NO. _____

_____

_____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

October Term, 2018

_____

ROBERT RYAN POWELL

*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

_____

# PETITION FOR A WRIT OF CERTIORARI

_____

JONATHAN S. SOLOVY, Esq.
*Counsel of Record for Petitioner*

LAW OFFICE OF JONATHAN S. SOLOVY, PLLC
705 Second Avenue, Suite 1300
Seattle, WA 98104-1705
(206) 388-1090
solovylaw@earthlink.net

## QUESTION PRESENTED

The questions presented in this case are as follows:

Where jury instructions lack the dates and timeframes specified in the indictment, do the jury instructions constructively amend the indictment, and thus violate Fifth Amendment grand jury and double jeopardy protections, deny the right to jury unanimity guaranteed under Article III, § 2 and the Sixth Amendment of the United States Constitution, and subvert statute of limitations protections?

Should a constructive amendment of the indictment necessarily result in per se prejudice or structural error requiring reversal even where the constructive claim is not raised below, or should the claim be subject to the plain error standard of review requiring a showing of prejudice?

## PARTIES TO THE PROCEEDING

The petitioner is Robert Ryan Powell. He is presently incarcerated by the United States Bureau of Prisons at FCI Coleman, located in Sumterville, Florida. The named respondent is the United States of America.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***FEDERAL CASES:***

***FEDERAL STATUTES:***



***CONSTITUTIONAL PROVISIONS:***

## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert Ryan Powell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished as *United States v. Powell*, 727 F. App'x 311, No. 16-30253 & 17-30012 (9th Cir. July 15, 2018). *See* Pet. App. 3a-7a. The district court's rulings, both oral and written, are unpublished. Pet. App. 8a-110a.

## JURISDICTION

The judgment of the court of appeals denying a panel rehearing and en banc review was entered on August 31, 2018. Pet. App. 1a. This petition is timely pursuant to Rule 13.1.

The procedural history of the disposition is set forth below.

The Ninth Circuit Court of Appeals entered its memorandum decision on June 15, 2018. Pet. App. 3a-7a. The Ninth Circuit granted petitioner's motion to extend time to file the en banc petition to August 17, 2018. Pet. App. 2a. On August 7, 2018, petitioner filed before the Ninth Circuit his petition for rehearing with suggestion for rehearing en banc. *See* Ninth Cir. Dkt. #58 (Ninth Cir. No. 16-30253). The Ninth Circuit on August 31, 2018, entered an order denying Powell's petition for rehearing with suggestion for rehearing en banc. Pet. App. 1a.

Robert Powell's petition for writ of certiorari is timely, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment specifies that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; . . . . " U.S. Const. amend. V.

The Fifth Amendment's Double Jeopardy Clause states that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . ." U.S. Const. amend. V.

The Grand Jury Clause of the Fifth Amendment states that "[n]o 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; . . . ." U.S. Const. amend. V.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . . ." U.S. Const. amend. VI. Similarly, Article III, Clause 2 of the United States Constitution specifies that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury; . . . ." U.S. Const. art. III, § 2.

## STATEMENT OF THE CASE

### A. Procedural History and Factual Background.

Count One and Count Two (Transportation of a Juvenile with Intent to Engage in Prostitution) of the Superseding Indictment charged that in August 2014, Powell transported C.C. and N.C., juvenile females, from Washington to California, for prostitution, in violation of 18 U.S.C. § 2423(a). Pet. App. 111a-112a.

Count Three (Sex Trafficking of by Force, Fraud, and Coercion) alleged that from January 2014 through January 13, 2015, Powell enticed, harbored, transported, provided and obtained an adult female, B.M., knowing that force, fraud and coercion would be used to cause her to engage in prostitution, in violation of 18 U.S.C. § 1591(a)(1) and (b)(1). Pet. App. 112a.

Count Four (Transportation of B.M. for the Purpose of Prostitution Through Coercion and Enticement) charged that on or about June 4, 2014, Powell persuaded, induced, enticed and coerced B.M. to travel from Washington State to Nevada to engage in prostitution, or attempted to do so, in violation of 18 U.S.C. § 2422(a). Pet. App. 112a.

Significantly, the court's jury instructions did not contain any dates or timeframes. Pet. App. 34a-72a. Although Count Three charged Powell with sex trafficking by force, fraud or coercion, "[b]eginning in or about January 2014, and continuing until on or about January 13, 2015," (Pet. App. 112a), the trial evidence reflected that B.M. served as a prostitute with Powell for only approximately 175 days or 46% of the one-year and twelve-day period specified in Count Three, during the following distinct periods: February 27, 2014; April 29 to August 12, 2014; and November 15, 2014 to January 13, 2015. B.M. lived and worked apart from Powell for significant periods of time – 61 days between the first and second periods, after having worked for Powell only one day; and 86 days between the second and third periods. The trial evidence presented the following sequence of events:

***Initial Contacts With B.M. And The Cancelled Trip.*** In January 2014, B.M. was 21 years old, living in Seattle-area hotels, and working as a prostitute. ER 614-616, 639.[1] While living in Las Vegas, Powell contacted B.M. after seeing her Backpage.com advertisements. ER 616-619. B.M. ultimately agreed to work for Powell "because she wanted something different." ER 618-622. B.M. wired Powell $350 to cover airfare. ER 885-887; ER 1368-1370. There was

[1] Citation to "ER__" refers to the excerpts of record Powell filed before the Ninth Circuit in his direct appeal. Citation to "SER__" refers to the sealed excerpts of record Powell filed before the Ninth Circuit. The trial exhibits are cited herein as "Exhibit__". In light of the voluminous nature of the transcript of the eight-day trial and the clerk's papers, Powell's Appendix to the certiorari petition contains only select portions of the district court record.

no evidence that Powell made the reservations or purchased the tickets. *See* Exhibits 89 & 96. ER 1651-1652.

