. Evertson’s defense was predicated on his contention

that he never intended to abandon hazardous materials he was storing in Salmon, Idaho. In its response, the United States concedes that if the materials were not abandoned, then they were not “hazardous waste,” and no crime was committed. The United States nonetheless insists that the jury was properly instructed regarding the elements of the alleged crime – even though the pivotal jury instructions (Nos. 17 and 18) were entirely silent on the issue of abandonment and did not require prosecutors to demonstrate that any abandonment was knowing.

The United States incorrectly asserts that the Ninth Circuit upheld the absence of a “knowing abandonment” instruction on the ground that the failure to give the instruction, even if inappropriate, did not constitute plain error. Opp. Br. at 21.¹ To the contrary, the Ninth Circuit explicitly rejected, as a matter of law, Mr. Evertson’s argument that a required RCRA element was a showing that he either *intended to dispose of* or *intended to abandon* his hazardous materials and that the trial court had erred in failing to so instruct the jury. In response to that argument, the appeals court stated:

Evertson incorrectly asserts that the RCRA violation requires a showing that he intended to dispose of the materials. While intent to dispose of the materials can be sufficient evidence to show that materials are discarded (and thus waste), we have never held that intent to dispose is required. . . . Disposal (or intent to dispose) can trigger criminal liability, but liability is also triggered when material is stored (without a permit) before or in lieu of disposal. *See* 40 C.F.R. § 261.2(b); 42 U.S.C. § 6928(d).

¹ In support of its erroneous contention, the United States cites to the third page of the Ninth Circuit decision (Pet. App. at 3a). The cited page includes no discussion of the “knowing” issue; rather, that discussion appears at Pet. App. 6a and includes no suggestion that the Ninth Circuit was applying a “plain error” standard.

Pet. App. 6a. While the Ninth Circuit focused on the intent-to-dispose portion of Mr. Evertson's argument, the appeals court's language clearly conveyed its conclusion that prosecutors need not prove any specific intent beyond an intent to store the materials in question. As the petition points out, that conclusion is in conflict with holdings of the Third, Fourth, Fifth, and Seventh Circuits. Pet. at 27-28.

In an effort to explain away the Ninth Circuit's language, the United States asserts that the petition mistakenly equates RCRA's use of the verbs "dispose" and "discard." Opp. Br. 21-22. As explained below, it is the United States that is mistaken; indeed, the verb "discard" appears neither in the relevant RCRA provisions nor in EPA's implementing regulations.

Section 6928(d)(2)(A) makes it a felony for any person to store or dispose of a "hazardous waste" without a permit. It is undisputed that the materials being stored by Mr. Evertson were hazardous; the principal issue at trial was whether they were "solid waste" (and thus "hazardous waste"). The parties agree that the materials can be deemed "solid waste" (as defined by 42 U.S.C. § 6903(27)) only if they qualify as "other discarded material." For purposes of this case there are two ways that Mr. Evertson's materials could have qualified as "other discarded material": (1) if they were "disposed of" or (2) if they were "accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of . . ." 40 C.F.R. § 261.2(b).² Accordingly, because it is understood in most federal circuits that

² EPA regulations provide that the regulatory term "abandoned" materials is a subset of the statutory term "other discarded material." See 40 C.F.R.

§ 6928(d)(2)(A)'s "knowingly" requirement applies to all elements of the crime, it follows that prosecutors were required to show that Mr. Evertson either "knowingly" disposed of his materials or that he "knowingly" accumulated, stored, or treated (but not recycled) the materials in lieu of disposing of them. Mr. Evertson argued in the Ninth Circuit that the trial court erred in failing to so instruct the jury.

