No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

DOMONIC McCARNS,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

_____

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

_____

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QUESTIONS PRESENTED

1. Whether Cryptic Letter, Number Codes are Sufficient to Satisfy the Speedy Trial Act Requirement that Reasons Justifying Delay of a Criminal Trial Must be Stated on the Record

2. Whether, on Plain Error Review, Harmless Error Analysis Applies to the Constructive Amendment of an Indictment Brought by a Grand Jury

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

Petitioner Domonic McCarns respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, entered in this matter on August 21, 2018.

OPINION BELOW

The Opinion of the Ninth Circuit Court of Appeals is reported at 900 F.3d 1141. It is reproduced in the Appendix to this Petition as Appendix A.

The Unpublished Memorandum of the Ninth Circuit is reported at 735 Fed.Appx. 406. It is reproduced in the Appendix to this Petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals, affirming the judgment of the United States District Court for the Eastern District of California, was entered on August 21, 2018. No petition for rehearing was filed.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . .

Amendment VI to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ...

The Speedy Trial Act, 18 U.S.C. § 1361, provides in relevant part:

> . . . .
>
> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial

officer of the court in which such charge is pending, whichever date last occurs. . . .

. . . .

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

. . . .

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance

under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the

reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

STATEMENT OF THE CASE

Domonic McCarns was charged in a superseding indictment on February 11, 2010, with a single count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349 for his part in connection with a mortgage rescue scheme that defrauded homeowners and lenders. The indictment also charged several co-defendants with conspiracy to commit mail fraud and some with substantive counts of mail fraud. McCarns was not among those charged with mail fraud.

Before trial McCarns joined with other defendants in a motion to dismiss the indictment on the ground that his speedy trial rights had been violated because the district court used coded terminology – letters and numbers referenced in a court general order – in giving its reasons for continuing the trial. The motion was denied by the district court. See Appendices C and D. On appeal,[1] McCarns argued that the indictment should have been dismissed because the reasons given on the record in the district court were inadequate to fulfill the requirements and purpose of the Speedy Trial Act. He argued the district court failed to make the requisite "ends of justice" findings on the record, as required by 18 U.S.C. §3161(h)(7)(A), when

[1] The district court had jurisdiction pursuant to 18 U.S.C. §3231. Appellate jurisdiction was conferred pursuant to 28 U.S.C. §1291.

it referred to local codes "T2" and "T4."[2] The Court of Appeals for the Ninth Circuit disagreed and held in a published opinion that "[t]he district court's references to the local codes, which correspond to the §3161(h)(7)(B) factors, sufficiently explain the district court's reasons for its 'ends of justice' findings." Appendix A, Slip Opinion at 9.

At trial, McCarns proceeded jointly along with two other defendants, one of whom, Charles Head, was charged with both conspiracy to commit mail fraud and mail fraud. When the district court instructed the jury as to the elements of mail fraud, it left the mailing element out of the conspiracy instruction and only included it in the instruction as to the mail fraud count charged against Head. See Appendix E, at pp 48, 52. McCarns did not object. On appeal for plain error, McCarns argued that this resulted in a constructive amendment to the indictment in violation of the Fifth Amendment. Compare Appendix F. The Court of Appeals disagreed in an unpublished memorandum, stating that the constructive amendment claim merely restated an argument with respect to an element missing from the instructions – mailing – for which there was sufficient proof at trial. Appendix B.

McCarns was sentenced to 168 months imprisonment, 36 months supervised release, and a $100 assessment. Following entry

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[2] T2 and T4 are defined in the Eastern District of California's General Order No. 479 (2009). T2 corresponds to §3161(h)(7)(B)(ii), which applies when a case is "unusual or complex." T4 corresponds to §3161(h)(7)(B)(iv) which applies when the parties need more time to retain counsel or effectively prepare for trial. See Appendix C.

of a stipulation and order as to the amount of restitution. An Amended Judgment was entered in the district court on January 24, 2017.

A. *The Cryptic Codes Invoked by the District Court*

In 2009 the Eastern District of California adopted General Order No. 479 giving judges the option of using a letter code to denominate the reasons for excluding time. With respect to exclusions of time under §3161(h)(7), the following codes relevant to this case were adopted:

(h)(7)(B)(ii)	T2	Case Unusual or Complex
(h)(7)(B)(iv)	T4	Continuance Granted in Order to Obtain or Substitute Counsel; give reasonable time to prepare

Under this system, when the district judge decides to enter an order excluding time based on §3161(h)(7)(ii), providing for time exclusion in cases that are "so unusual or so complex…" all that the district court must do is say "T-2." When cases are neither complex nor unusual, under the Eastern District's system, "T-4" is all a district judge must say in order to exclude time under §3161(h)(7)(B)(iv) on the grounds that the failure "to grant such a continuance…[1] would deny the defendant reasonable time to obtain counsel…[2] would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

This case started on March 13, 2008. Trial started on October 21, 2013. There were numerous continuances excluding 286 days. Three exclusions were challenged on appeal: [1] January 12, 2009, [2] March 16, 2009, and [3] February 10, 2011, which, cumulatively, involved exclusions in excess of 70 days. On each of these dates, the district court simply said "T2 and T4."

