No. 19-1447

In the Supreme Court of the United States

YEHUDI MANZANO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The United States' brief in opposition clearly illustrates why the Court should grant Mr. Manzano's petition for a writ of certiorari. First, the United States persists in failing to identify what harm it would have incurred as the result of the district court's decision to allow Mr. Manzano to argue that the jury in his criminal trial should judge the law. It then goes to tremendous lengths to make two circuit splits vanish before resorting to a last-ditch preservation argument. Finally, it again fails to engage with the Sixth Amendment's original meaning and history, which clearly indicate that Mr. Manzano has a constitutional right to argue that the jury should judge the United States' prosecutorial decision. Consequently, for the foregoing reasons as well as those contained in his petition for certiorari, Mr. Manzano respectfully requests that the Court grant his petition for a writ of certiorari.

I. The Court Has Never Approved The Government's Use of A Writ Of Mandamus In A Criminal Case To Review A Procedural Order When That Order Did Not Have The Effect Of A Dismissal.

The United States persists in ignoring Mr. Manzano's constitutional rights in this case even when the Court has clearly articulated them in support of its relevant decisions. In *Will v. United States*, the Court held that it "has never approved the [government's] use of the writ [of mandamus] to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." 389 U.S. 90, 98 (1967). The Court's jurisprudence does not reflect its lack of opportunities to review writs of mandamus sought by the government concerning procedural orders that did

not operate as a dismissal. Instead, the Court clearly articulated the constitutional considerations underlying the rule that it has adopted.

The *Will* Court began its contextual analysis of mandamus by stating its general approach to mandamus in all cases: "All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court." *Id.* at 96. It then articulated two considerations for when the United States seeks a writ of mandamus in a criminal prosecution.

> This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him…. Moreover, in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored…. at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition.

Id. at 96 (internal citations and quotation marks omitted).

Will indicates that Congress clearly prioritized a defendant's constitutional rights to a speedy trial and not to be placed in jeopardy twice by limiting the United States' appeal rights under 18 U.S.C. § 3731 to narrow categories of orders terminating the prosecution or improperly depriving the United States of a valid conviction's fruits. *Id.* at 97. Thus, *Will* made clear that the same principles apply to writs of mandamus sought by the United States: "Mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies." *Id.* at 97.

Even a cursory comparison of 18 U.S.C. § 3731 and the *Will* Court's recognition of the United States' permissible uses for a writ of mandamus reveals that the limitations governing the United States' use of a writ of mandamus are derived

directly from 18 U.S.C. § 3731. 18 U.S.C. § 3731 allows the United States to take interlocutory appeals when a district court dismisses an indictment or grants a new trial after a guilty verdict. The *Will* Court recognized that the United States has properly invoked a writ of mandamus when a trial court totally deprived the government of its right to initiate a prosecution. *Id.* at 97-98 (citing *Ex Parte United States*, 287 U.S. 241 (1932)). 18 U.S.C. § 3731 allows the United States to take interlocutory appeals when a district court releases someone charged with or convicted of a crime or denies a motion to revoke or modify a person's conditions of release. Likewise, the *Will* Court recognized that the United States had properly invoked a writ of mandamus when the district court "overreached its judicial power to deny the Government the rightful fruits of a valid conviction." *Id.* at 98 (citing *Ex Parte United States*, 242 U.S. 27 (1916)).

The United States does not make an argument that the district court's decision to allow Mr. Manzano's counsel to argue jury nullification on the basis of evidence of sentencing consequences falls under either of these two bases. Nor does it argue that the district court's decision effectively terminates the prosecution by improperly admitting or excluding overwhelming evidence that either shows Mr. Manzano's innocence or guilt. Instead, the United States' response to Mr. Manzano's petition is wholly devoid of any articulation of how the district court's decision will harm its ability to secure a conviction or of any reasoning for its charging decision in this case[1]

[1] The United States previously has been more than capable of articulating that the harm that it would suffer in applications for writs of mandamus, including in cases that it now relies on. *See, e.g.*, *United States v. United States District Court for*

– an omission that Judge Parker of the Second Circuit recognized and that a review of the district court's motion hearing transcript reveals. Pet. App.41-42, 61-102.

Without such an articulation of harm, the United States has no justification for halting Mr. Manzano's trial to seek a writ of mandamus akin to the policies of 18 U.S.C. § 3731 that the *Will* Court recognized as applying to writs of mandamus. Mr. Manzano, however, languishes under strict probationary conditions despite his presumption of innocence while he fights to protect his constitutional rights.

The United States also ignores the fact that *Will* expressly reserved whether it can seek a writ of mandamus to "review an interlocutory procedural order in a criminal case which [does] not have the effect of a dismissal." *Id.* at 98 ("We need not decide under what circumstances, if any, such a use of mandamus would be appropriate"). Instead, it relies on the Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972) to argue that the Court has resolved the question. *See* Resp. Br., p. 15.