The Ninth Circuit rejected that argument, stating that it is sufficient for prosecutors to demonstrate that the "material is stored (without a permit) *before or in lieu of disposal*," without regard to the defendant's intent. Pet. App. 6a (emphasis added). In other words, according to the Ninth Circuit, intent was irrelevant, and the mere fact that Mr. Evertson was storing or accumulating hazardous material was sufficient for the material to be deemed "solid waste," because any such storage or accumulation would by definition be occurring before any later disposal. In an effort to explain away the Ninth Circuit's holding, the United States asserts that the appeals court stated nothing more than that it is possible to "abandon" hazardous materials (thereby causing the materials to qualify as "solid waste") without intending to "dispose" of the materials (*e.g.*, one could store the materials with an intent of never taking them out of storage – storage "in lieu of" disposal). Opp. Br. 21-22.

The United States is not providing a fair characterization of the Ninth Circuit's holding. The appeals court was responding directly to Mr. Evertson's

§ 261.2(a)(2)(i)(A). Section 261.2(b) (set forth in the text) thus provides a definition not only of "abandoned" but also of "other discarded material."

argument that prosecutors should have been required to show either that he *knowingly* disposed of the materials or that he *knowingly* abandoned them. The appeals court flatly rejected that argument, holding (contrary to the holdings of four other circuits) that proof of such intent is not required and that it is enough for prosecutors to show that “material is stored (without a permit) before or in lieu of disposal.” Pet. App. 6a.

The United States cites *United States v. Huer*, 4 F.3d 723, 732 (9th Cir. 1993), for the proposition that there is no circuit conflict, and that the Ninth Circuit agrees with other circuits that “to prove a ‘knowing’ violation under RCRA, the government must prove a defendant’s knowledge that the subject material was hazardous waste.” Opp. Br. 20. But *Huer* arose in a totally different factual context. There was no real dispute that the material at issue was part of the defendant’s waste stream; he simply alleged that he had pulled the materials out of the waste stream in order to use them as a “sample” to help resolve a government contract dispute.³ The Ninth Circuit invoked the “knowingly” requirement merely to point out that prosecutors were required to demonstrate that the defendant had not really intended to pull the material out of the waste stream. *Huer*, 4 F.3d at 732. Nothing in *Huer* conflicts with the Ninth Circuit’s later determination in this case that “when material is stored (without a permit) before or in lieu of disposal” (Pet. App. 6a), prosecutors

³ EPA regulations included a special exception from the permitting requirement for a “sample” “being stored temporarily in the laboratory after testing.” 40 C.F.R. § 261.4(d)(vi).

need not also prove that the defendant acted “knowingly.”⁴

The United States also asserts that the petition “makes no effort to establish” that the plain-error requirements have been met. Opp. Br. 19. That assertion is meritless; the petition is replete with evidence that the trial court’s errors were obvious, that they seriously affected substantial rights, and that Mr. Evertson was severely prejudiced before the jury by those errors. For example, the petition noted that the failure of the trial court to provide a “knowingly abandoned” instruction severely prejudiced Mr. Evertson with respect to the status of the 11,000 pounds of “process sludge” stored in a stainless steel, insulated reactor tank. Pet. at 28.⁵ Although the defects in the trial court’s jury instructions quite obviously rose to the level of “plain error,” the petition does not focus on the issue because the Ninth Circuit mentioned “plain error” only in passing. Instead, the appeals court affirmed the conviction on the basis that it endorsed the trial court’s understanding of RCRA’s

⁴ Under the Ninth Circuit’s RCRA standard, every homeowner who stores a commercial vehicle on his property would be a felon unless he obtains a hazardous waste permit from EPA. Every car battery contains hazardous material. If, as the Ninth Circuit asserts, it is sufficient for prosecutors to demonstrate that a RCRA defendant has stored hazardous material “before . . . disposal,” then all such vehicles (which will eventually wind up in a junk yard) are hazardous waste – regardless that the vehicle may have a resale value and regardless that the owner has no intent of abandoning the vehicle.

⁵ The jury could well have convicted him based on a finding that (as the prosecution argued) the process sludge had no commercial value, and the jury was never instructed that it should not convict if it found that Mr. Evertson honestly believed that the process sludge had commercial value (thereby negating the possibility that he acted “knowingly”). *Id.*

requirements. It is the Ninth Circuit's erroneous understanding of RCRA, not alleged deficiencies in its supposed application of the plain error rule, that merits the Court's attention.

