No. 18-8854

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ZINNEL

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari

to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Steven Zinnel, X-1858541
Sacramento County Main Jail
651 I Street
Sacramento, CA 95814
Petitioner In Pro Se

Questions Presented

Question 1

Whether there was an unconstitutional constructive amendment or prejudicial variance that tainted all counts, caused by the confluence of the government's introduction of evidence and arguments that Zinnel committed bankruptcy fraud by hiding three property interests, one of which was Zinnel's one and only WAMU personal checking account that was actually listed on his bankruptcy schedules, twice, with a correct balance of $250, that were not charged in the indictment transferred and/or concealed, in violation of the Fifth, Sixth, and Fourteenth Amendments and the Supreme Court's holdings in *Stirone v. United States*, 361 U.S. 212 (1960).

Question 2

Whether it is Constitutionally required in a bankruptcy fraud prosecution under 18 U.S.C. § 152(1) and 18 U.S.C. § 152(7), that a complete description of the property charged transferred and/or concealed in the indictment, must be in the jury instructions as six other Circuits require and two previous Eastern District of California bankruptcy fraud cases have done.

Question 3

Whether a judge-determined Sentencing Guidelines Offense Level of 36 (188-235 months imprisonment), affirmed by the Ninth Circuit, is unconstitutional because the facts giving rise to 28 levels of the hotly contested sentencing enhancements, were not found by the jury or admitted to by the defendant, but were in fact used to increase Petitioner's penalty because the judicial fact-finding at sentencing changed Petitioner's Guideline range from 0-6 months imprisonment found by the jury, to 188-235 months imprisonment, and the sentencing judge, as he was predisposed to do, treated the Guidelines as mandatory and mechanically imposed a midrange within-Guideline sentence, in violation of Zinnel's right under the Sixth Amendment.

List of Parties

Those individuals who appeared in the criminal proceedings brought in the District Court for the Eastern District of California by the United States of America are:

Steven Zinnel

Derian Eidson

The following parties are before the United States Supreme Court: Steven Zinnel, Petitioner and the United States of America, Respondent.

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ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Steven Zinnel ("Zinnel" or "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Court of Appeals for the Ninth Circuit's opinion (Petition Appendix A, 1a-17a) is reported at *United States v. Zinnel*, 2018 U.S. App. LEXIS 3220 (9 CA, 2018). The Ninth Circuit denied Zinnel's petition for rehearing and rehearing en banc. (Appendix B, 18a-19a).

JURISDICTION

The district court had jurisdiction over this criminal case under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291; 18 U.S.C. § 3742. The Court of Appeals entered its judgment February 9, 2018. (Appendix A, 1a-17a). Zinnel timely filed a petition for rehearing which was denied on July 26, 2018. (Appendix B, 18a-19a). Zinnel received an extension of time from this Court to file this petition to December 23, 2018. (Appendix C, 20a). Zinnel timely

mailed his petition to the Court on December 17, 2018. In a letter dated March 28, 2019, Zinnel received notice that corrections needed to be made to his petition a corrected petition must be submitted to the Supreme Court within 60 days of the letter. (Appendix D, 21a). Therefore, this corrected petition is timely because it was submitted to the Supreme Court by mail from a county jail before May 27, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

1. Unconstitutional Constructive Amendment

A person is entitled under the Fifth Amendment not to be held to answer for a felony except on the basis of facts which satisfied a grand jury that he should be charged. He is entitled to fair notice of what he is accused of, and not to be twice put in jeopardy on the accusation." *United States v. Tsinhnahijinnie,* 112 F.3d 988, 992 (9 CA, 1997); Fifth Amendment. Just as in *Tsinhnahijinnie*, "the problem in this case is thus not that the government failed to prove an element of the crime, but that it failed to comply with the requirements of the Constitution." *Id.* The variation between pleading and proof, the prosecutors' arguments emphatically urging jurors to convict Zinnel on Counts 1 and 2 based on concealing uncharged assets, and the defective jury instructions affected Zinnel's substantial rights under the Fifth and Sixth Amendments. *Stirone v. United States*, 361 U.S. 212, 218-219 (1960).

Zinnel's due process rights under the Fourteenth Amendment of the Constitution were also violated because, as in *Stirone*, (1) Counts 1 and 2 charged that specific assets were transferred and/or concealed at different times either in contemplation of bankruptcy (Count 1) or from the bankruptcy trustee post-petition (Count 2), (2) the trial evidence included uncharged alleged asset transfers and concealments, (3) the prosecutors argued that uncharged transfers and concealment of assets not listed in Counts 1 and 2 were among the bases the jury could use to convict on those counts, and (4) the jury instruction failed to provide "assurance . . . requiring the jury to find the conduct charged in the indictment before it may convict."

2. Unconstitutional Jury Instructions

The jury instructions on Bankruptcy Fraud violated Zinnel's Fifth and Sixth Amendment rights to be tried only on charges in the indictment and to notice of the charges against him, and were also prejudicially confusing. The Fourteenth Amendment requires that notice be "reasonably calculated,

under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

3. Judge-Found Facts of Sentencing Enhancements

Zinnel challenges the Court of Appeal's affirmation of his Sentencing Guidelines Offense Level of 36, based almost entirely on judge-found facts in violation of his Sixth Amendment right to a jury trial.

Fifth Amendment

"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; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"Rights of the accused.
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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

A. Introduction

- *It's hard to fight when the fight 'in ain't fair.* Taylor Swift
- *For every wrong there is a remedy.* California *Civil Code* § 3523
- *Because we can: The motto of power since the idea of power over others was born in our kind.*

This is a bankruptcy fraud case that went horribly wrong below, and continues to do so. The convictions and sentencing enhancements are flat wrong and do not promote respect for the law. Zinnel, a fifty year-old entrepreneur and job-creator with no criminal past, but a long history as a productive, decent human being and devoted father of two, was convicted by a jury for bankruptcy fraud and related money laundering counts. After rejecting two five-year plea offers, which were represented by the government as a reasonable and appropriate sentence in this case, Zinnel was convicted at trial and was mechanically sentenced by a first-time judge, who treated the Guidelines as mandatory, to a mid-range Guideline sentence of 212 months (17.67 years), three years supervised release, $2,513,319 in restitution, $1,297,158 in a forfeiture money judgment, and the maximum $500,000 fine, for a total monetary judgment in excess of $4.3 million dollars. Zinnel's prison sentence was six times longer than what similarly situated defendants received and was the longest sentence in the history of the United States for bankruptcy fraud by almost double. Almost two decades long because the sentencing guidelines for economic crime cases are absurd, flawed, and abused by vengeful prosecutors if not tamed by a seasoned judge.

The prison sentence and fine in this case is not just high, but shockingly high for a run-of-the-mill bankruptcy fraud and money laundering convictions that consisted of a mere transfer of funds from one corporate account to another. The convictions are wrong and the sentence was too long. Nevertheless, the three-judge panel affirmed Zinnel's convictions for bankruptcy fraud and money laundering and reversed and remanded for resentencing in a memorandum opinion. (Appendix A, 1a-17a). The convictions and draconian sentence "strike as more than probably wrong, they strike as wrong with the force of a five-week old unrefrigerated dead fish." *United States v. Bussell*, 504 F.3d 956, 962 (9 CA, 2007) ("Bussell").

Because of the constructive amendment that tainted all counts and the unconstitutional jury instructions, there is no way any one, or any Court, can say beyond a reasonable doubt that the jury did not convict Zinnel solely on an uncharged and disclosed WAMU personal checking account, that Zinnel listed on his bankruptcy schedules twice, with a correct balance of approximately $250, and that is a constructive amendment requiring reversal of the bankruptcy fraud convictions. All of Zinnel's money laundering convictions (Counts 4-12, 15-18) must also be reversed as well because they were predicated on the defective bankruptcy fraud convictions.

Then, based on an alleged $256 property concealment, the government claims, and the Court of Appeals has affirmed, that there is over $3.6 million in judge-found loss in this case with eleven judge-found victims, and a total of judge-found 28 levels of sentencing enhancements that mechanically increased Zinnel's within-Guideline sentence from 6 months to almost 18 years in prison. The $3.6 million invalid "Claims Register," the government and the Court of Appeals erroneously claim was the amount scheduled for discharge, was never before the district court at sentencing and is entirely disputed by Zinnel under penalty of perjury. In aggravation, post-indictment and post-conviction, a total period of over five years, neither the bankruptcy trustee nor the bankruptcy court made a claim that there were any "concealed" property that was part of Zinnel's bankruptcy estate and thus needed to be administered for the benefit of creditors. Further, the bankruptcy court did not determine a single debt on Zinnel's bankruptcy schedules was valid.

This case is an important case because the Ninth Circuit three-judge panel has so far departed from the accepted and usual course of a criminal judicial proceeding and sanctioned the departure by the district court, as to call for an exercise of this Court's supervisory power. Further, the Ninth Circuit has entered a decision that is conflict with six other Circuits. Moreover, the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. This Court should exercise its supervisory powers to correct the Ninth Circuit's departure that allowed a constructive amendment to the indictment and fatally flawed jury instructions, to unlawfully convict Zinnel of allegedly concealing from the bankruptcy court his uncharged WAMU personal bank account, with a balance of with $250, that Zinnel actually disclosed twice on his bankruptcy schedules.

Zinnel implores this Court not to view Zinnel as a number or just another case. Zinnel hopes that mathematically bad odds will not deny the reversal of his unconstitutional convictions and judge-found facts of sentencing enhancements, as this case warrants. This case does not involve a routine business dispute with only money or property at stake and no one's liberty interest. This case involves two federal prosecutors cheating to unlawfully convict Zinnel and twice seeking twenty (20) years of imprisonment of Zinnel and a life-sentence of financial obligations and collateral consequences in a bankruptcy fraud case that the sentencing *court found nothing atypical about*. The Constitutional errors below are clear and Zinnel urges the Solicitor General, looking through a different lens and vantage point than the line prosecutors, to do the right thing and concede error. Zinnel pleads with the Supreme Court to right this wrong and correct the horror that has already been inflicted on Zinnel because his first-half life has been utterly destroyed and he has been incarcerated thus far, for over 3,000,000 minutes, 50,000 hours, 2,100 days, 69 months, or 5.8 years.

B. Statement of the Case

Zinnel was charged in a 19-count superseding indictment ("indictment") on December 7, 2011. (CR #63). [1] In Count 1 of the indictment, Zinnel was charged with bankruptcy fraud by pre-petition transfer of property in anticipation of bankruptcy in violation of 18 U.S.C. § 152(7). The indictment in Count 1 was unconstitutionally vague as to what property Zinnel allegedly transferred pre-petition because no specific property was identified as the indictment simply alleged that the defendant *"fraudulently transferred some of his property and the property of said corporation."* (CR #63, p, 3, lines 15-16). Thereafter, the indictment alleged steps of alleged pre-petition transfers and concealments in paragraphs 4(a)-(n) of the indictment. In the government's trial brief, filed a mere 24 days before trial, the government, for the first time, specifically identified only one property that it alleged to be the fraudulent pre-petition transfer: *"Zinnel used these shells to transfer the Luyung Property, a commercial lot."* (CR 169, p. 14, line 12).