During the layover in Boise on February 15, B.M. decided not to continue to Las Vegas, and flew back to Seattle. ER 886-887; ER 609. Detective Washington testified he did not consider B.M.'s February 15 flight as being in furtherance of sex trafficking. ER 1452-1453.

***First Period With Powell – February 27, 2014***. After her return to Seattle, B.M. initiated contact with Powell, and elected to fly to Las Vegas on February 26 or February 27, 2014. ER 623-624; ER 886-887, 891. B.M. testified that Powell slapped her on the face after she playfully pinched him. ER 626-627.

On February 27, B.M. called her mother from a hotel-casino and stated Powell hit her in the face. ER 966-968. B.M. went to casino security and met with the police. ER 633-634; ER 1057-1061. *See* Exhibit 120 (videotape). Although B.M. testified Powell's slap left a mark on her face, the police noted no injuries. ER 627; ER 1058. The police arrested her on an outstanding warrant for being a minor in a gaming establishment. ER 635-636, 684; ER 1060. B.M. returned to Seattle on March 3, and lived with her mother. ER 636; ER 970-971, 1048.

***First Period Away From Powell – March 3 to April 29, 2014***. B.M. left her mother after staying three nights, and worked a few days for Isaiah, a former pimp. ER 637-638, 669; ER 971-972. B.M. rebuffed her mother's efforts for B.M. to enter programs to leave prostitution. ER 1047-1049. Her mother described B.M. as headstrong and stubborn. ER 1055.

From March 7 through April 29, 2014, B.M. resided at a motel in Montlake Terrace, Washington, and having no plans to return to Powell, worked for herself and a pimp named Alex. ER 639; ER 891-894; ER 1444-1445. *See* Exhibit 238; Exhibits 266-313. According to

B.M., Powell apologized and regularly contacted her. ER 638-640; ER 926. B.M. testified she returned to Powell "to see if things would have been different." ER 640.

***Second Period With Powell – April 29 to August 21, 2014***. From April 29 to August 21, 2014, B.M. worked as a prostitute with Powell in Las Vegas, and traveled to various states with Powell or by herself. ER 663-667, 671-691; 834; 1374-1400, 1441-1445; ER 1651-1652 (Exhibit 96). *See* Exhibit 89. B.M. and Powell's June 4 flight from Seattle to Las Vegas served as the basis for Count Four. ER 831-832; ER 1441. B.M. testified she gave all her proceeds to Powell, but received limited amounts of cash. ER 655-656.

While stating that Powell did not do anything physical against her, B.M. testified that Powell threw clothing and a plate of food at her. ER 650. While in Seattle in May, B.M. paid a "choose-up" fee to Isaiah, her former pimp, and worked for him a few days. ER 621-622, 669-670. B.M. could not recall the exact reason she did not want to be with Powell, or what Powell said to get her to return. ER 669-670.

B.M. testified that when the phone charger she grabbed went into his food, Powell said he felt like punching her in the face. ER 672. She testified that when she became too ill to engage in prostitution Powell seized the phone when she tried to call her mother, and stated he would send her out naked if she left. ER 684-688. However, Powell drove B.M. to her mother on August 21. ER 688-689, 691; ER 973-976. Before B.M. left, Powell allegedly threw her clothes and a croissant across the room. ER 690. B.M.'s mother testified B.M. reported that Powell yelled and threw objects at her, and hit her. ER 976.

***B.M.'s Second Period Away From Powell – August 21 to November 15, 2014***. B.M. called Powell within a day, or the same day, that Powell left B.M. with her mother on August 21. ER 691-694. Although Powell had kept B.M.'s phone, B.M. was able to call Powell by finding

her old phone at her mother's house and downloading an app with a WiFi number. ER 692-694. B.M. testified she did not know why she contacted Powell, but stated she wanted an explanation from him, and that she was torn about whether to continue as a prostitute. ER 692-695.

On August 26, the Oakland Police arrested Powell on a parole violation warrant.[2] ER 822-827; ER 1234-1235. After his release in the beginning of November, Powell lived with his mother. ER 1235, 1242. B.M. frequently telephoned Powell while he worked for his mother's real estate business. ER 1235-1236.

B.M. got a job at Starbucks while she was living with her mother. ER 896, 978. B.M. stated Powell called her about twice a week, and spoke of her returning, but that Powell knew she was not ready to return. ER 696-697.

B.M. left her job at Starbucks, and in October left her mother's residence without notice. ER 896, 978-979, 1051. B.M. testified she returned to Powell because she did not know what she wanted to do, and because she had feelings of love and affection for Powell who "made it seem like he still cared." ER 697.

***Third Period With Powell – November 15, 2014 to January 13, 2015***. B.M. flew to Las Vegas on November 15, 2014. ER 897; ER 1400-1401; ER 1651-1652. She worked as a prostitute with Powell in Las Vegas, and traveled to various states with Powell or by herself, and sometimes with R.B., another prostitute working for Powell, until Powell's arrest in Rapid City on January 13, 2015. ER 508-535, 698-714; ER 838-839; ER 1400-1401, 1406-1428.