B. In Conflict with Other Circuits, the Ninth Circuit's Understanding of RCRA Requires Deference to EPA Determinations That a Substance Is a Hazardous Waste

The petition explained at length why the Ninth Circuit-endorsed jury instructions in this case improperly relieved prosecutors of their burden of proving that Mr. Evertson's materials were "hazardous waste," including their burden of proving that he abandoned those materials. Pet. at 19-25. The United States has provided no meaningful response to that argument.

The United States asks that the jury instructions be interpreted as a whole, and asserts, "Read as a whole, those instructions informed jurors that they could not find petitioner guilty unless they found, beyond a reasonable doubt, that the named materials had been 'discarded' or 'abandoned.'" Opp. Br. 14.⁶ But the United States never explains how that could be, given that the instructions did not mention the words "abandoned," "solid waste," or even "waste." Instead, the instructions merely stated that it was up to the government to prove that Mr. Evertson knowingly "stored" or "disposed of" *hazardous waste* – without any explanation that the

⁶ As noted above, the United States is employing inaccurate nomenclature – the jury should have been asked to determine whether the materials had been "disposed of" or "abandoned." "Discarded material" is a more generally applicable term and encompasses both "abandoned" material and material that has been disposed of.

materials being stored could not be deemed hazardous waste unless Mr. Evertson were found to have knowingly abandoned them.

Nor has the United States rebutted the petition's showing that the third element of Instruction 17 (the government was required to prove that "the '*hazardous waste*' was identified as a hazardous waste by the . . . [EPA] pursuant to RCRA") essentially instructed the jury to defer to EPA's determination that the materials being stored by Mr. Evertson were "hazardous waste." The United States argues that the third element of Instruction 17 was intended to convey to the jury the prosecutors' obligation to satisfy the "identified or listed" element of 42 U.S.C. § 6928(d)(2). Opp. Br. 17-18.⁷ As the petition explained at length (Pet. 21-22), that is not even a plausible interpretation of the third element's language, which the United

⁷ The United States asserts that the district court "correctly instructed jurors that they needed to separately determine whether (1) the material was waste (first element of instructions 17 and 18 with terms defined in instruction 19), and (2) the material had been 'identified and listed' as hazardous waste by the EPA." Opp. Br. 18. In making that assertion, the United States appears to be as confused as the district court was. EPA does not "identify" materials, it "identifies" characteristics which, if possessed by a substance, render it hazardous. It does not "list" hazardous wastes, it "lists" hazardous substances. Moreover, as explained in more detail in the petition, Instructions 17 and 18 *did not* state that the jury was to determine whether "the material" was identified as a hazardous waste by EPA; rather it was to determine whether "the '*hazardous waste*'" had been so identified by EPA. Also, contrary to the United States's assertion, the instructions did not ever ask the jury to "separately determine" whether the material was "waste." Rather, the jury was asked to determine (in the first element of Instruction 17 and 18) whether Mr. Evertson's material was "hazardous waste," a determination that it would not have been in a position to make until *after* determining that the material exhibited characteristics identified by EPA as indications of hazardousness. Of course, as noted in the text, the district court made the "hazardous waste" determination easy for the jury: it instructed the jury to find that Mr. Evertson's material was "hazardous waste" if it was identified as such by EPA personnel.

States makes no effort to parse. The jury could not rationally have concluded that the third element of Instructions 17 and 18 instructed them merely to determine whether Mr. Evertson's materials exhibited characteristics that EPA in its regulations had identified as indicative of a hazardous substance. Rather, the only plausible interpretation of the language included in the third element was that the jury should determine that Mr. Evertson's materials were "hazardous wastes" if they were determined to be such by EPA personnel – regardless whether the jury believed Mr. Evertson's claim that he had not abandoned the materials. Given that EPA officials did, indeed, determine (in connection with their disposal of Mr. Evertson's materials) that the materials were "hazardous waste" – and so testified at trial – the prejudice to Mr. Evertson caused by the language in the third element is readily apparent.⁸