In Count 2 of the indictment, Zinnel was charged with bankruptcy fraud by post-petition concealment in violation of 18 U.S.C. § 152(1). Count 2 specifically listed six property interests that were allegedly concealed from the bankruptcy trustee:

[1] "CR" refers to the Clerk's Record and the docket # in the underlying district court, ED CA no. 11-cr-00234-TLN

a. System 3
b. Payments from System 3 through Done Deal
c. Zinnel's interest in Done Deal's bank account
d. 4Results
e. Auto & Boat Store
f. The Luyung Property (CR 63, p. 7, lines 1-8).

In the government's trial brief, the government reaffirmed the exact same six properties listed above, as being the properties allegedly concealed post-petition in Count 2 of the indictment. (CR 169, p. 15). None of the properties listed in the indictment or the government's trial brief as allegedly transferred or concealed, were Zinnel's Washington Mutual personal checking account ending in account number "5442" ("WAMU"), Corporate Control, Inc., or the entire company Done Deal, Inc. (CR 63 & 169). The rest of the counts in the indictment were for money laundering with Count 2 being the predicate bankruptcy fraud offense. (CR 63). Therefore, just 24 days before trial, Zinnel was given notice by the government that in Count 1 he had to defend at trial against the pre-petition transfer of the Luyung Property and in Count 2, the post-petition concealment of the six itemized properties listed in the indictment and trial brief. (i.e. a-f above).

All nine of the money laundering counts 4 - 12 were the mere transfer of funds via checks from one corporate account to another easily traceable by law enforcement. (Appendix F is a representative example). It is noteworthy, that a single check in the amount of $4,826.00, allowed the government to circumvent the five-year statutory maximum for bankruptcy fraud and seek 20 years for "money laundering" with the "criminal conduct" being depositing a check. Justice Breyer criticized this government tactic in *United States v. Santos*, 553 U.S. 507, 530 (2008): "the Government can seek a heavier money laundering penalty (say, 20 years), even though the only conduct at issue is conduct that warranted a lighter penalty (say, 5 years for [bankruptcy fraud]."

During the two years from indictment to trial, Zinnel believes that government provided around 100,000 pages of documents in discovery in this case and if the image of System 3's computer hard drive image is counted, the government provided the Zinnel defense over a million pages. (Appendix G, 36a). The government produced several years of Zinnel's WAMU personal account records for his account ending in "5442," twice, because the government had obtained the records from both Washington Mutual and Zinnel's bankruptcy trustee Stephen Reynolds. (Appendix G, 36a & 37a). The WAMU bank records included the bank statement for the period ending on 6/13/05 and the government marked this statement with Bates Number "ZBK002318."

(Appendix G, 36a; Appendix E, 22a). Zinnel viewed his WAMU bank statements as irrelevant because Zinnel was not charged with concealing his WAMU personal checking account ending in "5442." (Appendix G, 37a). Zinnel remembers that the government did mark as Exhibit 30, his WAMU Master Account Agreement for his one and only WAMU account ending in account number 5442, as a possible trial exhibit. However, the prosecutor's marked lots of exhibits that they never sought to admit at trial. (see CR #230; Appendix G, 37a). The government **never** provided the Zinnel defense with any discovery relating to a WAMU checking account titled in Zinnel's name or otherwise, with an account number ending in "9842." (Appendix G, 35a).

> In ruling on Zinnel's Constructive Amendment issue on appeal, the Ninth Circuit stated:
>
> We additionally conclude that even if **the personal bank account** constituted a variance, the variance was nonfatal because it did not affect Zinnel's substantial rights. Evidence of the bank account was provided during discovery [2] and marked as a trial exhibit, and **Zinnel did not object when it was introduced at trial.** Cf. *Brulay v. United States*, 383 F.2d 345, 351 (9th Cir. 1967) (**finding variance nonfatal where "at no time did the defendant claim surprise"**). (emphasis added) (Appendix A, 3a & 4a)

The government also provided the Zinnel defense with voluminous documents in pretrial discovery pertaining to Done Deal and other irrelevant companies. (Appendix G, 37a).

Trial began on July 1, 2013 with Judge Troy L. Nunley presiding over his first trial as a federal judge after being appointed by President Obama. During the trial, the government solicited testimony on three uncharged alleged concealments of the WAMU account (Appendix E, 26a, 27a, & 32a), Corporate Control, Inc., and the entire company Done Deal, Inc. Right off the bat, government attorney AUSA Audrey B. Hemesath stressed Zinnel's uncharged personal WAMU checking account that he actually listed on his bankruptcy schedules, not the Done Deal account. AUSA Hemesath started her direct examination of Zinnel's first bankruptcy trustee Stephen Reynolds, by asking the following questions:

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[2] This Court cannot allow the government to evade its obligation to only try Zinnel on property charged by the grand jury as concealed or transferred in the indictment, by simply providing Zinnel with thousands upon thousands of pages of documents in discovery for him to glean whatever might be learned from the mountain of paper. Put differently, "if there is a needle in this haystack [of discovery], it is [not] up to Zinnel to find it." *Caneva v. Sun Cmtys. Operating Ltd. (In re Caneva)*, 530 F.3d 755 (9 CA, 2008). It is error to hold Zinnel to a mythical requirement that he must search through a paperwork jungle in the hope of finding an overlooked needle in a documentary haystack of what he must defend against at trial. Zinnel was given no notice by either the indictment, or the government's trial brief, that he would have to defend against concealment of the three uncharged properties, including his WAMU personal account, in addition to the six properties actually specified in the indictment and the government's trial brief.

Q. "Government moves to admit Exhibit 30." (Appendix E, 26a)

Q. "This is a signature card for Washington Mutual Bank account.

Whose bank account is it?" (Appendix E, 26a)

A. "It appears to be Steven Zinnel's." (Appendix E, 26a)

Q. "And put side by side with Exhibit 202 page 3." (Appendix E, 26a; 23a & 25a)

Q. "Were you aware that Steven Zinnel, had another personal bank account not listed on Schedule B?" (Appendix E, 26a)

A. "NO." (Appendix E, 26a)

Q. "If you had been aware, what would you have done? (Appendix E, 27a)

A. "I would have investigated it. **I would have wanted to know what the balance was**. I might have asked for bank records. But if it had simply been disclosed he had **two bank accounts**, **I would have looked at the balances** and see if they were **exempt** [3] or **worthwhile administering**." (emphasis added) (Appendix E, 27a)

To deceive the jury and the Court, AUSA Audrey B. Hemesath only showed the signature card (Master Account Agreement) (Appendix E, 25a) to the testifying bankruptcy trustee and the jury rather than the actual bank statement (Appendix E, 22a) that indicated the same $250 balance as the account listed on Zinnel's bankruptcy schedules twice. (Appendix E, 23a & 24a). This deception prevented the jury and the district court from comparing the $250 balances and allowed the government lawyers to insinuate that this was a multi-million dollar asset concealed by Zinnel.

The prosecutor then moved on to the next uncharged property of Done Deal:

Q. "May we please see Exhibit 202, page 4. Do you see any reference here to a company called Done Deal?" (Appendix E, 27a)

A. "No." (Appendix E, 27a)

Q. "Move to admit what has been market as Government's Exhibit 140, a certified business record. (Appendix E, 27a & 28a)

During the government's direct examination of bankruptcy trustee Stephen Reynolds, Zinnel was perplexed because he knew he had listed his one and only WAMU personal checking account

[3] Zinnel did properly and legally claim his WAMU personal checking account as "Exempt." (Appendix E, 24a)

on Schedule B of his bankruptcy schedules (Appendix G, 38a-40a). The government ended its direct examination of bankruptcy trustee Stephen Reynolds at lunch. During the lunch court recess, Zinnel frantically went through the government produced discovery at his attorney Tom Johnson's office and discovered for the first time, that he made a mistake with two digits of the account number of his WAMU personal checking account listed on Schedule B, that no one had caught for eight years. (Appendix G, 38a-40a).

With the government's introduction of Exhibit 30, which Zinnel's only WAMU personal checking account Master Account Agreement, and Zinnel's lunch-time research, Zinnel discovered that he got the last two digits of "42" correct, but for some unknown reason, made a typographical error of typing "98" instead of "54." (Appendix E, 39a). Also during the court recess, Zinnel electronically searched all of the government produced discovery in this case, and as expected, did not find a single document that the government produced in discovery with a WAMU bank account ending in "9842." (Appendix E, 39a). Therefore, Zinnel realized he had mistakenly listed his one and only WAMU personal checking account on Schedule B of his bankruptcy schedules as "9842" instead of "5442," and for eight (8) years, nobody caught the mistake until the government surprised Zinnel at trial by soliciting erroneous testimony that Zinnel "*had another personal bank account* [at WAMU] *not listed on Schedule B.*" (Appendix G, 35a; Appendix E, 23a & 26a). To this day, Zinnel has no idea how he made a mistake with two digits of the bank account number of his one and only WAMU personal checking account listed on Schedule B. (Appendix G, 39a).

Zinnel told his lawyer to cross-examine the bankruptcy trustee after the lunch recess on the 6/13/05 WAMU bank statement to show the jury and the Court that the government lawyers were cheating because Zinnel was not charged with concealing any WAMU personal checking account ending in either "9842" or "5442." (Appendix G, 39a-40a). Despite his preparation, after the lunch court recess, all that Zinnel's attorney asked the bankruptcy trustee Stephen Reynolds relating to Zinnel's WAMU personal account was:

Q. "So did he list a checking account for Washington Mutual?

A. "He did." (Appendix E, 29a)

Zinnel sat in shock when his lawyer did not cross-examine bankruptcy trustee Stephen

Reynolds regarding the mistake Zinnel made in two digits of the WAMU bank account number or the fact that Zinnel had only one WAMU personal checking account that he listed on Schedule B of his bankruptcy schedules. Zinnel was also shocked and dismayed that his lawyer did not point out to the jury or the Court that Zinnel was not charged by the grand jury with concealing any WAMU personal checking account ending in either "9842" or "5442." (Appendix G, 40a).

On Redirect of Zinnel's bankruptcy trustee Stephen Reynolds, AUSA Audrey B. Hemesath, immediately began hammering Zinnel's one and only personal WAMU checking account in order to leave an indelible impression on the jury and the district court that Zinnel concealed his only WAMU personal account:

Q . "Please put up side by side Exhibit 202, page 3. Schedule B is the personal property where the bank accounts are to be listed correct?" (Appendix E, 32a).