On January 12, 2009 the court stated, "[w]e'll have a status conference on the 16th [of March] at 10:00 a.m. Time will be excluded until that date under T2 and T4." On March 10, 2009 the court stated that "the matters will be continued to the 15th of June for further status. Time will be excluded under local codes T2 and T4." On February 10, 2011, the court announced "Time will be excluded under local codes T2 and T4."

Along with other defendants, McCarns filed a motion to dismiss for violation of the Speedy Trial Act. The motion was denied. Appendix D. And the Court of Appeals affirmed. Appendix A.[3]

B. *Constructive Amendment of the Indictment*

The superseding indictment alleges in Count I that:

> "¶ 12. Beginning at a date no later than on or about March 19, 2005, and continuing to at least June 30, 2006, in the State and Eastern District of California and elsewhere, defendants CHARLES HEAD, KEITH BROTEMARKLE, BENJAMIN BUDOFF, JOHN CORCORAN, DOMONIC MCCARNS, LISA VANG,

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[3] This Court of Appeals affirmed the same district court order in connection with Charles Head's trial. *United States v. Charles Head and Jeremy Head*, Nos. 14-10438, 14-10442, 14-10493 (Memorandum). This Court denied certiorari on February 26, 2018. No. 17-7549.

> AND KOU YANG, together and with others known and unknown to the Grand Jury, knowingly combined, conspired, confederated, and agreed among themselves to devise a material scheme and artifice to defraud, and, to obtain property and money by means of materially false and fraudulent pretenses, representations, and promises, and to use the United States Mails and any private and commercial interstate carrier to execute the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341 (Mail Fraud).

Appendix F (italics added).

Requiring proof of the mailing element of conspiracy to commit mail fraud "is critical since the Federal Government's jurisdiction of this crime" rests on evidence of mailings. See Stirone v. United States, 361 U.S. 212, 218 (1960) (Hobbs Act).[4] The instruction given at trial with respect to the Count I conspiracy mentioned the legal term "mail fraud" and cited generally to a section of the United States Code, but it omitted "mailing" as a necessary element that needed to be proved beyond a reasonable doubt.

The Government was only required to prove:

> there was an agreement between two or more persons to commit mail fraud, and, second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

Appendix E, at p. 48.

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[4] The mailing element distinguishes ordinary conspiracy from the federal offense of conspiracy to commit mail fraud. See 18 U.S.C. §1341 (whoever "places in a post office or authorized depository for mail matter, ..."); 18 U.S.C. §1349 ("Any person who attempts or conspires to commit any offense under this chapter.....).

The grand jury indicted McCarns for a conspiracy that included use of the mail ("and to use the United States Mails and any private and commercial interstate carrier to execute the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341 (Mail Fraud)," but the instructions allowed the jury to convict him for conspiracy to defraud without finding use of the mail. In other words, McCarns was convicted of a crime, ordinary conspiracy, that was not charged in the count of the indictment alleging conspiracy to commit mail fraud. By the terms of the instructions, he was convicted of ordinary conspiracy, rather than conspiracy to commit mail fraud.

REASONS FOR GRANTING THE PETITION

A. Whether Cryptic Codes Satisfy the Requirement **of the Speedy Trial Act as Interpreted in Zedner v. United States, 547 U.S. 489 (2006)** that Reasons for Findings Justifying Delay Must be Stated on the Record Presents an Important Question That Has Not Been, but Should Be, Settled by this Court

In Zedner v. United States, 547 U.S. 489, 508 (2006), the Court concluded with respect to the Speedy Trial Act that "if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted…." The focal point of the Zedner opinion is the public's interest in a speedy trial. Id. at 501. The statute itself could not possibly be clearer in its command: No time shall be excludable

"unless the court sets forth, in the record of the case…its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." §3161(h)(7)(A). See United States v. Ammar, 842 F.3d 1203, 1210 (11th Cir. 2016) (“Zedner makes clear that the findings must be expressly made on the record”).

What matters is that the district court make “on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial.” Zedner at 499. As the Tenth Circuit has said, “A record consisting of only short, conclusory statements lacking in detail is insufficient.” United States v. Toombs, 574 F.3d 1262, 1271 (10th Cir. 2009).

Even the most persuasive showing of the need for “effective preparation” by counsel will not suffice to support an exclusion of time unless the court also finds, and puts on the record, that the “ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.” §3161(h)(7)(A). “[T]he Act was designed with the public interest firmly in mind.” Zedner, at 501.