Moreover, the United States is wrong to suggest that the Ninth Circuit upheld this instruction merely on the basis of absence of "plain error." Opp. Br. at 19. Rather, the appeals court affirmatively concluded, "The district court did not err in instructing the jury as to the RCRA offenses." Pet. App. at 2a. Indeed, the appeals court noted that the jury instructions were "nearly identical" to ones that it had upheld in a prior case, *id.* at 3a, thereby signaling to other trial courts within the Ninth Circuit that they should use the same defective instructions in future RCRA

⁸ If the trial court had wanted to convey to the jury that prosecutors were obligated to satisfy § 6928(d)(2)'s "identified or listed" requirement, it could simply have stated, "That the materials stored at Steel and Ranch Supply exhibited characteristics that EPA has identified as indicators of hazardousness."

cases. Thus, the decision below is likely to have a significant impact on future RCRA prosecutions unless this Court intervenes.

The United States disputes the petition's assertion that the Ninth Circuit's endorsement of the "third element" instruction conflicts with the approach of other federal appeals courts. Opp. Br. 18. It argues that there is no conflict because, read as a whole, Instructions 17 and 18 "did not relieve the jury of independently concluding that the hazardous materials were 'waste.'" *Id.* (quoting Pet. App. 3a).⁹ Even if true, that is of little solace to a RCRA defendant if prosecutors can meet their burden by demonstrating that *the EPA* has determined that the materials stored by the defendant are "hazardous waste." Because, as occurred here, the EPA makes such a determination in virtually every RCRA prosecution, the third element instruction effectively relieves prosecutors of their obligation to demonstrate to the jury that the stored materials constitute "hazardous waste."

The United States also asserts that Mr. Evertson was not prejudiced by the challenged jury instructions, because his counsel was still permitted to argue, during closing arguments, that the jury should acquit because Mr. Evertson had never

⁹ It is unclear what specific language in Instructions 17 and 18 the United States could be relying on in making that assertion. The instructions did not use the term "waste." Rather, the instructions stated that prosecutors needed to demonstrate that Mr. Evertson "knowingly '*stored*' . . . '*hazardous waste*' in above-ground storage tanks at Steel and Ranch Supply." According to the United States, the jury should have deduced based on this language and on the definitions of the terms in quotation marks – and notwithstanding the language in the third element – that it was solely the jury's responsibility to determine whether Mr. Evertson had abandoned his materials and had thereby transformed them into "solid waste" and thus "hazardous waste."

abandoned his materials. Opp. Br. 15-16. But closing argument could overcome the prejudice created by the erroneous jury instructions only if we assume that the jury was willing and entitled to ignore its instructions – which could only be interpreted as telling jurors that, without regard to abandonment, Mr. Evertson’s materials were “hazardous waste” if EPA had determined them to be such. As this Court has held, “[A]rguments of counsel cannot substitute for instructions by the court.” *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978). It is particularly unlikely in this case that the jury would have been willing to accept the arguments of defense counsel in derogation of the jury instructions, because the trial judge explicitly charged the jury that “arguments and statements are not evidence,” and that jurors must “disregard anything the lawyers said that differed from the court’s instructions.” Pet. App. 7a. The United States cites no case law in support of its argument that closing argument can mitigate the prejudicial effects of an erroneous jury instruction. Under the circumstances of this case, there can be little doubt that the erroneous instructions “affect[ed] substantial rights,” and “seriously affect[ed] the fairness . . . of judicial proceedings.” *Johnson v. United States*, 520 U.S. 461, 467 (1997).

C. This Case Offers the Court a Particularly Appropriate Vehicle for Clearing Up Confusion Regarding RCRA Liability

Although RCRA was adopted more than 30 years ago, the Court has never granted review in a case involving a criminal conviction under the statute. The result has been widespread confusion – among prosecutors as well as courts – regarding the meaning of several of its more important terms.