A. "Correct." (Appendix E, 32a)

Q. "Can you box in the second exhibit. Are those the same bank account numbers?"

A. "No." (Appendix E, 32a)

Q. "So this second bank account on the right-hand side, Government's Exhibit 30, is not listed on Schedule B correct?" (Appendix E, 32a, 23a)

A. "That's correct." (Appendix E, 32a)

Q. "Can we see just Exhibit 30?" (Appendix E, 32a, 23a)

Q. "Whose bank account is this?" (Appendix E, 32a)

A. "Mr. Zinnel's." (Appendix E, 32a)

AUSA Hemesath did not ask anything related to Done Deal's WAMU bank account actually belonging to Zinnel. AUSA Hemesath started her presentation of evidence by soliciting erroneous evidence that Zinnel concealed his personal WAMU checking account and the entire company of Done Deal, both uncharged properties in the indictment and not mentioned in the government's trial brief as concealed. (Appendix E, 26a, 27a, 32a; CR 169, p. 15).

The indictment was never read or given to the jury and the district court never told the jury what property indictment charged transferred and concealed. Zinnel objected to the jury instructions for Counts 1 and 2 and requested specification of the property interests charged in the indictment and detailed in the government's trial brief, citing the risk that without such clarification, the jury

could convict on conduct not charged in the indictment including the WAMU account. (Appendix J, 65A1 & 65A2). The court denied this request. *Id.* Zinnel also challenged the general verdict form not listing the properties, because the government proposed verdict form simply required the jury to determine "Not Guilty" or "Guilty" on all the counts.

As explained below, the jury instructions given, allowed the jury to find Zinnel guilty of Counts 1 and 2 based on transfers and concealments not charged by the grand jury because the jury was instructed: "The law does not require that the government prove that each and every one *of the above items of property* was concealed. You may find the defendant guilty if you find that all of the above elements have been proven beyond a reasonable doubt as to *at least one of the above items of property* for each defendant and you unanimously agree to that item." (Appendix J, 69a-70a). However, neither the jury instructions nor the verdict form identified the "above items." (Appendix J and Appendix M). The jurors were not limited, as the Constitution required, to the properties charged in the indictment.

Pattern Jury Instructions in six other Circuits for 18 U.S.C. § 152(1) and 18 U.S.C. § 152(7) require a description of the property alleged to be pre-petition transferred and/or post-petition concealed as alleged in the indictment. (Appendix H). Unbelievably, the Ninth Circuit has no Model Jury instructions for bankruptcy fraud concealment or prepetition transfers in violation of 18 U.S.C. § 152(1) and 18 U.S.C. § 152(7). [4] However, jury instructions and verdict forms in similar bankruptcy fraud cases in the Eastern District of California have complied with the law by itemizing specific property concealments that were charged in the indictment, directing jurors to agree unanimously on at least one misstatement or asset listed, and check a box next to the asset(s) agreed on.[5] (Appendix I & L). However, the government and the court refused to use that format here.

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[4] Strangely, the Ninth Circuit has only one jury instruction for bankruptcy fraud and that is 8.11 for a scheme or artifice to defraud in violation of 18 U.S.C. § 157 which is no aid in the majority of bankruptcy fraud prosecutions because bankruptcy fraud prosecutions are almost always for alleged violations of 18 U.S.C. § 152.

[5] E.g. *United States v. Burke,* CR 05-365-JAM; *United States v. Klassy,* CR 05-503-MCE. The jury instructions and verdict forms in these cases specified the charged interests. (Appendix I & L).

After the jury was instructed, without identifying a single property alleged transferred or concealed in Counts 1 & 2 of the indictment (Appendix J), AUSA Audrey B. Hemesath began the government's closing argument by again hammering Zinnel's uncharged personal WAMU checking account:

> All legal interests. **That's something with your name is on**. For example, a bank account. This is Government Exhibit 30. (Appendix K, 71a).
>
> **Steven Zinnel's personal bank account**. (Appendix K, 71a)

AUSA Audrey B. Hemesath actually waved Exhibit 30 in front of the jury. AUSA Audrey B. Hemesath then told the jury they should convict on uncharged Done Deal:

> Equitable interests. That's the big bag in this case of hidden property. Done Deal." (Appendix K, 71a).
>
> Equitable control of Done Deal. And listed personal bank account. Just as in Count 1, any one item of concealed property is sufficient. (Appendix K, 72a)
>
> And listed **personal bank account**. (Appendix K, 72a)
>
> **Any one item of concealed property is sufficient**. (Appendix K, 72a)

When it was the defense's turn for closing argument, Zinnel's attorney Tom Johnson ineffectively attempted to explain the two-digit mistake in the WAMU account number:

> One thing that, you [need to] know, concerns the WAMU check[ing account]. Ms. Hemesath is right. It's a different account [number]. (Appendix K, 73a- 74a)
>
> Is it possible that [Zinnel] made a mistake in [two digits of] the account [number]? Certainly. (Appendix K, 73a- 74a)
>
> If he's going to hide WAMU, why put WAMU on the form at all? But she's right. That check[ing account] doesn't match the account number [on Zinnel's bankruptcy schedules.] (Appendix K, 74a)
>
> Is it possible and reasonable that was a mistake? Absolutely. Why else [would he] even put WAMU on the [bankruptcy schedules] at all? (Appendix K, 74a)

In the government's rebuttal closing argument, AUSA Matthew D. Segal first chastised Zinnel's attorney's WAMU account explanation and then picked up right where his co-counsel started and ended, by emphasizing uncharged concealment of property:

> And the big defense here is, well, he put one account at Washington Mutual down on the bankruptcy schedules, but, you know, just forgot about the fact that **he didn't put his own bank account**. **That's silly**. (Appendix K, 75a)
>
> Now, so what's really the centerpiece of this case? Let's put up Government Exhibit 202, the bankruptcy schedules, because this is a bankruptcy fraud case. The centerpiece of this case is truth versus the lies. (Appendix K, 76a)
>
> Let's look at page 3, please. Number 2. The checking account. Where is Done Deal? Done Deal is nowhere." (Appendix K, 76a).
>
> **Zinnel's personal account is not disclosed.** (Appendix K, 76a; Appendix E, 22a)
>
> But AUSA Matthew D. Segal is not done hammering uncharged property to the jury: You remember, I think the first or second Mission Impossible movie where they've got these masks and they tear them off and there you have the real person. That's how Steven Zinnel uses corporations. Like he creates **Done Deal**...**Corporate Control**. Well, those are the big ones in this case...That's the centerpiece of this case. (Appendix K, 77a)

As one Justice of the Ninth Circuit forcefully wrote: "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." *United States v. Rivera-Gallegos*, 692 Fed. Appx. 428 (9 CA, 2017) citing *United States v. Kojayan*, 8 F.3d 1315 (9 CA, 1993).

AUSA Segal barely mentions System 3. Instead, he names two uncharged properties as "the centerpiece of the case." **Both prosecutors emphasized Zinnel's one and only WAMU personal checking account** and the company Done Deal to the jury as "the big ones" and the "centerpiece of the case." (Appendix K, 71a, 72a, 75a-77a). Thereafter, the jury was simply given a verdict form that only required the jury to check "Not Guilty" or "Guilty." (Appendix M, 82a & 83a). This is in stark contrast to the verdict forms used in the two previous Eastern District of California bankruptcy fraud cases of *Burke* and *Klassy* (Appendix L, 78a-81a) where the jury was required to check lines next to the properties they unanimously agreed were concealed.

ASUA Segal's and AUSA Hemesath's arguments about uncharged assets were so forceful and memorable that Judge Troy L. Nunley, who presumably read the indictment and the government's trial brief, and thus knew Zinnel's WAMU personal account, Done Deal, and Corporate Control were not charged concealed, recalled them at sentencing eight months later:

> In the bankruptcy proceeding, I believe Mr. Reynolds testified that **you didn't list a bank account**... You didn't list any interest on Corporate Control. Done Deal." (Appendix N, 84a)

1. During oral argument before the Ninth Circuit, the prosecutor misrepresented the emphasis put on the three uncharged properties during the trial and closing argument

At oral argument before the Ninth Circuit panel on November 16, 2017, AUSA Segal began his argument with the following blatant misrepresentations to the Ninth Circuit:

"They say we hammered these uncharged properties." Time-stamp 17:20;

"This was a System 3 trial and a System 3 closing." Time-stamp 17:50;

"If this was a real variance, the government would have stood up and said Aha! We've got this personal checking account [AUSA Segal raising his right hand during oral argument like he is holding a piece of paper]. That is not what happened at all." Time-stamp 18:15;

These are lies to the Court of Appeals by AUSA Matthew D. Segal. During closing argument, the government lawyer in fact did stand up, wave Exhibit 30 in her hand, and tell the jury in effect: Aha! We've got this personal checking account: "Exhibit 30."

"**Steven Zinnel's personal bank account**. That bank account isn't here on schedule B." (Appendix K, 71a)

"**Zinnel's personal account is not disclosed**." (Appendix K, 76a)

Contrary to AUSA Segal's representation to the Ninth Circuit, neither of the government prosecutors ever referred to Exhibit 140 (Appendix K, 71a, 72a, 75a,-77a) which is Done Deal's WAMU bank account. (Appendix E, 28a). AUSA Hemesath and AUSA Segal erroneously told the jury and the judge that Zinnel's WAMU personal checking account is "the big one" and the "centerpiece of the case." (Appendix K, 76a-77a).

At oral argument below, Judge Wilken asked the following question:

Q. "The complaint seems to be this WAMU personal checking account. Which I guess is not the Done Deal WAMU checking account that had a couple of hundred dollars in it. Was that emphasized in any way?" Time-stamp 19:03

Judge Wilken's question was and is significant. However, AUSA Matthew D. Segal's response to her caused the Court of Appeals panel to erroneously believe that the prosecutors were referring to Done Deal's WAMU bank account, not Zinnel's personal WAMU checking account.

This is not supported by the record or the actual exhibits the prosecutors held up for the jury to reference. AUSA Segal answered Judge Wilken's question by lying to the panel and disingenuously claiming a business account was a personal account, but both prosecutors asserted to the jury at trial that an uncharged personal WAMU account was concealed:

> A. "NO! And I think that is the source of the confusion. As both of those accounts were at WAMU. And we spent just a ton of time with witness Kimberly Barr showing that the Done Deal account was Zinnel's personal account. That was his personal account." Time-Stamp 19:13;
>
> A. "And if you look at the excerpts of records (Appendix K, 75a & 76a), I'm holding up the bankruptcy schedule and saying personal account. Where is Done Deal? Look at all the money he spent out of it. This is the personal account." Time-stamp 19:31
>
> A. "You need to look at the exhibits that are actually being referred to during the closing." [Judge Wilken again nodded her head] Time-stamps 19:51

These are blatant misrepresentations to the Court of Appeals by AUSA Matthew D. Segal. The trial testimony the government solicited stressed Zinnel's uncharged personal WAMU checking account that he actually listed on his bankruptcy schedules, not the Done Deal account. The government lawyers hammered uncharged properties including Zinnel's one and only personal WAMU checking account. (see pages 9-14 above for the government's emphasis during trial and closing argument).