***B.M.'s Interview in Rapid City.*** B.M., R.B., and Powell travelled to Rapid City, South Dakota, where, on January 13, 2015, the police questioned B.M. and R.B., and arrested Powell. ER 508-510, 538, 544, 718-722. B.M. sometimes laughed during the police interview, but

[2] Defense counsel detailed that Powell was transferred to a halfway house in Orange County. ER 1217.

testified it was her way of coping. ER 476-477; ER 937. *See* Exhibit 211A (audiotape).[3] B.M. repeatedly voiced her distrust of law enforcement and her concern that she would be prosecuted, and repeatedly asked how the police were going to help her. Exhibit 211A. Officer Masur told B.M. he drew a distinction between victims – persons "being forced to go out, have sex for money, and help support other people's habits and needs" – as opposed to other persons, who deserve punishment because they "go out and they work to support their own issues, their own habits," and "do it because they want to do it." ER 213-214. After being told that she could face up to a year of incarceration, B.M. showed Officer Masur her bruises and claimed Powell slapped, hit and beat her. ER 223-229. When B.M. protested how a year in jail would help, Officer Masur stated "then I need to know about it if you're a victim." ER 224-225. B.M. subsequently alleged that Powell stomped on her at his mother's residence. ER 250. She alleged being beaten five or six times since meeting Powell. ER 268. Despite Officer Masur's entreaties to provide details, B.M. could only recall the incident at his mother's residence and related that one of her friends punched and slapped her. ER 268-269.

The police recovered B.M.'s cell phone which contained a text message to Powell stating that she cared, did not want anything bad to happen to him, and that she would not leave him. ER 724. Powell responded that he was committed to her and appreciated her. ER 726.

At the Rapid City Police station, B.M. told R.B. that Powell bruised her leg at Powell's mother's house. ER 943-944; Exhibit 136 (videotape). Officer Masur had informed B.M. that

[3] For ease of reference, petitioner cites herein Exhibit 211, the transcript of the audiotape (Exhibit 211A) of Rapid City Officer Masur's interview of B.M., played to the jury. ER 184-285; ER 813-817, 842-851; ER 1402-1403. Pages 159 to 209 of the transcript are not fully redacted, as they contain portions of the audiotape which were skipped pursuant to the court's *in limine* rulings.

she and R.B. were being recorded, and that he hoped B.M. would influence R.B. to provide information. ER 483-484.

B.M. testified the bruises on her legs resulted from Powell kicking her, but that she did not want to remember the details. ER 716-717. She could not specify where or when Powell had allegedly struck her on the leg. ER 855-856. The defense investigator testified that B.M. denied Powell stomped on her legs or beat her at his mother's house. ER 1507, 1515. B.M. denied telling the investigator Powell had never stomped on her legs. ER 908.

***B.M.'s False Or Misleading Statements to the Rapid City Police.*** Based on B.M.'s representation that she wanted to see her grandmother and brother in California, law enforcement paid for B.M. to fly from Rapid City to Ontario, California. ER 485; ER 548; ER 808-809, 857-859; ER 876-877. B.M. admitted she was untruthful in telling the Rapid City Police she wanted to go California to see her grandmother and brother, rather than revealing her actual plans to be with another pimp who was Powell's friend. ER 745-746, 856-859, 876-877. B.M. explained her mother would not take her back, and that she rejected her mother's efforts to get her to a Seattle-area group home for women fleeing prostitution. ER 857-859, 803-804; ER 876-877, 909-910, 980-981. B.M. did not seek the aid of Kirkland, Washington officer Mark Brown, who had helped her in the past. ER 878-879. Law enforcement did not charge B.M. for prostitution in Rapid City or the greater Seattle area. ER 808.

When Officer Masur asked B.M. what got her back into prostitution, B.M. replied: "Went and got a job. Lost my job. Lost my apartment. Lost everything. My life went to shit." ER 214-215; ER 937. B.M. told the police she lost her job at Radio Shack, but failed to disclose that Radio Shack fired her in June 2013 for stealing merchandise at the behest of her pimp, Alex. ER 859-862; ER 695-696. B.M. testified she would not have stolen the merchandise unless her

pimp told her to do so. ER 860-861. She admitted that she did not provide Officer Masur with all the circumstances leading to her being fired. ER 861-862.

***Jury Note Regarding The Temporal Scope of Count Four***. During deliberations, the jury sought clarification regarding whether Count Four included all dates of travel, or only June 4, 2014. Pet. App. 28a. The court responded in writing that "[t]he date in Count 4 is June 4, 2014." Pet. App. 32a-33a. In responding to the jury note concerning Count Four, the district court recognized the importance of instructing the jury concerning the date charged:

> I think the objective is accomplished and specifically answers the question, because they're really looking for the date, *and I think the date is a critical component* of what's not present before the jury. Because their specific question is, "Clarification on Count 4. Does the count include all dates of travel, or is it limited to June 4, 2014, as stated by the prosecution in closing argument?"
>
> So my read of that is, they're looking at two options. Is it all dates of travel, or is it June 4th, 2014?
>
> The defendant is charged with *specific activity*, of having committed the violation on June 4. Because here's the problem that the court has *if we leave them with an impression of all dates, and that is, we wouldn't know if they came back with a verdict on one period of travel as opposed to another period of travel.*

Pet. App. 32a (emphasis added). Despite recognizing that the date constitutes "a critical component" of the offense in Count Four, the court failed to notify the jury of the dates and timeframes specified in the other counts.

***The Verdict and Sentencing***. The jury found Powell not guilty of Count Four, but guilty of the other three counts. Pet. App. 25a-26a. The district court sentenced Powell to 198 months imprisonment, 10 years supervised release, a $100 special assessment, and $677,221 restitution. Pet. App. 8a-22a.