Essentially, the Ninth Circuit reached the conclusion that the underlying reasons for granting an exclusion of time must be stated on the record, but the statutorily required articulation of an “ends of justice” finding is optional. The issue is not what particular words must be used, but that whatever the particular words employed, there must be an articulable “ends of justice” finding, identifiable as such, on the record in order to exclude time. The Act “requires express findings,” Zedner at 506. Simply stating “T2" or “T4” does

not constitute an "ends of justice" finding, nor does the invocation of these codes articulate reasons for finding.

These abbreviated terms are nothing more than the equivalent of a checkmark. Reliance on a two-character designation to reference a complex subsection of a federal statute fosters a non-specific memory of exactly what those subsections actually provide. In some ways, using the codes is similar to using speed dial on a phone. Pressing a button is considerably faster and more efficient than looking up and considering a number. But the actual number is buried away and easily forgotten.

The ordinary public has no way of knowing, let alone finding, what a code listed in the district court General Order number 479 might mean. The public is unlikely ever to know what occurred in court, or what findings were made. Whether this satisfies the ends of the Speedy Trial Act should be settled by the Court.

B. Whether Harmless Error Analysis Applies to a Constructive Amendment on Plain Error Review Presents an Important Question That Has Divided the Circuits and Should be Settled by this Court

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." Kann v. United States, 323 U.S. 88, 95 (1944).

The Fifth Amendment requires that a federal defendant has a right to be tried only on charges presented to the grand jury and charged in the indictment. "A constructive amendment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after a grand jury has last passed on them." United States v. Ward, 747 F.3d 1184, 1190 (9th Cir. 2014). See Stirone, 361 U.S. at 218-219 ("The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment.").

The constructive amendment occurred in this case because the district court left out of the conspiracy instruction an element that was included in the superseding indictment. The unconstitutionality of this type dates as far back as the Court's decision in Ex Parte Bain, 121 U.S. 1, 7 (1887) in which the Court held that a trial court that struck out the words "the Comptroller of the Currency" stated in the indictment effectively allowed conviction of making a false statement with intent to deceive the Comptroller of the Currency without proof that the Comptroller had been deceived. See Stirone, 361 U.S. 216-217, citing Bain with approval.[5]

Here, the district court permitted the jury to convict Domonic McCarns without considering proof of mailing. Although the jury instructions later correctly informed the jurors of the elements of mail fraud in the context of charges against co-defendant Charles

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[5] *Bain* was overruled on other grounds by *United States v. Cotton*, 535 U.S. 625, 631 (2002).

Head, the instructions did so because Charles Head unlike McCarns, was charged with mail fraud.

The way the instructions were read to the jurors they needed to compartmentalize the one conspiracy count against McCarns, Head, and another defendant, Benjamin Budoff, and the separate three counts of mail fraud against Head. A juror hearing the instructions on the whole would have first considered the guilt or innocence under the conspiracy instruction. The juror would not have considered use of the mail because it was not included as a requirement of the conspiracy. Then the juror would have considered whether Charles Head had committed mail fraud. Following the instructions, the juror would have confined its mailing analysis to the three counts against Head.

Nothing in the instructions told the jury to pull the mailing element from the three counts against Head, when it considered whether McCarns was guilty of conspiracy to defraud homeowners. Thus, the jury could have found McCarns conspired to defraud homeowners, but that he did so regardless whether there was a required nexus with the mail. This error was not trivial. Use of the mail was essential to federal jurisdiction.

The Court of Appeals found that this is no different than leaving an element out of an instruction and it found enough evidence in the record to support the verdict regardless. Appendix B, Memorandum at 2. See Neder v. United States, 527 U.S. 1 (1999).

However, as Stirone says, the charge brought by the grand jury is jurisdictional and defines the scope of the criminal proceeding. Whether the failure to try a defendant on the same

charge is subject to harmless error analysis warrants review by this court. See United States v. Centeno, 793 F.3d 378, 389, n. 10 (3d Cir. 2015); United States v. Syme, 276 F.3d 131, 155 (3d Cir. 2002) ("constructive amendments are presumptively prejudicial under plain error review"); United States v. Mills, 29 F.3d 545, 548 (10th Cir.1994) ("A constructive amendment that broadens an indictment is reversible error per se, because only the grand jury can amend an indictment."). But see United States v. Brandao, 539 F.3d 44, 60 (1st Cir. 2008) ("constructive amendment claims on plain error review do not presume prejudice").[6]

Whether harmless error analysis applies should be settled by the Court.

CONCLUSION

The writ should be granted.

November 16, 2018

Respectfully submitted,

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Counsel of Record for Petitioner

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[6] The circuit split was acknowledged in *United States v. Gonzalez Edeza*, 359 F.3d 1246, 1251 n. 3 (10th Cir. 2004) ("we need not choose sides in a three-way circuit split regarding the proper method to determine whether the alleged constructive amendment affected the defendant's substantial rights.").