At Zinnel's March 4, 2014 sentencing, the court cumulatively added 28 objected-to levels of enhancements. (Appendix O). The court imposed a 212-month sentence (17.67 years). The savage sentence drastically exceeded similarly situated defendants who received an average of 19 months incarceration and was 6 times the sentence of Letantia Bussell who Judge Troy L. Nunley found at Zinnel's sentencing was "factually similar."

2. Even after conviction, neither the trustee nor the bankruptcy court has ever made a claim that any property was concealed or was part of Zinnel's bankruptcy estate

The bankruptcy trustee had a legal duty to collect and reduce to money the property of estate. (11 U.S.C. § 704(a)(1)). As AUSA Audrey B. Hemesath correctly stated the law during her closing argument, "**it is up to the bankruptcy court to determine which assets belong to the estate.** (Appendix K, 72a). During the over five years Zinnel's bankruptcy case remained reopened

after the indictment in this case, the bankruptcy trustee expended $313,195 in attorney's fees and accounting fees, which the trustee used in part to completely review all the government provided discovery in this case, issue subpoenas, and search for property of the bankruptcy estate. (Appendix G, 51a). Further, even though Zinnel is ostensibly convicted of concealing one or more properties that belonged to his bankruptcy estate, in the 65 months that Zinnel's bankruptcy case remained reopened, including 40 months after conviction, the bankruptcy trustee did not make a single claim that any property not listed on Zinnel's bankruptcy schedules belonged to Zinnel's bankruptcy estate. (Appendix G, 51a).

The bankruptcy trustee did not claim charged property such as System 3 or Luyung was property of Zinnel's bankruptcy estate. The trustee did not claim uncharged property such as Zinnel's WAMU personal checking account ending in number 5442, the entire company of Done Deal, Inc., or the entire company of Corporate Control, Inc. was part of Zinnel's bankruptcy estate. Likewise, during the 65 months Zinnel's bankruptcy case remained reopened after indictment, the bankruptcy court never made a single finding that any of the property charged concealed in the indictment was property of Zinnel's bankruptcy estate. (Appendix G, 51a & 52a). The reason the bankruptcy trustee did and the bankruptcy court did not make a claim on any property charged in the indictment, or the uncharged three properties, is because the property is not part of Zinnel's bankruptcy estate. This is the position Zinnel has consistently held to this day. Therefore, contrary to the government's assertions, Zinnel's creditors are not getting "millions" because of Zinnel's criminal convictions. In fact, the creditors are receiving just $36,807.

Petitioner now challengers the Constitutionality of all of his convictions and the judicial fact-finding that determined his sentencing guideline was Offense Level 36.

REASONS FOR GRANTING PETITION

The variation between pleading and proof, the prosecutors' arguments encouraging jurors to convict Zinnel on Counts 1 and 2 based on concealing three uncharged assets, and the defective jury instructions affected Zinnel's substantial rights under the Fifth and Sixth Amendments. *Stirone v. United States*, 361 U.S. 212, 218-219 (1960); *United States v. Lloyd*, 807 F.3d 1128, 1164 (9 CA, 2015). This allowed Zinnel to be unconstitutionally convicted on transfers and concealments he was

not charged with and prevents Zinnel from pleading double jeopardy if he was later indicted for concealment of the three uncharged assets.

The jury instructions on bankruptcy fraud violated Zinnel's Fifth and Sixth Amendment rights to be tried only on charges in the indictment and to notice of the charges against him, and were also prejudicially confusing. There is a circuit split on jury instructions for bankruptcy fraud pre-petition transfer and post-petition concealment. 18 U.S.C. § 152(1) and 18 U.S.C. §152(7). A defendant can be found guilty of bankruptcy fraud only upon proof that he knowingly transferred or concealed the property stated in the indictment.

Justice Scalia, dissenting from denial of Certiorari in *Jones v. United States*, 135 S. Ct. 8 (2014), expressed his frustration with judge-found facts that increase a defendant's prison time. Petitioner puts Justice Scalia's question again before this Court. The facts that the jury found beyond a reasonable doubt mandated a sentencing Guideline Offense Level of 8; 0-6 months in prison. Zinnel did not admit to the next 28 levels of sentencing enhancements nor did the jury ever consider them, let alone find them, beyond a reasonable doubt. Over Zinnel's spirited objections, the sentencing judge solely determined the Sentencing Guidelines Offense Level of 36 (Appendix O) which was affirmed by the Ninth Circuit. Judge Nunley then imposed a midrange within-guideline sentence of 212 months based solely on the sentencing guidelines. This cannot be the starting point at any resentencing. [6]

Even though it would be reversible error and would instantly trigger another Zinnel appeal, given the government's posture and Judge Nunley's predisposition, Zinnel does face the possibility of a hollow victory on appeal at resentencing by marching down only to climb right back up and receive the same midrange within-guideline sentence of almost 18 years because Zinnel's judge-found Offense Level of 36 (188 – 235 months) has not changed. Judge-found facts to support 28 levels of enhancements are unconstitutional because the hotly contested sentencing enhancements were not found by the jury, not admitted by the defendant, but were used to increase Zinnel's penalty from 6 months to 212 months in prison in violation of Zinnel's right under the Sixth Amendment as applied.

[6] As the United States Supreme Court explained in *Rita v. United States*, 501 U.S. 338 (2007), a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.

United States v. Booker, 543 U.S. 220 (2005) excised 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3472(e) in order to remedy the Sixth Amendment violation created by the mandatory nature of the Guidelines. However, with 50.4% of offenders still receiving within-Guideline sentences post-*Booker* (Appendix Q) based on sentencing enhancements not admitted by the defendant or found by the jury, there is still a Sixth Amendment violation. This is an issue of national importance because so many people with a liberty interest are affected and it is a reoccurring issue because over 80,000 men and women get sentenced annually in federal cases alone. Therefore, the Supreme Court should hold that if a defendant receives a within-Guideline range sentence, he or she must admit to all the facts giving rise to all of the sentencing enhancements, or all the facts giving rise to all of the sentencing enhancements must be found by the jury.

THE DECISION BELOW IS WRONG

I. THE COURT AND PROSECUTORS CREATED A CONSTRUCTIVE AMENDMENT OR PREJUDICIAL VARIANCE ON COUNTS 1 AND 2 THAT TAINTED ALL COUNTS

Whether deemed an unconstitutional constructive amendment or prejudicial variance, the error here was unconstitutional and prejudicial because it enabled the jury to convict Zinnel on Counts 1 and 2 based on uncharged concealment of three assets. This resulted in unconstitutional convictions and makes it so Zinnel cannot plead double jeopardy if he were to be indicted for concealing his WAMU personal checking account, Done Deal, or Corporate Control.

The bankruptcy fraud Jury instructions were inadequate because the omitted the property allegedly transferred or concealed. A defendant can be found guilty of bankruptcy fraud only upon proof that he knowingly transferred or concealed the property stated in the indictment. 18 U.S.C. §§152(1) and 152(7). Under determinative-type sentencing schemes, the Sixth Amendment demands that any fact that increases the "prescribed range of penalties to which a criminal defendant is exposed" must be treated as an element to be found by the jury or admitted by the defense. "The fundamental meaning of the jury-trial guarantee of the *Sixth Amendment* is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." [7]

[7] *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

A. Pre-Indictment

In his entire life, Zinnel has had only one Washington Mutual personal checking account and that account number was 490-0000497<u>5442</u>. ("WAMU"). (Appendix G, 34a & 35a; Appendix E, 22a & 25a). The Master Account Agreement to open Zinnel's WAMU account was the government's Exhibit 30 admitted at trial. (Appendix E, 25a). When filling out his bankruptcy schedules in pro se, Zinnel used the most recent WAMU bank statement he had, which was for the period ending 6/13/05. (Appendix E, 22a; Appendix G, 35a &36a). Zinnel listed his only WAMU personal checking account on his bankruptcy schedules with a correct ending balance of approximately $250. (compare Appendix E, 22a to 23a; Appendix G. 35a-37a). Zinnel has **never** had a personal bank account at Washington Mutual ending in "98<u>42</u>." (Appendix G, 35a). Zinnel, mistakenly listed his one and only WAMU personal checking account on Schedule B of his bankruptcy schedules as "98<u>42</u>" instead of "5<u>442</u>." (Appendix G, 35a; (compare Appendix E, 22a to 23a). On Schedule C of his bankruptcy schedules, Zinnel claimed his WAMU personal checking account as exempt from administration by the bankruptcy court under California *Code of Civil Procedure* § 704.070(b)(2) which means as a matter of law the bank account was not part of Zinnel's bankruptcy estate. (Appendix E, 24a). During the pendency of Zinnel's bankruptcy, Zinnel voluntarily produced several years of his WAMU bank statements for his account ending in "5<u>442</u>" to bankruptcy trustee Stephen Reynolds. Mr. Reynolds never once told Zinnel that the account numbers did not match. Zinnel did not catch the mistake either. (Appendix G, 37a).

B. <u>The Indictment, Trial Evidence, and Jury Instructions</u>

The indictment and the government's trial brief provided Zinnel with actual notice that he would have to defend against at trial an alleged pre-petition transfer of the Luyung Property in Count 1 and the alleged concealment of the following six properties in Count 2: System 3, Payments from System 3 through Done Deal, Zinnel's use of Done Deal bank account as his personal account, 4Results, Auto & Boat Store, & the Luyung Property. (CR 169, p. 14, line 12, p. 15, lines 13-16; CR 63, p. 7, lines 1-8). None of the properties listed in the indictment or the government's trial brief as allegedly transferred or concealed, were Zinnel's Washington Mutual personal checking account ending in account number "5<u>442</u>" ("WAMU"), Corporate Control, Inc., or the entire company Done Deal, Inc. (CR 63 & 169).

Count 1, ¶4(a)-4(n) listed specific actions as "ways and means" of concealing unspecified property to defeat the bankruptcy laws, and then alleged in ¶5 that Zinnel excluded from his bankruptcy "interests in assets transferred or concealed as alleged in ¶4(a)-4(n) above." However, in the government's trial brief, filed a mere 24 days before trial, the government, for the first time, specifically identified one property that was alleged to be the fraudulent pre-petition transfer: "*Zinnel used these shells to transfer the Luyung Property, a commercial lot.*" (CR 169, p. 14, line 12). The government's trial brief functioned as a Bill of Particulars. *United States v. Rodrigues*, 678 F.3d 693, 702 (9 CA, 2012). Count 2 alleged fraudulent concealment of Zinnel's interests six specific properties including System 3 and the Luyung Property. (CR 169, p. 15, lines 13-16; CR 63, p. 7, lines 1-8).