***Arguments of Defense Counsel***. There is no indication in the record that the court read the indictment to the jury or provided a copy of the indictment.[4] ER 1653-1691; ER 1553-1571, 1624. In moving to dismiss and for acquittal as to Count Three, Powell argued, in part, that he was denied his right to a unanimous verdict where (1) the evidence presented three distinct episodes of alleged trafficking, separated by significant time periods of time during which B.M. worked for two other pimps, (2) Powell was under judicial restraint on a parole violation, and (3) the jurors may not have been in agreement regarding the time period of the offense. Pet. App. 76a-80a; ER 380-389; SER 1713-1721; ER 157-158. Powell argued that the jury's acquittal on Count Four established a break in the supposedly continuous trafficking. ER 157-158.

In denying Powell's motions, the court provided that sex trafficking under Section 1591 constitutes a continuing offense, a rational jury could find there was continuous activity, and that the jury rejected the theory of a "break" in defendant's conduct. Pet. App. 23a-24a, 88a-89a, 91a-92a, 99a-100a; ER 149-154; ER 157-158. The jury verdict form did not require a finding concerning whether the conduct was continuous. Pet. App. 25a-26a.

Although defense counsel did not use the terms "variance" or "constructive amendment," he effectively raised the claims by arguing that (1) the indictment provided inadequate notice regarding the three separate episodes of alleged trafficking, and (2) although the indictment charged that Powell continuously trafficked B.M., the trial evidence showed significant breaks during the 54-week period charged. Pet. App. 76a-79a; ER 384.

[4] The parties' closing arguments referenced various dates without detailing which dates or timeframes were specified in the indictment. ER 1575-1606, 1613-1614.

## B. The Ninth Circuit Panel's Memorandum Decision Affirming Mr. Powell's Conviction.

The Ninth Circuit panel held that the claim alleging that the jury instructions constructively amended the superseding indictment is not reviewable. Pet. App. 4a. The panel explained that Powell waived his challenge to the jury instructions when his defense counsel stated that he had no objection to the court's failure to give any of his requested jury instructions, which contained dates and timeframes. Pet. App. 4a. The panel further held that even if it found the issue was merely forfeited, rather than waived, no plain error was shown. *Id.* Citing *United States v. Alvarez-Ulloa*, 784 F.3d 558, 570 (9th Cir. 2015), the panel provided that for a constructive amendment to inhere, jury instructions must diverge materially from the indictment and evidence must have been introduced at trial that would enable the jury to convict the defendant for conduct with which he was not charged. Pet. App. 4a. The panel concluded that neither of these circumstances is present in Powell's case. *Id.*

The panel also held that the superseding indictment provided sufficient notice, and was not duplicitous. Pet. App. 4a-5a. In addition, the panel held that Powell was not deprived of his right to a unanimous jury verdict. Pet. App. 5a. The panel explained:

> Although Powell asserts that there were three "distinct" time periods involved and the jurors may not have come to an agreement on which of the three time periods was the one in which Powell trafficked the victim, Count Three charged, and the Government presented evidence at trial establishing, ongoing trafficking of the victim by Powell during the timeframe alleged in the superseding indictment—"beginning in or about January 2014, and continuing until on or about January 13, 2015," the date of Powell's arrest.

Pet. App. 5a-6a. The panel further provided that Powell did not request a specific unanimity jury instruction beyond the general instruction given by the district court. Pet. App. 6a. Also, the panel rejected Powell's evidentiary claims. Pet. App. 6a-7a.

**C. Robert Powell's Petition For Rehearing With Suggestion For Rehearing En Banc.**

On August 7, 2018, Powell filed his petition for rehearing with suggestion for rehearing en banc, raising the constructive amendment and jury unanimity claims. Ninth Cir. Dkt. #58.

Powell argued that the instructions' lack of dates and timeframes constructively amended the indictment, or resulted in a variance, denied Powell's Fifth Amendment grand jury and double jeopardy protections, and denied his right to jury unanimity guaranteed under Article III, § 2, and the Sixth Amendment. Ninth Cir. Dkt. #58, pp. 1-3, 12-15. He asserted that review is warranted because at stake is the power of grand juries to specify the parameters of the charges. *Id.* at 2.

In addition, Powell argued that review is warranted to address the important question of whether the constitutional right to jury unanimity is necessarily violated where the jury instructions contain no reference to dates or timeframes. Ninth Cir. Dkt. #58, pp. 3, 15-18. He asserted that every crime involves an act or omission taking place in real time, and that dates and timeframes are essential because without them, the charged conduct is amorphous and impossible to define. *Id.* at 3. He asserted that the panel's holding is untenable because it subverts the grand jury's power to set the temporal parameters of the offenses charged, and leaves no confidence that the verdict is unanimous or protects against double jeopardy. *Id.* at 3.

Powell also raised the issue concerning whether plain error, de novo, or another standard of review is required where the government plays a significant role in creating and failing to identify the error before the district court. Ninth Cir. Dkt. #58, pp. 3-4, 9-12. Powell argued that the government played the primary role in creating the constructive amendment or variance by failing to follow the routine practice of stating in the proposed jury instructions the dates and timeframes specified in the indictment. *Id.* at 3-4, 9-11. In addition, Powell asserted that the

government invited the error in failing to cite in its proposed instructions relevant authority or model jury instructions which would have "flagged" the departure from the routine practice setting forth the indictments' dates and timeframes. *Id.* at 3-4, 10.

Powell detailed that after the jury issued its note concerning the applicable date for Count 4, the government missed an opportunity to correct the error when it represented that "we reviewed the jury instructions again, specifically Instruction No. 25, and saw that, indeed, it does not include the date that was charged in the superseding indictment." *Id.* at 11.