In particular, there appears to be widespread confusion regarding the meaning of § 6928(d)(2)(A)'s "identified or listed" requirement.¹⁰ Pattern jury instructions for RCRA cases often use language quite similar to the unintelligible language employed by the district court in its misguided effort to set forth the "identified or listed" language. Many courts have erroneously concluded that the EPA maintains listings of "hazardous wastes," when (as explained in more detail in the petition) EPA in fact merely: (1) maintains a list of substances that it deems hazardous and that will be deemed hazardous wastes if and only if they enter the waste stream by virtue of being (*inter alia*) disposed of or abandoned, 40 C.F.R. §§ 261.30-35; and (2) identifies characteristics that, if possessed by a solid waste, will cause that solid waste to be deemed a hazardous waste. 40 C.F.R. §§ 261.21-24.

For example, according to the First Circuit, "The Congress has delegated to the Administrator of the EPA the responsibility for listing the types and characteristics of *substances considered to be hazardous waste*." *United States v. Henry*, 136 F.3d 12, 16 (1st Cir. 1998) (emphasis added). The Ninth Circuit has exhibited similar confusion:

RCRA charges the EPA with the '*identification and listing*' of hazardous wastes that meet the statutory definition, and instructs the agency to develop specific criteria for doing so. . . . The EPA has, accordingly, established a

¹⁰ 42 U.S.C. § 6928(d)(2)(A) provides, in relevant part:

Any person who . . . knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subtitle without permit under this subtitle . . . shall, upon conviction, be subject to a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed . . . five years . . ., or both.

comprehensive regulatory scheme that classifies hazardous wastes as either ‘listed’ or ‘characteristic’ hazardous substances. . . . Several hundred substances are now *‘listed’ as hazardous wastes* in the Code of Federal Regulations.

United States v. McDonald, 339 F.3d 1080, 1082 (9th Cir. 2003) (emphasis added). *See also, United States v. Bentley-Smith*, 2 F.3d 1368, 1371 (5th Cir. 1993) (“At all relevant times, 2, 4-D and 2, 4, 5-T [the two components of Agent Orange] were both *listed as hazardous wastes* by the [EPA].”) (emphasis added); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 663-64 (3d Cir. 1984) (“In its operations the company . . . uses degreasers and other industrial chemicals that contain chemicals such as methylene chloride and trichloroethylene, *classified as ‘hazardous wastes’* under [RCRA].”) (emphasis added).

Similar confusion as to the nature of the RCRA regulatory scheme is widespread among the lower federal courts, but in many instances the confusion has little practical effect. For one thing, whether material is “hazardous waste” or merely hazardous is often not at issue in RCRA cases; the evidence is often largely undisputed that the material has been discarded. But in this case, the distinction between “hazardous waste” and hazardous material is front and center: Mr. Evertson’s principal defense is that he did not abandon his hazardous materials and thus that the materials are not “hazardous wastes.” Thus, granting the petition would allow the Court not only to resolve the conflicts that have developed between the Ninth Circuit and other federal circuits, but also to clear up confusion that has developed as to how the RCRA regulatory scheme operates. Given the widespread

and longstanding nature of that confusion, Supreme Court review of a criminal RCRA case is long overdue.

D. Summary Reversal Is Warranted

As the petition explained, this case merits plenary review, but at a bare minimum should be summarily reversed. The trial court's jury instructions regarding what prosecutors were required to prove under RCRA were indefensible and highly prejudicial, even taking into account the failure of Mr. Evertson's trial counsel to raise specific objections to them. Mr. Evertson, an inventor and model citizen with no prior criminal record, was sentenced to 21 months in prison for actions that admittedly caused no environmental harm. While the government believes that he abandoned his valuable and carefully stored materials, Mr. Evertson knows that he did not, and there was substantial evidence to support his position – if only the plainly erroneous jury instructions had not prevented him from making his case.

The United States essentially takes the position that this is a “plain error” case whose issues are not sufficiently important to merit plenary review. If the Court subscribes to that view, then we ask it to summarily reverse.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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