The defense moved unsuccessfully for a bill of particulars. (CR #83). For both Counts 1 & 2, Zinnel asked the Court to order the government to identify the specific property transferred and/or concealed along with Zinnel's alleged interest in the property. (CR #83). The government attorneys staunchly opposed Zinnel's motion for a bill of particulars, which would have given him some little warning of what he was to be tried for, by initially arguing that the indictment was sufficiently detailed. (CR #99). What can now only be viewed as foreshadowing, the government's spirited opposition stated: "*One reason why a bill of particulars is disfavored is because the government must strictly adhere to its answers filed in response.*" (CR #99, p. 3). Zinnel's Motion for a Bill of Particulars was never ruled on the merits.

After calling Zinnel's bankruptcy trustee Stephen Reynolds as a witness trial, AUSA Audrey B. Hemesath instantly began hammering the Zinnel's personal WAMU checking account ending in account number "5442." (Appendix E, 26a). Zinnel was completely surprised at trial when the government moved to admit Exhibit 30 (Appendix E, 26a) because he knew he was not charged with concealing his one and only WAMU personal checking account with an account number of 490-4975442 and Zinnel knew he had disclosed his WAMU personal checking account on Schedule B. (Appendix E, 23a & 24a). When the government moved to admit Exhibit 30, Zinnel emphatically told his lawyer Tom Johnson to object on relevancy grounds and Fed.R.Evid. 403 because Zinnel was not charged with concealing his WAMU personal checking account. (Appendix G, 38a-40a). Zinnel's lawyer did not object. (Appendix G, 38a-40a).

This Court should question why the government lawyers did not move to admit into evidence the WAMU bank statement for the period ending 6/13/05 in their effort to flaunt to the jury that two digits of the account number were different. (Appendix E, 22a). Zinnel emphatically believes it was a deliberate attempt by the government lawyers to deceive the jury and the Court, because the government lawyers knew full well that Zinnel had simply made a mistake with two digits in the account number of his WAMU personal account, and the $250 account balance actually matched Zinnel's bankruptcy schedules. (compare Appendix E, 22a to 23a & 24a). Further, Zinnel believes the government did not want to introduce the 6/13/05 bank statement because the lawyers wanted to imply to the jurors and the Court, that Zinnel had concealed from the bankruptcy court a multi-million dollar bank account.

As to Count 1, the jury was instructed *inter alia*: "You may find the defendant guilty if you find that all of the above elements have been proven beyond a reasonable doubt as to at least one *of the alleged items of property* for each defendant and you unanimously agree to that item," without explaining what interests comprised the "alleged items of property." (Appendix J, 66a-68a). As to Count 2, the jury was instructed *inter alia*: "The law does not require that the government prove that each and every one *of the above items of property* was concealed. You may find the defendant guilty if you find that all of the above elements have been proven beyond a reasonable doubt as to *at least one of the above items of property* for each defendant and you unanimously agree to that item." (Appendix J, 66a-68a).

Prior to trial and during trial, Zinnel told his attorney Tom Johnson that we needed a verdict form that listed the property charged transferred and concealed like the verdict forms used in *United States v. Burke* and *United States v. Klassy*. (Appendix G, 40a & 41a; Appendix L). Zinnel's concern was that without a Verdict Form listing the property actually charged transferred or concealed, Zinnel could be found guilty by the jury on property not charged in the indictment. (Appendix G, 41a). Zinnel's attorney, told him he would take care of it. (Appendix G, 41a). Thereafter, Zinnel drafted a verdict form for his lawyer that contained a list of the property the indictment actually charged concealed. (Appendix G, 41a).

However, neither the instructions nor the verdict form identified the "above items," and the jury was never read or given the indictment. (Appendix J & M). The verdict forms did not itemize property interests alleged in Count 1 or 2. (Appendix M). The jurors were not limited, as the

Constitution required, to the properties charged in the indictment. This is in light of the fact that as Zinnel knew prior to trial, jury instructions and verdict forms in similar bankruptcy fraud cases in the Eastern District of California have complied with the law by itemizing specific misstatements or property concealments that were charged in the indictment, directing jurors to agree unanimously on at least one misstatement or asset listed, and check a line next to the asset(s) agreed on. (Appendix I). However, the government and the court declined to use that format here.

In opposition, the prosecutor pointed to the phrase "among others" in Count 1, implying that it included unstated property interests. This was inaccurate for two reasons. First, the government's trial brief limited the government to one specifically identified property that was alleged to be the fraudulent pre-petition transfer: "*Zinnel used these shells to transfer the Luyung Property, a commercial lot.*" (CR 169, p. 14, line 12). Second, while Count 1 had the phrase "among others" in the "ways and means" section, ¶5 of Count 1 referred to the omitted interests listed in ¶4(a)-4(n), without the qualifier "among others." In her arguments, the AUSA failed entirely to address Count 2, which nowhere used the term "among others," and explicitly listed the property interests allegedly concealed.

This Court's and the Ninth Circuit's precedent defeats the government's argument that it could offer the jury a smorgasbord of "the specific items of property...listed in the indictment and also others." If the government opts to specify factual bases for an offense in the indictment, even if it could have instead issued a generic charge, the Fifth Amendment limits the government to the specified bases for conviction. In *Stirone*, the indictment charged interference with sand shipments, but the trial evidence proved interference with steel shipments. *Id.* at 214. The Supreme Court held in *Stirone*:

> "When only one particular kind of commerce is charged to have been burdened, a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." *Id.*, 361 U.S. at 218.

The Ninth Circuit as applied this rule consistently. In *Howard v. Daggett*, 526 F.2d 1388 (9 CA, 1975), the indictment charged the defendant with bringing a named woman over state lines for prostitution, but evidence was introduced at trial of the defendant's actions regarding other women

in addition to the woman named in the indictment. The generic jury instructions did not mention any name. *Id.* at 1390. The Ninth Circuit held in *Howard* at 1390 (citing Stirone at 217):

> The grand jury might have indicted appellant in a general allegation, without specifying the women to whom his alleged illegal acts or purposes related. But it did not do so. To allow the jury to consider the evidence respecting the other alleged prostitutes was to allow the jury to convict of a charge not brought by the grand jury.

Therefore, in this case, the government could convict only on the specific properties charged.

The court refused petitioner's requests to instruct the jury it was limited to charged property interest as a basis for Counts 1 and 2. During the jury instructions conference, the district court acknowledged the problem of leaving jurors without guidance on which property interests they could consider, asking if the verdict forms and closing arguments would "specify which companies relate to which count." (Appendix J, 65A1 & 65A2). The prosecutor revealed that the verdict forms would not so specify, but assured the court that closing argument would do so. *Id.* The judge was wrong to rely on the prosecutor's closing argument to protect Zinnel from this constructive amendment.

As explained above, the jury instructions given, allowed the jury to find Zinnel guilty of Counts 1 and 2 based on transfers and concealments not charged by the grand jury because the jury was instructed: "The law does not require that the government prove that each and every one *of the above items of property* was concealed. You may find the defendant guilty if you find that all of the above elements have been proven beyond a reasonable doubt as to *at least one of the above items of property* for each defendant and you unanimously agree to that item." (Appendix J, 69a-70a). However, neither the jury instructions nor the verdict form identified the "above items," and the jury was never read or given the indictment. (Appendix J and Appendix M). The verdict forms did not itemize property interests alleged in Count 1 or 2 (Appendix M). The jurors were not limited, as the Constitution required, to the properties charged in the indictment.

Jury Instructions and verdict forms in similar bankruptcy fraud cases in the Eastern District of California have complied with the law by itemizing specific misstatements or property concealments that were charged in the indictment, directing jurors to agree unanimously on at least one misstatement or asset listed, and check a line next to the asset(s) agreed on. (Appendix L). In closing and rebuttal arguments, government counsel argued that Zinnel concealed the WAMU

personal account, Corporate Control, and the entire company of Done Deal, and that concealment of any of those assets could serve as the basis to find Zinnel guilty of Counts 1 and 2. (Appendix K, 71a, 72a, 75a-77a). For example, as to Count 1 the prosecutor argued: "But does he have a beneficial interest in Done Deal? Absolutely. And as you heard in the jury instructions given by the judge, concealment of any one of these pieces of property is sufficient for conviction."

On Count 2, the prosecutor argued that Zinnel's WAMU account "isn't here on Schedule B, personal property, from his bankruptcy schedules," (Appendix K, 71a) and that Zinnel concealed an equitable interest in Done Deal. (Appendix K, 71a). The prosecutor told the jury "Just as in Count 1, any one item of concealed property is sufficient." (Appendix K, 72a).

In rebuttal, the other prosecutor displayed the bankruptcy schedules and argued: (1) "Where is Done Deal? Done Deal is nowhere;" (Appendix K, 76a), (2) "Zinnel's personal account is not disclosed;" (Appendix K, 76a) and (3) "in the 341 hearing,...Zinnel says all the assets of Corporate Control were sold in 2002 and went to First Bank." Zinnel was not charged with transferring or concealing any of these three properties. The prosecutors' hammering uncharged property made it highly likely that jurors convicted Zinnel based on the uncharged transfer or concealment of the WAMU personal account, Corporate Control, and Done Deal, and it is impossible, to ascertain that they did not.

C. The Jury Instructions and the Government's Arguments, Allowed the Jury to Convict Zinnel Unconstitutionally on Uncharged Conduct

"A person is entitled under the Fifth Amendment not to be held to answer for a felony except on the basis of facts which satisfied a grand jury that he should be charged. He is entitled to fair notice of what he is accused of, and not to be twice put in jeopardy on the accusation." *United States v. Tsinhnahijinnie*, 112 F.3d 988, 992 (9 CA, 1997). "In federal court a defendant may not be convicted of an offense different from that specifically charged by the grand jury." *United States v. Stewart Clinical Laboratory, Inc.*, 652 F.2d 804, 807 (9 CA, 1981). "The indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself." *United States v. Adamson*, 291 F.3d 606, 614 (9 CA, 2002) (citing *Stirone v. United States*, 361 U.S. 212, 215-16 (1960)). An amendment to an indictment occurs "when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is

contained in the indictment." *United States v. Dennis,* 237 F.3d 1295, 1299 (11 CA, 2001). Neither the statutory citation nor the heading in an indictment is considered part of the indictment. *United States v. Pazsint,* 703 F.2d 420, 423 (9 CA, 1983).

Amending the indictment to charge a new crime through the jury instructions constitutes per se reversible error. *Stewart Clinical Laboratory*, at 807. Whether deemed constructive amendment or prejudicial variance, the error here was unconstitutional and prejudicial because it enabled the jury to convict Zinnel on Counts 1 and 2 based on uncharged concealment of three properties.