In addition, Powell argued that the record and case law conclusively establish that the panel incorrectly determined that Powell's counsel waived his challenge to the jury instructions by affirmatively stating that he had no objection to the court's failure to give any of his requested jury instructions. Ninth Cir. Dkt. #58, pp. 7-9. Reviewing the record, Powell specified as follows: (1) Powell's proposed jury instructions detailed the dates and timeframes specified in each count of the indictment (ER 288, 295-297, 301); (2) the jury issued a note asking whether the charge in Count 4 includes "all dates of travel, or is it limited to June 4, 2014, as stated by the prosecution in closing arguments?" (ER 1635): (3) the parties and the court agreed on the need to clarify the date for Count 4 (ER 1634-1638, 1677); (4) defense counsel asked the court to read Count Four "as it is stated in the indictment" (ER 1637); (5) during the colloquy, the trial court stated he had before him the Superseding Indictment (ER 1637); and, (6) nevertheless, the trial court apparently did not notice that the jury instructions lacked the dates and timeframes for the other counts. Ninth Cir. Dkt. #58, pp. 7-9.

Powell argued that a knowing and affirmative wavier could not have occurred because like the government and judge, Powell's counsel was clearly unaware that the jury instructions lacked dates and timeframes. Indeed, in stating he had no objection to his instructions not being

used, defense counsel made no reference to the court's jury instructions lacking dates or timeframes. Ninth Cir. Dkt. #58, p. 8. Powell noted that after the jury issued a note asking whether the charge in Count 4 includes all dates of travel or was limited to June 4, 2014, the government, defense counsel, and the trial court agreed that the jury must be apprised that Count Four was limited to June 4, 2014. *Id.* The petitioner argued that the fact that defense counsel agreed there was a need to apprise the jury as to the date for Count Four conclusively establishes that defense counsel, along with the government and the trial court, remained unaware that the instructions for the other counts lacked dates and timeframes. *Id.* at 8-9. He asserted that had defense counsel realized that the jury instructions pertaining to the other counts lacked dates and timeframes, he would have certainly notified the court. *Id.* at 9.

Powell also raised the question regarding how plain error review should be applied in constructive amendment claims, in light of the recent United States Supreme Court opinion in *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), adopting a more liberal standard of plain error review. Ninth Cir. Dkt. #58, pp. 4, 9-12. Powell argued that the panel's application of plain error review conflicts with *Stirone v. United States*, 361 U.S. 212, 218-19 (1960), which created a strong presumption that constructive amendments result in plain error by providing that the grand jury's right to make the charge on its own judgment is "a substantial right which cannot be taken away with or without court amendment." *Id.* at 11-12.

On August 31, 2018, the Ninth Circuit denied Powell's petition for rehearing with suggestion for rehearing en banc. Pet. App. 1a.

## REASONS FOR GRANTING THE PETITION

### A. Introduction.

In Powell's case, the jury instructions radically diverged from the charges specified by the grand jury. Indeed, the jury instructions were temporally open-ended as they lacked any of the dates or timeframes specified by the grand jury's superseding indictment. Individuals may not be convicted of crimes, irrespective of the dimension of time, by allowing for jury instructions lacking dates or timeframes. Every crime involves an act or omission taking place in real time. Dates and timeframes are essential because without them, the charged conduct is amorphous and impossible to define. Attempting to delineate criminal conduct without dates and timeframes is as impossible as establishing a nation without borders. A conviction standing on jury instructions which lack any reference to the indictment's dates and timeframes subverts the grand jury's power to define the scope of the offenses by setting the temporal parameters of the charged conduct. Also, a conviction based on temporally open-ended jury instructions subverts the Due Process Clause, the Double Jeopardy Clause, the constitutional right to a unanimous jury, and the Sixth Amendment right to counsel. Further, a jury verdict based on instructions lacking any temporal reference does not sufficiently define the offense to ensure statute of limitations protections.

The issue raised by petitioner is of great importance because it poses the question regarding how is a crime defined. Petitioner asserts it is axiomatic that an offense cannot be properly defined without reference to dates or timeframes, and that without a defined temporal scope for the charged conduct convictions cannot pass constitutional muster.

## B. Review Is Warranted To Address The Constitutional Necessity For Jury Instructions To State The Dates And Timeframes Which The Grand Jury Specified In The Indictment.

There is a compelling need for review to address the constructive amendment claim because the right to grand jury is sacrosanct. Grand juries have the exclusive prerogative to determine the charges. *United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014). A defendant may only be tried on charges set forth in the grand jury indictment. *Stirone v. United States*, 361 U.S. 212, 216-17 (1960). A constructive amendment occurs when the charging terms are altered, either literally or in effect, by the prosecutor or the court. *United States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017).

Reflecting the need for review is that the Ninth Circuit is not consistent in its own opinions addressing temporally open-ended indictments or jury instructions. The Ninth Circuit's decisions in *United States v. Harrison-Philpot*, 978 F.2d 1520, 1526 (9th Cir. 1992), and *United States v. Laykin*, 886 F.2d 1534, 1544 (9th Cir. 1989), provide that when time is not a material element of the offense, the court may constructively amend the indictment without running afoul of the Fifth Amendment. *Harrison-Philpot* and *Laykin* did not address the unique circumstance in which the jury instructions provide no guidance regarding dates and timeframes. Although these decisions provide that the failure to instruct on dates or timeframes does not result in a constructive amendment where time is not a material element of an offense, the Ninth Circuit has provided mixed signals. Indeed, in *United States v. Cecil*, 608 F.2d 1294, 1295 (9th Cir. 1979), the Ninth Circuit held that temporally open-ended indictments are constitutionally deficient. The indictment in *Cecil* alleged a drug conspiracy "beginning on or before July, 1975, and continuing thereafter until on or after October, 1975." *Id.* at 1295. The Ninth Circuit held that the indictment failed to place the conspiratorial acts within any particular timeframe because the

language describing the dates of the conspiracy was "open-ended in both directions." *Id.* If a temporally open-ended indictment in *Cecil* does not pass constitutional muster, jury instructions devoid of the dates and timeframes specified in the indictment must also be constitutionally infirm. Review is warranted in order to resolve this conflict, and to avoid the dangerous precedent of obviating the need for jury instructions to specify dates or timeframes, except for the small minority of cases where time is an element of the offense.