This error violated Zinnel's constitutional rights to notice, freedom from double jeopardy, and to be convicted only on charges found by the grand jury. The indictment gave no notice that Zinnel was being charged in Counts 1 and 2 with transferring or concealing the WAMU account, Done Deal, and Corporate Control. Given the government's exhortations to jurors to convict based on any of these uncharged property interests, it is impossible to find that Zinnel was *not* convicted of Counts 1 and 2 based on concealment of property *not* charged by the grand jury.

In *Adamson*, the indictment charged that the defendant falsely stated "that upgrades to servers had been made," whereas the trial evidence proved that he told a different lie; "[about] how upgrades had been made." *Id.,* 291 F.3d at 616. The trial court instructed the jury in *Adamson* that it must agree unanimously on at least one falsehood, but did not specify the falsehoods charged in the indictment. *Id.* at 611. The Ninth Circuit held that this was a prejudicial variance, because the court instructed the jury "in such a way as to allow the defendant to be convicted on the basis of conduct other than that with which he was charged." *Id.* at 616.

In *Ward*, the Ninth Circuit reversed on nearly identical facts. While the indictment named two identity theft victims, the jury heard testimony evidence that Ward also victimized others. The trial court instructed the jury that it could convict if the defendant stole the identity of "a real person," without specifying any names. The Ninth Circuit reversed, reasoning that where the trial included evidence of both charged and uncharged conduct that would satisfy an element of an offense, the jury instructions did not limit the jury to the charged conduct, then "the defendant's conviction could be based on conduct *not* charged in the indictment. That possibility creates a constructive amendment of the indictment, requiring reversal, because it 'destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment.'" *Ward*, 747 F.3d at 1186-1188, 1191 (*quoting Stirone*, 361

U.S. at 217). *See also United States v. Shipsey,* 190 F.3d 1081, 1085 (9 CA, 1999). This is exactly what occurred here.

Stirone, Ward, and *Adamson* compel reversal of Zinnel's bankruptcy fraud convictions. The variation between pleading and proof, the prosecutors' arguments encouraging jurors to convict Zinnel on Counts 1 and 2 based on concealing uncharged assets, and the defective jury instructions affected Zinnel's substantial rights under the Fifth and Sixth Amendments. *Stirone,*at 218-219. See also *United States v. Lloyd*, 807 F.3d 1128, 1164 (9 CA, 2015).

D. Adding Uncharged Concealed Properties Impermissibly Broadened the Indictment

Zinnel and his counsel were indeed surprised at trial, to Zinnel's detriment. (Appendix G, 38a-40a). Zinnel could easily have refuted the government's contentions that he knowingly concealed the WAMU account. Had Zinnel known that the prosecution would argue that he had concealed this account, he would have offered evidence that (1) he had listed a WAMU personal account on Schedule B as account number "...9842" with a balance of $250 (Appendix E, 23a), (2) he had only WAMU account, account no. ending in "5442" as shown by the bank signature card admitted into evidence (Appendix E, 25a; Appendix G, 34a & 35a), and (3) this real account had a balance of $256.41 in June 2005. (Appendix E, 22a). This readily available evidence would have proven his counsel's argument that he mistakenly misstated the account number on Schedule B. (compare Appendix E, 29a, Appendix K, 73a & 74a).

The government selectively related that the "trustee testified that if he had been aware of this account, he would have investigated." (Appendix E, 27a). The trustee added, however, that he "would have wanted to know what the balance was...[to see if the accounts] were exempt or worthwhile administrating." (Appendix E, 27a). In fact, on Schedule C of his bankruptcy schedules, Zinnel claimed his WAMU personal checking account as exempt from administration by the bankruptcy court under California *Code of Civil Procedure* § 704.070(b)(2) which means as a matter of law the bank account was not part of Zinnel's bankruptcy estate. (Appendix E, 24a). Even if the WAMU account was not exempt, it is doubtful the trustee would have found $256.41 worth administrating, making any omission immaterial.

Zinnel did everything he could to prevent being surprised at trial, to no avail. He moved for a bill of particulars on Counts 1-2, sought jury instructions that spelled out the assets charged in

Counts 1-2, and complained that it was fundamentally unfair to require the defendant to defend against a charge or a factual basis not charged in the indictment. The prosecutors resisted filing a bill of particulars, because the government was loath to commit itself to prove a disclosed set of facts it was claiming violated 18 U.S.C. §§152(1) and 152(7).

In evaluating the constructive amendment and flawed jury instructions questions presented, the Court should ask itself, and the government, the following key question: **What property did the jury actually convict Zinnel of transferring and/or concealing?**

Did the jury unanimously agree on Zinnel's uncharged WAMU personal account and/or uncharged Done Deal, and then simply put an "X" on the "Guilty" line for Counts 1 and 2, and move on to Count 3? Or did the jury unanimously agree that the charged Luyung Property was concealed and put an "X" on the Guilty line? The verdict form does not answer the question because the jury simply put an "X" under "Guilty." (Appendix M, 82a-83a). In aggravation, the government drafted, and Judge Troy L. Nunley approved, verdict form reflects that the jury convicted Zinnel in Counts 1 and 2 for violating 18 U.S.C. § 157(7) and § 157(1), but Zinnel is not charged with violating those two statutes in the indictment. (Appendix M, 82a-83a).

In this case, the government lawyers opposed Zinnel's jury instructions and verdict form listing the properties charged transferred and concealed in the indictment like the same U.S. Attorney's Office did in *Burke* and *Klassy*. Judge Troy L. Nunley, as he has done all along in this case, sided with the government. With this enormous unconstitutional advantage secured, both prosecutors hammered the uncharged property during closing argument, waving Exhibit 30 and Zinnel's bankruptcy schedules before the jury, implying that the WAMU personal account held millions, saying Zinnel's mistake defense was "*silly*," and urged the jury to find Zinnel guilty of bankruptcy fraud for not disclosing his own WAMU personal account.

Like *Kojayan* twenty-five years ago, the prosecutor made "factual assertions he well knew were untrue. This is the difference between fair advocacy and misconduct." *United States v. Kojayan*, 8 F.3d 1313, 1321 (9 CA, 1993). "[The Ninth Circuit] has made plain when a prosecutor makes unsupported factual claims, it is definitely improper." *Kojayan* at 1318-19. This case is *Kojayan* on steroids. When the government deprives a person of life, liberty, or property, it is required to use fundamental fair processes. This Court has long emphasized our

Constitution's "overriding concern with the justice of finding guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1973). In particular, the Due Process Clause guarantees for every defendant the right to a trial that comports with basic tenets of fundamental fairness. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 24-25 (1981).

Zinnel wholeheartedly believes he is convicted of concealing his uncharged WAMU personal account that he in fact listed on his bankruptcy schedules twice, with the correct $250 balance, but simply made a typographical mistake with two digits in the account number. (Appendix G, 44a). This is because both prosecutors cheated by jumping on Zinnel's minor immaterial mistake and hammered Zinnel's WAMU personal checking account, both during trial and in closing argument. In aggravation, the government attorneys deliberately and deceitfully, concealed from testifying bankruptcy trustee Stephen Reynolds, the jury, and the Court that Zinnel has never had a WAMU personal account ending in "9842," that Zinnel did not actually have a second WAMU account, or that Zinnel's one and only WAMU personal account ending in "5442" had an ending balance of a mere $256 the month prior to Zinnel filing bankruptcy that matched Zinnel's bankruptcy schedules in the two places where the WAMU personal account was listed. (Appendix E, 22a-24a). As a result, **Zinnel was sandbagged** by AUSA Matthew D. Segal and AUSA Audrey B. Hemesath and **the witness, jury, and the judge were hoodwinked**. As a result, in this case, **no one, or no Court, can say what property Zinnel is convicted of transferring and/or concealing, let alone say beyond a reasonable doubt.**

As Justice Douglas once warned, "the function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right people as expressed in the laws and give those accused of a crime a fair trial." *Donnelly v. DeChristofra*, 416 U.S. 637, 648-49 (1974).

E. The Money Laundering Counts Must Fall because their Predicates were Constructively Amended

This Court must also reverse all of Zinnel's money laundering convictions (Counts 4-12, 15-18) because they were predicated on the defective bankruptcy fraud convictions. *United States v. Garrido*, 713 F.3d 985, 998-999 (9 CA, 2013) (reversing §1957 convictions where the alleged

criminally-derived property was derived from defective fraud conviction); *Shipsey*, 190 F.3d at 1083, 1088 (reversing § 1956 convictions predicated on reversed theft convictions).

No money laundering count specified which bankruptcy fraud count was the predicate "specified unlawful activity" for 18 U.S.C. § 1956 and 18 U.S.C. § 1957. It is impossible to determine which bankruptcy fraud count the jury used as the predicate for any money laundering count. Thus, those money laundering convictions collapse with the reversal of Counts 1 and 2.

II. THE COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY

A. The Jury Instructions on Bankruptcy Fraud Were Fatally Flawed

This claim incorporates Question 1 above. The jury instructions on Bankruptcy Fraud (Appendix J) violated Zinnel's Fifth and Sixth Amendment rights to be tried only on charges in the indictment and to notice of the charges against him, and were also prejudicially confusing. Zinnel timely objected.

The language and formulation of jury instructions is reviewed for abuse of discretion. *United States v. Christensen*, 801 F.3d 971, 990 (9 CA, 2015). Omitting an element of an offense is constitutional error that requires reversal, unless the error was "harmless beyond a reasonable doubt," i.e., if there is no reasonable possibility that the error materially affected the jury's deliberations. *United States v. Pierre*, 254 F.3d 872, 877 (9 CA, 2001). The Fifth Circuit has held that in fashioning instructions the trial courts are accorded substantial latitude, and their charge need not be faultless, but we must reverse when we have a substantial doubt that the jury has been fairly guided in its deliberations. *Bode v. Pan Am. World Airways, Inc.*, 786 F.2d 669, 672 (5 CA, 1986) (internal citations omitted). This Court should find that challenged instructions fall below this threshold of acceptable jury guidance.

1. The Bankruptcy Fraud Instructions were Inadequate because they Omitted the Property Allegedly Transferred or Concealed

A defendant can be found guilty of bankruptcy fraud only upon proof that he knowingly transferred or concealed the property stated in the indictment. 18 U.S.C. §§ 152(1) and 152(7). Of the seven circuits that have pattern instructions for sections 152(1) or 152(7), six require a

description of the property the indictment alleged was transferred or concealed. [8] (Appendix H. The description of the property is critical to allow preparation of a defense. E.g., 10th Cir. Pattern Crim. Jury Instr. 2.10 (Rev. 2011), cmt. ("...the property should be sufficiently identified in the instructions") (quoting United States v. Arge, 418 F.2d 721, 724 (10 CA, 1969)).

In creating the bankruptcy fraud instructions given here (Appendix J), the government exploited *United States v. Klassy*, CR 05-503-MCE (E.D. Cal.). (Appendix I 62a-64a) However, the government omitted *Klassy's* list of the property charged. (Appendix I, 64a). The jury instructions in *United States v. Burke*, CR 05-365-JAM (E.D. Cal.), also authored by the same U.S. Attorney's Office, also listed the properties alleged in the indictment. (Appendix I, 60a-61a). By omitting which items of property the jury could consider, the jury instructions for Counts 1 and 2 were inadequate to guide the jury. Reversal is warranted, because it is impossible to determine if this error materially affected the verdicts.

2. The Instructions on Counts 1-2 Created Juror Confusion

In addition to omitting the property interests alleged in the indictment, the jury instructions for Counts 1 and 2 were prejudicially confusing because each instruction referred to property items as if they were identified elsewhere. The instructions made reference to "at least one of the alleged items of property" for Count 1 (Appendix J, 68a), and "as to at least one of the above items of property" as to Count 2. (Appendix J, 70a). These phrases were obviously lifted from the jury instructions in *Burke* and *Klassy* (Appendix I). However, unlike in those cases, here the district court never identified the "alleged items of property" or the "above items of property." (Appendix J). The jury never got the indictment, the court never told the jury what property the indictment alleged was transferred and concealed, and the verdict forms did not identify the interests. (Appendix M). The instructions created unresolvable jury confusion. Jurors were left to glean the possible items of property from the prosecutors' arguments, which urged them to convict on uncharged conduct. (Appendix K, 71a, 72a, 75a-77a). It cannot be said that there is no reasonable possibility that this error materially affected the verdict. *United States v. Pierre*, 254 F.3d 872, 877 (9

[8] *See* First Cir. Pattern Crim. Jury Instr. 4.18.152(1) and 4.18.152(7); Third Cir. Manual of Model Crim. Jury Instr. No. 6.18.152(1) (Rev. 2012); Seventh Cir. Pattern Crim. Jury Instr. 18 U.S.C. 152(1) (Rev. 2013); Eighth Cir. Model Crim. Jury Instr. No. 6.18.152A (Rev. 2014); Tenth Cir. Pattern Crim. Jury Instr. No. 2.10 (Rev. 2011); Eleventh Cir. Pattern Jury Instr.

CA, 2001). Zinnel requested a verdict form with lines to check for the property actually charged in the indictment. (Appendix G, 40a-43a). If the jury had in front of it the jury instructions and verdict forms used in *Klassy* and *Burke* (Appendix L), it is highly probable that the jury would have had a question as to why the WAMU personal checking account, Done Deal, and Corporate Control were not listed on the verdict form so they could check the line that they unanimously agreed on one of those properties, because of the government lawyers' emphasis.

These instructional errors require reversal of all Zinnel's convictions.

B. It is impossible to know beyond a reasonable doubt whether uncharged or charged property was unanimously agreed upon by the jury as fraudulently transferred or concealed and this requires reversal of all of Zinnel's convictions

With regards to the Court's determination whether there is an unconstitutional constructive amendment and/or fatally flawed jury instructions, the Court should go no further than to recognize that it is impossible to determine, let alone determine beyond a reasonable doubt, by the jury instructions and verdict form deceivingly drafted by the two government lawyers, approved by the district court over Zinnel's emphatic objections, and given to the jury in this case, what property the jury unanimously agreed to convict Zinnel on under Count 1 for a pre-petition transfer and Count 2 for a post-petition concealment in order to be satisfied beyond a reasonable doubt that the jury did not unanimously agree solely on one or more of the three uncharged properties the government emphasized during trial and closing argument. (Appendix J & M)

III. THE JUDGE-DETERMINED SENTENCING GUIDELINES OFFENSE LEVEL OF 36 IS UNCONSTITUTIONAL BECAUSE 28 LEVELS OF THE HOTLY CONTESTED SENTENCING ENHANCEMENTS WERE NOT FOUND BY THE JURY OR ADMITTED TO BY THE DEFENDANT, BUT WERE USED TO INCREASE PETITIONER'S PENALTY IN VIOLATION OF THE SIXTH AMENDMENT

A. Distressing Facts

- Petitioner received a mechanically applied within-Guideline draconian prison sentence of 212 months in prison (17.67 years) that is the longest sentence in the history of the United States for bankruptcy fraud by almost double when similarly situated defendants received around 19 months in prison;

- The hotly contested sentencing enhancements increased Petitioner's punishment from 6 months to 212 months in prison - a 3,400 % increase;
- Post-*Booker* the Department of Justice's prevailing policy is still "*to actively seek sentences within the range established by the Sentencing Guidelines.*" (Appendix R, 90a, 95a-96a);
- Post-*Booker* half of federal sentencing judges still treat the guidelines as mandatory by slavishly adhering to the sentencing guidelines. According to a 2017 United States Sentencing Commission, almost all of the offenders in the federal prison population were sentenced post-*Booker*, yet 50.4% of the offenders in the federal prison population were still sentenced within the recommended Guideline range. Thus the sad reality is that in half the cases still, the Guidelines are treated by judges as if they were still mandatory, which runs afoul of the Sixth Amendment. (Appendix Q, 89a);
- Probation officers have been called the "guardians of the guidelines;"
- The Assistant United States Attorneys in the Eastern District of California, routinely insert in the plea agreements they draft the following language: "*The defendant agrees that the application of the United States Sentencing Guidelines to his case results in a reasonable sentence and that the defendant will not request that the Court apply the sentencing factors under 18 U.S.C. § 3553 to arrive at a different sentence than that called for under the Sentencing Guidelines' advisory guideline range as determined by the Court*;"
- Prior to becoming a federal judge, with Petitioner's trial his first, the sentencing judge in this case, told Senator Chuck Grassley in written responses to the Senator's questions, that "*If confirmed, I intend to give the Federal Sentencing Guidelines significant difference. The Federal Sentencing Guidelines create uniformity, consistency, and fairness while assuring similarly situated cases are treated the same.*" (Appendix S, 102a);
- Both prosecutors in this case have urged only Guideline sentences and have told the sentencing judge that "*you've done your duty on unwarranted sentencing disparities if you calculate the guidelines correctly.*" citing *Treadwell*;
- Even though the law is well-settled that correctly calculating the applicable Guidelines range is the "starting point" of any sentencing proceeding, and the Guidelines are not given any more weight than any 18 U.S.C. § 3553(a) factor, [9] the reality is, that post-*Booker,* in the

[9] *Kimbrough v. United States*, 552 U.S. 85 (2007)

majority of cases, the calculation of the defendant's "Guideline range" is the start and finish of the determination of the defendant's prison term. Thus, every single judge-found fact that increases the Guideline range directly increases the defendant's prison time;

- Barrels of ink have been spilled on how the Sentencing Guidelines for economic crimes are absurd. (e.g. Appendix R, 91a-100a);
- As of the date of this petition, Steven Zinnel has been unjustly incarcerated over 3,000,000 minutes, 50,000 hours, 2,100 days, 69 months, 5.8 years, 16% of his adult life thus far, and 2.8 times "factually similar" Letantia Bussell; [10]
- Emboldened by Ninth Circuit's erroneous opinion affirming the convictions and Guideline range of 188-235 months in prison (O.L. 36), the prosecutors have indicated that they intend to seek the same savage sentence at Petitioner's resentencing; [11]
- Judge Troy L. Nunley has noted that Zinnel's Guideline range has not changed;
- On April 4, 2019, Judge Troy L. Nunley <u>again</u> imposed a within-Guideline range sentence of nine years imprisonment on Zinnel's co-defendant Derian Edison at her resentencing.

B. The Supreme Court and the majority of the Court of Appeals <u>have side-stepped around this issue</u>

Petitioner contends that, but for the judge's finding of facts, resulting in 28 levels of sentencing enhancements, increasing his guideline sentence from 6 months to 212 months, a 3,400% increase, his sentence would have been "substantively unreasonable" and therefore illegal. See *Rita v. United States,* 551 U.S. 338 (2007). If so, Zinnel's constitutional rights were violated. The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, "requires that each element of a crime" be either admitted by the defendant, or "proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99 (2013). Facts that increase mandatory minimum sentences must be submitted to the jury. *Id.* Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, *Apprendi v. New Jersey*, 530 U.S. 466, 483, n. 10, 490 (2000), and "must be found by a jury, not a judge," *Cunningham v. California*, 549 U.S.

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[10] *United States v. Bussell*, 504 F.3d 956 (9 CA, 2007). At Zinnel's sentencing on March 4, 2014, Judge Troy Nunley made a finding that Zinnel's case was "factually similar" to Bussell, who was sentenced to 36 months in prison.

[11] Currently set for May 2, 2019.

270 (2007). This Court held that a substantively unreasonable penalty is illegal and must be set aside. *Gall v. United States*, 552 U.S. 38 (2007). It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable-thereby exposing the defendant to the longer sentence-is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge.

Justice Scalia, joined by Justice Thomas and Justice Ginsburg, dissenting from denial of Certiorari in *Jones v. United States*, 135 S. Ct. 8 (2014), expressed his frustration with judge-found facts that increase a defendant's prison time:

> "For years, ... this Court has refrained from saying so."
>
> "*In Rita v. United States*, we dismissed the possibility of Sixth Amendment violations resulting from substantive reasonableness review as hypothetical and not presented by the facts of the case. We thus left for another day the question whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness. *Rita*, 551 U.S., at 353. Nonetheless, the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial fact finding, so long as they are within the statutory range.
>
> ***
>
> We should grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment - or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable."

Justice Gorsuch, then a Circuit Judge, authored the opinion in *United States v. Sabillon-Umana*, 772 F.3d 1328 (10 CA, 2014) wherein he challenged the district court's power to find facts at sentencing citing Justice Scalia's dissenting from denial of certiorari in *Jones v. United States*, 135 S. Ct. 8 (2014). Justice Gorsuch wrote in relevant part:

> "We admit the proper order of [sentencing] operations we've outlined rests in part on a questionable foundation. It assumes that a district judge may either decrease or increase a defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent. It is far from certain whether the Constitution allows at least the second half of that equation. See, e.g., *Jones, Id.*

In *Jones* supra., Justice Scalia cited *United States v. Treadwell*, 593 F.3d 990 (9 CA, 2010). In *Treadwell*, all three defendants raised an as-applied Sixth Amendment challenge to their

sentences, arguing that their sentences would not be "reasonable" under 18 U.S.C. § 3553(a) without relying on judge-found facts, in violation of their Sixth Amendment right to a jury trial. The *Treadwell* defendants adopted an argument that Justice Scalia, writing separately, has encouraged litigants to raise in several Supreme Court sentencing decisions. The *Treadwell* defendants contended that "for every given crime there is some maximum sentence that will be upheld as reasonable [under § 3553(a)] based only on the facts found by the jury or admitted by the defendant." According to the defendants, the facts found by the jury at their trial warrant only a 1 to 7 month sentence under the Guidelines. This is Zinnel's position as well.