Review is warranted because when the jury instructions leave out the indictment's dates and timeframes, the instructions necessarily diverge materially from the indictment, and thus result in a constructive amendment. Indeed, because the temporal scope of the charged conduct is central to defining the offense, jury instructions which lack dates and timeframes necessarily broaden the indictment.

The Ninth Circuit panel's decision sets a dangerous precedent because it effectively concludes that dates and timeframes do not matter. Dates and timeframes are essential for both the indictment and instructions because they notify the defendant and jurors of the scope of the offense, and protect against double jeopardy. *See Stirone v. United States*, 361 U.S. 212, 218 (1960) (grand jury's purpose "is to limit his jeopardy to offenses charged"). Dates and timeframes in indictments and jury instructions are essential to provide adequate notice, and protect against double jeopardy and statute of limitations violations.

By concluding that no constructive amendment arose, the panel subverts the power of the grand jury to set the temporal scope of the offenses. Significantly, the grand jury would not have issued an indictment lacking the dates and timeframes. For good reason, indictments specify dates and timeframes to preserve the right to a grand jury, the proof beyond a reasonable doubt

requirement, the right of jury unanimity, and statute of limitations and double jeopardy protections.

### C. Supreme Court Review Is Warranted To Resolve A Conflict Between The Circuits Regarding Whether Constructive Amendments Result In Per Se Or Structural Error Requiring Reversal Of The Conviction, Or Whether Standard Plain Error Review Should Apply.

In *United States v. Olano*, 507 U.S. 725, 732 (1993), this Court established the plain error standard of review as to claims first raised on appeal. The *Olano* standard requires that there must be (1) an error (2) that is plain and (3) that has affected the defendant's substantial rights; and if the first three prongs are satisfied, then a court may exercise discretion to correct a forfeited error if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* There can be no dispute that a constructive amendment meets the first two prongs of the *Olano* plain error test.

The Supreme Court in *Olano* reserved the question of whether there may be some errors for which specific prejudice need not be shown. *Olano*, 507 U.S. at 735. This Court stated:

> There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice. Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the "affecting substantial rights" prong of Rule 52(b).

*Id.* Here, this Court declined to address whether there is a "special category" of errors which deprive the defendant of a fundamentally fair trial, and, accordingly, may not be found harmless under Federal Rule of Criminal Procedure 52(a)'s harmless error standard. *Id.* Petitioner asserts that constructive amendment errors fall into this limited category – whether such errors may be termed "structural error" or "per se prejudicial error" – and thus satisfy the third and fourth *Olano* prongs.

There is a compelling need for Supreme Court review because the circuits are split regarding whether constructive amendments constitute per se or constructive error requiring reversal, or whether standard plain error review applies, requiring a showing of prejudice. The Second Circuit presumes that a constructive amendment will always satisfy the third *Olano* prong because such an error is per se prejudicial. *United States v. Thomas*, 274 F.3d 655, 670 (2d Cir.2001) (en banc). *See also United States v. Ford*, 435 F.3d 204, 216 (2d Cir. 2006). Similarly, the Fourth Circuit in *United States v. Floresca*, 38 F.3d 706, 713-14 (4th Cir. 1994) (en banc), held that under the Supreme Court's opinion in *Stirone*, "constructive amendments of a federal indictment are error per se, and, under *Olano*, must be corrected on appeal even when not preserved by objection." In addition, the Fourth Circuit stated, "[w]e apply *Olano* although it is by no means clear that we should." *Id.* at 712. The Fourth Circuit added that "because constructive amendments are not subject to review for harmlessness, the Supreme Court would consider them to be 'structural defects' in the trial mechanism." *Id.* (citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993)). The Fourth Circuit further provided that "[t]t is an open question as to whether the absence of an objection requires further analysis when the alleged error goes to the heart of the entire judicial process." *Id.* at 712.

Sitting in the other camp, the First, Fifth, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits follow the usual plain error formulation by requiring in constructive amendment claims that the defendant bear the burden of showing specific prejudice. *United States v. Hugs*, 384 F.3d 762, 768 (9th Cir. 2004); *United States v. Fletcher*, 121 F.3d 187, 192-93 (5th Cir.1997), *abrogated on other grounds*, *United States v. Robinson*, 367 F.3d 278, 286

n.11 (5th Cir.2004);[5] *United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010); *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir.1996);[6] *United States v. Madden*, 733 F.3d 1314, 1319-22 (11th Cir. 2013) (reversing because no "certainty" that with the constructive amendment the defendant was convicted solely on the charge made in the indictment); and, *United States v. Lawton*, 995 F.2d 290, 294 (D.C. Cir. 1993) (finding that a constructive amendment error was prejudicial under prong three without discussion of per se prejudice or structural error). Similarly, by declining to provide the defendant with a presumption of prejudice, the First Circuit adhered to the usual plain error standard. *United States v. Brandao*, 539 F.3d 44, 57-62 (1st Cir. 2008).