In *Treadwell*, the Ninth Circuit rejected the defendants' argument, and joined the Fourth, Sixth, and Seventh Circuits in holding that "this argument is too creative for the law as it stands."

> "in *Booker*, the Supreme Court rendered the Guidelines advisory, permitting a district court to impose a sentence anywhere within the range established by the statute of conviction without violating the Sixth Amendment...Accordingly, no constitutional violation occurred, even if the district court did rely on facts not found by the jury."

In another Ninth Circuit case, *United States v. Hickey*, 580 F.3d 922 (9 CA, 2009), the defendant argued that the district court impermissibly enhanced his sentence by fifteen levels based on the amount of the loss because the amount was not proven beyond a reasonable doubt to the jury. This is Zinnel's position as well. The Ninth Circuit held:

> "This argument fundamentally misunderstands the current state of constitutional law on sentencing. The relevant Sixth Amendment question is not, as Hickey claims:
>
> Whether judge found facts that were not proven beyond a reasonable doubt by the jury in the process of calculating the guidelines range. Rather, the Sixth Amendment question . . . is whether the law forbids a judge to increase a defendant's sentence unless the judge finds facts that the jury did not find (and the offender did not concede). *Rita*, 551 U.S. 338, 352 (2007).
>
> Because the sentencing guidelines are advisory after *Booker*, the Sixth Amendment does not require that the loss be proved to a jury beyond a reasonable doubt. See *United States v. Booker*, 543 U.S. 220 (2005)."

C. Because post-Booker, the majority of judges, including the sentencing judge in this case, still improperly slavishly impose Guideline sentences, every fact the judge finds that adds a sentencing enhancement does increase the punishment and thus must be found by the jury or admitted by the defendants, including Petitioner here

Current Supreme Court law is that facts that increase mandatory minimum sentences must be submitted to the jury. *Alleyne v. United States*, 570 U.S. 99 (2013). However, in economic crime cases there are no mandatory minimums and six circuits have interpreted the Supreme Court's holdings post-*Booker*, to mean that since the Guidelines are advisory, and no mandatory minimums in economic crime cases, *Alleyne's* holding is not triggered. *United States v. Booker*, 543 U.S. 220 (2005) excised 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3472(e) in order to remedy the Sixth Amendment violation created by the mandatory nature of the Guidelines. However, in over half the defendants sentenced, including Zinnel, the Guidelines are strictly adhered to which is a de facto mandatory minimum. Thus, every Offense Level increase, increases over half the federal offenders' punishment, including Zinnel's. Zinnel's 28 levels of objected to enhancements (Appendix O) are comprised of five two-level enhancements and an eighteen-level mega-enhancement for loss with no evidence by the government except for Zinnel's disputed bankruptcy schedules. (Appendix P). Because the Guidelines are non-linear, there is a huge difference in prison time between two levels from 8 – 10 mid-range (a 6 month difference) and two levels from 34 to 36 mid-range (a 42 month difference). **Thus, for Zinnel, a 2-level enhancement adds 3.5 years in prison**. A flagrant example is the 2 level enhancement for number of victims. In this case, the objected-to Presentence Report ("PSR"), details two victims, with an alleged loss of $141 and $3,026, that triggered the 2-level enhancement (Appendix P, #3 & #5). Thus, Zinnel was sentenced to 3.5 years in additional prison time over $3,167 in fake losses that were completely disputed on Zinnel's bankruptcy schedules.

1. The district court erred by imposing sentence based on judicial fact-finding concerning loss and number of victims

Zinnel was sentenced to an additional 15 years and 8 months in prison based on the amount of loss and number of victims determined by the district court at sentencing. As discussed below, the amount of loss and number of victims was the single most important sentencing factor in this case, above all else. The amount of loss was determined by the district court at sentencing. The Sixth Amendment requires factual determinations to be made by the jury. *Apprendi v. New Jersey*,

530 U.S. 466 (2000). The sentence here was imposed solely on alleged "facts" contained in the objected-to-PSR that was determined at sentencing by the district court itself under the preponderance of evidence standard, not beyond a reasonable doubt by the jury. "The preponderance standard is no more than a tie-breaker dictating that when the evidence on an issue is evenly balanced, the party with the burden of proof loses." *United States v. Gigante*, 94 F.3d 53 (2 CA, 1996). "Quantified, the preponderance standard would be 50+% probable." *Id.* Such a judicial determination of the facts is in violation of the Sixth Amendment and erroneous.

Only Zinnel's disputed bankruptcy schedules were before the courts below, and here. (Appendix P). Every one of the eleven listed claims are listed as disputed. *Id.* As Zinnel objected to the loss calculation contained in the PSR, the district court was not permitted to rely on the PSR at all for loss or number of victims. Zinnel's factual objections triggered the government's obligation to submit clear and convincing evidence to support the 20-level mega -- enhancement for loss and number of victims. *Federal Rules of Criminal Procedure* 32(i)(3)(B). During Zinnel's sentencing, AUSA Matthew D. Segal announced twice that the loss calculation was "all academic [because] there was a trial here...we proved it beyond a reasonable doubt," and called Zinnel's bankruptcy petition the "gold standard of evidence." On pages 33 and 34 of his Reply Brief below, Zinnel copied and pasted the relevant portions of his bankruptcy schedules relied on by the government at sentencing. (Appendix P). Every one of the eleven listed claims are listed as disputed. *Id.* Neither the government, the trustee, nor any court evaluated any claim listed in the PSR, or Zinnel's bankruptcy schedules, for truth or validity. The government chose to rely solely on Zinnel's disputed bankruptcy schedules at sentencing and the court erroneously relied on the objected-to PSR as "evidence" of loss and number of victims adding 15 years 8 months to Zinnel's mid-range "Guideline" sentence.

Zinnel asserts that before he is enhanced 20 levels, adding 15 years 8 months to a "Guideline sentence," the government proffered "gold standard" of evidence should have been thoroughly vetted by the courts below. However, even a cursory review, shows the glaring problems with using the list of eleven creditors contained in PSR para. #21 for $3,615,758 as loss and number of victims. For example, listing #4 on the relevant portion of Zinnel's bankruptcy schedules, the PSR assigned a value of $115,000, but Zinnel scheduled the Amount of Claim as "unknown" and

"disputed" the creditor. (Appendix P, 86a). Listing #7 on the relevant portion of Zinnel's bankruptcy schedules, the PSR assigned a value of $2,174,982.00, but Zinnel scheduled the Amount of Claim as "0.00" and "disputed" the creditor. (Appendix P, 87a). Listing #8 the PSR assigned a value of $780,147.00, but Zinnel scheduled the Amount of Claim as "0.00" and "disputed the creditor. (Appendix P, 77a). No court can "guess" loss and number of victims. Especially when it adds 15 years 8 months to a mid-range Guideline sentence that Judge Nunley has expressed, albeit erroneously, to Congress that he will impose. (Appendix S, 102a). "Guessing is for contestants on television game shows, not for judges applying the law." *United States v. Houston*, 217 F.3d 1204, 1208-1209 (9 CA, 2000).

Zinnel's bankruptcy schedules reflect a Total Claims amount of $2,008,369.97 with all of it **disputed**. (Appendix P, 87a). The PSR assigned a value of $3,615,758. *Id.* The relevant portions of Zinnel's bankruptcy schedules the government relied on to meet its burden, are hardly the "gold standard" of evidence. Yet these two pages of phantom money and victims (Appendix P), added 15 years 8 months to a mid-range "Guideline" sentence of 17 years 8 months for Zinnel. This cannot be the starting point at any resentencing; especially when the government's plan is to seek the same draconian sentence as before because Zinnel's "Guidelines" have not changed.

As seasoned Judge Jed Rakoff observed: "By making a Guidelines sentence turn, for all practical purposes on the single factor of loss, the Sentencing Commission effectively ignored the statutory requirement that federal sentencing take many factors into account (18 U.S.C. § 3553(a)), and by contrast, effectively guaranteed that many such sentenced would be irrational on their face." [12] (also see Appendix R, 91a-100a). Judge Nunley's mechanical Guidelines application, coupled with his imprecise estimation of loss, produced a shockingly-high sentence. There is no way Zinnel is Offense Level 36. Subtracting 20 levels for nonexistent loss and number of victims, Zinnel would be Offense Level 16 (21-27 months in prison). Zinnel's extreme sentence, not being based on a jury's fact finding and being multiples of the norm for the offenses of conviction, simply subvert the Sentencing Reform Act's "basic aim of ensuring similar sentences for those who have committed similar acts in similar ways."

[12] *United States v. Gupta*, 904 F.Supp. 2d 349, 350-351 (S.D.N.Y. 2012)

2. Zinnel's Fifth and Sixth Amendment rights are affected

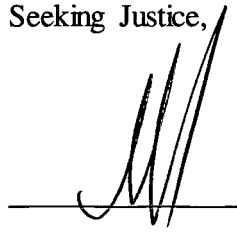
Substantial rights are affected here because the issue concerns Zinnel's Fifth Amendment, Sixth Amendment, and Due Process rights. This Court has made it clear that "any jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001). Last year, Justice Sotomayor eloquently defined that actual jail time is significant. *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (June 18, 2018)

There can be no rights more substantial than a defendant's explicit constitutional rights. Imposition of sentence based entirely upon facts that were never proved beyond a reasonable doubt, or admitted by the defendant, seriously affects the fairness and integrity of judicial proceedings. Zinnel's Offense Level should therefore be vacated and remanded at Offense Level 8 for Zinnel's re-sentencing.

CONCLUSION

This Court has made it clear that when the government action "shocks the conscience," it violates due process. The underlying convictions and sentences reflect a serious, recurrent, and unconstitutional practices. Zinnel knows the parties and all the Courts below have labored long and hard over this case, and that this Court is likely reluctant to push the reset button. But fairness is (and must be) the hallmark of federal-court litigation, and the essence of fairness is the provision of a level playing field. Here, there is no way anyone, or any Court, can say, let alone beyond a reasonable doubt as required, that Zinnel was not convicted of transferring or concealing property uncharged by the grand jury; property that he was given no notice he would have to defend against. This Court and Zinnel, are "left guessing" as to what property the jury unanimously agreed on in order to convict on Counts 1 and 2 and the money laundering counts which mandates reversal. Therefore, the petition for a writ of certiorari should be granted.

Seeking Justice,



Steven Zinnel, Petitioner In Pro Se Dated: April 8, 2019