Taking a separate course, the Third Circuit applies a rebuttable presumption of prejudice for unpreserved claims of constructive amendment on plain error review. *United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002) (en banc). *See also United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007). The Tenth Circuit recognized the unsettled nature of the issue. In *United States v. Gonzalez Edeza*, 359 F.3d 1246, 1251 (10th Cir. 2004), the Tenth Circuit provided that "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."

Even if automatic reversal is not required, there should be a strong presumption that constructive amendments are prejudicial, resulting in plain error. Bolstering this conclusion is *Stirone v. United States*, 361 U.S. 212, 218-19 (1960), in which the Supreme Court established

---

[5] Both the Fifth and the Ninth Circuits have recognized that their pre-*Olano* jurisprudence required automatic reversal for constructive amendments, even on plain error review. *See United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir.2001), and *United States v. Daniels*, 252 F.3d 411, 414 n. 8 (5th Cir.2001).

[6] The Seventh Circuit recognized that in "dicta the Court hinted that some constitutional errors can be so corruptive to the judicial process that they may be corrected without a showing of prejudice, while still others may warrant a presumption of prejudice." *Remsza*, 77 F.3d at 1044.

that 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." Emphasis added. Review is warranted to resolve whether a constitutional violation arises if "the possibility exists" that the defendant's conviction could be based on conduct not charged in the indictment. The record in Powell's case easily establishes that there was at least a "possibility" that the jury relied on uncharged conduct. Indeed, the instructions did not delineate the charged conduct to the indictment's dates and timeframes, and the government submitted extensive evidence beyond the temporal scope of Count Three's timeframe of January 2014 to January 13, 2015.[7]

Review is warranted also because in Powell's case, the panel's plain error analysis did not have the benefit of the Supreme Court's recent decision in *Rosales-Mireles v. United States,* 138 S. Ct. 1897, 1905 (2018), which adopted a more liberal approach to plain error review to address when an error "seriously affects the fairness, integrity or public reputation of judicial proceedings." Rejecting the Fifth Circuit's "shocks the conscience" and "powerful indictment against the system of justice" tests, the Supreme Court in *Rosales-Mireles* provided that by "focusing on principles of fairness, integrity, and public reputation," it "recognized a broader category of errors that warrant correction on plain-error review" *Id.* at 1906-07. In light of this Court's recent decision in *Rosales-Mireles*, there is good reason for this Court to address the issue of whether constructive amendments constitute per se error requiring reversal, or establish a rebuttable presumption of prejudice.

[7] A constructive amendment also arose regarding Count 1 and Count 2 because in successfully opposing Powell's motion to sever, the government asserted that the indictment's counts cover an "overarching, continuing scheme and plan. . . ." CR 52; CR 76, pp. 1, 9-11; ER 141-143.

**D. Supreme Court Review Is Warranted In Order To Determine The Important Question Of Whether The Constitutional Right To Jury Unanimity Requires That The Jury Instructions Specify The Indictment's Dates And Timeframes.**

Much of the case law concerning the need for temporal specificity concerns indictments which are completely or partially open-ended. *E.g., United States v. Cecil*, 608 F.2d 1294, 1295 (9th Cir. 1979). *See also United States v. Rawlins*, 606 F.3d 73, 78 (3d Cir. 2010) (while an indictment cannot be completely open-ended as to start and end dates, it suffices for an indictment to specify an end date). Review is warranted to establish that dates and timeframes are essential not just for indictments, but also for jury instructions. Indeed, there is no compelling reason to conclude that while an indictment lacking dates and timeframes cannot pass constitutional muster, somehow jury instructions lacking dates and timeframes are constitutionally sufficient. Dates and timeframes are essential for both the indictment and instructions because they notify jurors of the scope of the offense, and protect against double jeopardy. *See Stirone v. United States*, 361 U.S. 212, 218 (1960) (grand jury's purpose "is to limit his jeopardy to offenses charged").

Jury instructions must include the dates and timeframes the grand jury specified in the indictment because the temporal scope of the charged offenses is essential to preserving the right of jury unanimity guaranteed by Article III, § 2 and the Sixth Amendment of the Constitution. The panel's analysis is flawed because it does not account for the essential relationship between the constitutional right of jury unanimity and the Fifth Amendment right to grand jury and double jeopardy protections. Review is warranted because the panel's conclusion conflicts with the Supreme Court's decision in *Stirone v. United States*, 361 U.S. 212, 218 (1960), providing that the "very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either

prosecuting attorney or judge." The panel's holding conflicts with *Stirone* because the panel not only undercuts the grand jury's power to set the charged offenses' temporal parameters, but also undermines the concomitant Fifth Amendment double jeopardy protections and right to jury unanimity. Dates and timeframes are essential because without jury instructions specifying the charged offenses' temporal scope, the verdict leaves in doubt the defendant's double jeopardy and statutes of limitations protections.

The need for review is reflected by the Ninth Circuit's own conflicting authority. For example, the panel's analysis conflicts with *United States v. Garcia-Rivera*, 353 F.3d 788, 791 (9th Cir. 2003), holding that the firearms possession instruction was fatally ambiguous because the jury could have concluded they must decide unanimously only that possession occurred during any of the three time periods enumerated rather than unanimously agreeing on a specific period. The panel's decision also conflicts with *United States v. Echeverry*, 698 F.2d 375, 377, *reh'g denied and opinion modified*, 719 F.2d 974 (9th Cir. 1983), reversing the conviction because there was no means to know whether the jurors unanimously found the defendant guilty for the December conspiracy or the June conspiracy. This Court in *Garcia-Rivera* and *Echeverry* established that unanimity regarding dates and timeframes is essential.

Although the panel reviewed the merits of Powell's jury unanimity claim, it is unclear which standard of review the panel applied. Pet. App. 5a-6a. The panel noted that Powell did not request a specific unanimity instruction. Pet. App. 6a. Even if defense counsel did not request a specific unanimity instruction, which would have been futile, Powell did not waive his general unanimity claim as he repeatedly raised the jury unanimity claim in moving for dismissal and acquittal. Pet. App. 76a-80a; SER 1713-1721; ER 157-158. Powell also argued that the

acquittal on Count Four established a break in the supposedly continuous trafficking. ER 157-158.

The panel concluded that Powell was not deprived of his right to a unanimous jury because, despite Powell's assertion that there were three distinct time periods involved, the government presented evidence of ongoing trafficking of the victim during the timeframe alleged in Count 3. Pet. App. 5a-6a. The panel's conclusion gives short shrift to Powell's double jeopardy protections and his right to jury unanimity. Indeed, the verdict does not establish whether the jury found guilt for the entire one-year period specified in Count Three, the three distinct episodes during which B.M. and Powell were together, the period during which Powell was in federal custody, or any other distinct period. Significantly, by finding Powell not guilty of Count Four, which charged that on June 4, 2014, Powell transported B.M. for purposes of prostitution through coercion and enticement, the jury effectively found that Count Three was not continuing in nature. Pet. App. 26a. The elements of Count 3 and Count 4 are virtually identical, and Count 4's date (June 4, 2014) falls in the middle of the period (January 2014 through January 13, 2015) specified in Count 3.

Further, the trial evidence created ambiguity concerning the alleged offense's temporal scope and the reach of the verdict. The evidence reflects: B.M. and Powell were together during three distinct periods, totaling only 46% of the timeframe specified in Count Three;[8] B.M. lived and worked separately from Powell for significant periods of time – 61 days, and later 86 days;[9] and B.M. initiated contact with Powell after leaving him the first and second times.[10] *See United States v. Lapier*, 796 F.3d 1090, 1096-98 (9th Cir. 2015) (plain error to fail to give *sua sponte*

[8] *See* Opening Brief, Section IV; ER 147.
[9] *See* Opening Brief, Section IV.
[10] ER 623-624, 691-694.

specific unanimity instruction where trial evidence tended to show at least two separate conspiracies rather than a single overarching conspiracy).

Also leaving jury unanimity in doubt is that the government presented extensive evidence and arguments to the jury asserting that after January 13, 2015 (the end date for Count Three), Powell continued sex trafficking by intimidating or manipulating B.M while he was in federal custody. ER 448, 745-746, 812, 856-859; ER 876-877. The Ninth Circuit panel's decision fails to account for the extensive evidence presented at trial which broadened the temporal scope of the Count Three's timeframe of January 2014 to January 13, 2015. Indeed, the government presented evidence ascribing guilt to Powell for B.M.'s decision to work after January 13, 2015, for another pimp in California, who was Powell's friend. ER 745-746, 812, 856-859; ER 876-877. Because the pimp was Powell's friend, the jury could have concluded that Powell had a hand in B.M.'s decision to go to California to work as a prostitute. Also, the government presented extensive evidence, including B.M.'s testimony and audiotapes, regarding Powell's telephonic and written communications with B.M. while he was in federal custody awaiting trial. ER 761-797.

In opening argument, the government asserted that even after his arrest, Powell "still kept trying to manipulate B____." ER 447. The government argued that "beginning the end of September through October [2015], the defendant bombarded B____ with calls and e-mails," in which he professed his love and desire to be back with her. ER 447-448. Significantly, the government argued that Powell's in-custody telephone calls to B.M. constituted "additional evidence of his sex trafficking of her." ER 448. In closing, the government argued that Powell manipulated B.M. "right up until the end," and cited Powell's "jail calls" and e-mail messages. ER 1587. Similarly, the government argued that Powell made B.M. "scared about what else he

knew," and that he "was *continuing to manipulate and coerce* B____ through those phone calls." ER 1616 (emphasis added). Clearly, the jury could have convicted Powell based on the extensive evidence the government presented which were beyond the timeframe in Count Three.

Moreover, the government's case was far from overwhelming. The jury acquitted Powell of Count Four, which is very similar in nature to Count Three, and involves a date during the timeframe for Count Three. Further, the jury did not swiftly return a guilty verdict. The jury commenced deliberations on June 23, 2016, at 11:50 a.m., and was excused at 4:33 p.m., resumed deliberations the next day at 9:00 a.m., and returned its verdict at 3:38 p.m. ER 1677. The jury submitted two written questions during deliberations. ER 1677. As detailed in the defense's closing arguments, there were numerous significant reasons to doubt the complaining witnesses' motives and credibility. ER 1591-1609.

Assuming, *arguendo*, Section 1591(a)(1) constitutes a continuing offense, the instructions' lack of dates or timeframes is still prejudicial. Indeed, even continuing offenses must be delimited by a timeframe. Otherwise, the defendant would have no jury unanimity, double jeopardy, and statute of limitations protections. Review is warranted for this Court to determine the need for temporal specificity, even if the offense charged constitutes a continuing offense. Clearly, there is a compelling need for review because dates and timeframes in indictments and jury instructions are essential to preserve multiple rights and protections enshrined in the Constitution.

## CONCLUSION

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

Respectfully submitted,

Jonathan S. Solovy
U.S. Supreme Court Bar No. 196425

LAW OFFICE OF JONATHAN S. SOLOVY, PLLC
705 Second Avenue, Suite 1300
Seattle, WA 98104-1705
(206) 388-1090
solovylaw@earthlink.net

*Counsel for Petitioner Robert Powell*

November 20, 2018