The United States, however, misapprehends the Court's decision. In the underlying Sixth Circuit case, the Sixth Circuit did entertain a challenge to its jurisdiction over the United States' attempted invocation of a writ of mandamus in a criminal proceeding and decided, with minimal analysis, that it had jurisdiction because the case was an extraordinary one and the district court's order would have

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Eastern Dist. Of Mich., Southern Div., 444 F.2d 651, 655 (6th Cir. 1971) ("Petitioner United States… argues that this is an extraordinary case wherein the respondent has entered an illegal order which if allowed to stand, 'would result in grave and irreparable harm to legitimate Governmental interests'"); *see also* Resp. Br., p. 15 (relying on *id.*).

had the "effect of forcing the government to dismiss the prosecution of one defendant." *United States v. United States District Court for Eastern Dist. Of Mich., Southern Div.*, 444 F.2d 651, 655-56 (6th Cir. 1971). Because "[n]o attack was made in this Court as to the appropriateness of the writ of mandamus procedure," the Court merely stated that the Sixth Circuit had correctly resolved the jurisdictional issue without explaining why. *United States v. United States District Court*, 407 U.S. 297, 301 n.3 (1972). The Sixth Circuit's jurisdictional decision, however, was entirely consistent with *Will* and 18 U.S.C. § 3731 because the district court's decision would have effectively denied the United States the ability to prosecute one of the defendants.

The United States has never argued that any harm will result from the district court's ruling in this case, let alone harm rising to the level required by *Will* and 18 U.S.C. § 3731. Consequently, Mr. Manzano's petition squarely presents the question that the *Will* Court reserved, and the Court should grant it to resolve the question and protect the constitutional rights that it recognized in *Will* and that Congress recognized in 18 U.S.C. § 3731.

II. There Is A Genuine Circuit Split Over Whether 18 U.S.C. § 3731's Principles Limit The Matters For Which The United States May Seek A Writ Of Mandamus.

The United States spends several pages of its opposition to Mr. Manzano's petition denying the fact that there is a genuine circuit split over whether 18 U.S.C. § 3731's principles limit the matters for which it may seek a writ of mandamus. *See* Resp. Br., pp. 15-18. Its arguments, however, do not consider the relevant circuit decisions in the context of the Court's decision in *Will* and fail as a result.

Mr. Manzano maintains that three circuits – the First, Seventh, and Tenth Circuits – require the United States to establish its right to a criminal appeal under 18 U.S.C. § 3731 before an appellate court may grant its application for a writ of mandamus. The United States argues that the decisions Mr. Manzano relies on from those circuits "recognize that the government may seek a writ of mandamus if it cannot appeal under 18 U.S.C. § 3731." Resp. Br., p. 16. Its argument is misplaced.

The United States starts its analysis in the First Circuit with *United States v. Kane*, 646 F.2d 4 (1st Cir. 1981). The United States is correct in pointing out that the *Kane* court held that it had jurisdiction to entertain the United States' petition for a writ of mandamus. *Id.* at 9. It, however, conveniently neglects why the *Kane* court reached that conclusion. The *Kane* Court articulated multiple bases under 18 U.S.C. § 3731 for the United States taking a later appeal. *Id.* at 9.

> In this case, an appeal could lie at some later stage of the proceedings from a judgment of conviction or from either pre-trial exclusion of evidence or dismissal of the indictment as a sanction for the government's noncompliance with the present order; alternatively, this court's potential appellate jurisdiction could be avoided by an order of exclusion after jeopardy attaches, which could lead to acquittal.

Id. at 9. Consequently, even though an interlocutory appeal under 18 U.S.C. § 3731 was untimely, the First Circuit found the potential consequences for the United States' noncompliance with the district court's order to produce grand jury minutes and witness lists fell within the ambit of 18 U.S.C. § 3731, thus granting it mandamus jurisdiction to review the district court's action for a usurpation of power. *Id.* at 9-10.

The United States also relies on *United States v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001), *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994), and *United States*

v. Collamore, 868 F.2d 24 (1st Cir. 1989), but they also do not support its position. In *Acosta-Martinez*, the First Circuit held that the United States' appeal from a district court's order striking a death penalty notice from an indictment and forbidding the United States from seeking the death penalty was proper under 18 U.S.C. § 3731. *Acosta-Martinez*, 252 F.3d. at 17. It also penned the following sentence: "This case would also be within our mandamus jurisdiction, if there were no statutory jurisdiction." *Id.* at 17. That sentence is nothing more than dicta, especially in view of the First Circuit's finding that it had appellate jurisdiction under 18 U.S.C. § 3731.

In *Horn*, the First Circuit considered whether sovereign immunity barred a district court's order assessing the United States attorney's fees for gross prosecutorial misconduct. *Horn*, 29 F.3d at 759. Even though the criminal defendants did not challenge jurisdiction, the First Circuit was unsatisfied with the United States' assertion of jurisdiction under 28 U.S.C. § 1291 and conducted its own analysis. *Id.* at 768. While it acknowledged that it could not find a permissible basis under 18 U.S.C. § 3731, the First Circuit ultimately employed the "special circumstance" exception to review the district court's order as a collateral order under 28 U.S.C. § 1291, thus finding a statutory jurisdictional basis for the United States' appeal. *Id.* at 769. Not content, the First Circuit then stated that it was "fortified in [its] resolve to hear and determine this appeal… that, even if no appeal lies of right…," it would review the order under its mandamus authority. *Id.* at 769. Similar to *Kane* and *Acosta-Martinez*, however, it found an independent statutory basis for its jurisdiction. Even if it had not, the First Circuit acknowledged that review of the

district court's order did not implicate any of the defendants' constitutional rights to a speedy trial or not being put in jeopardy twice. *Id.* at 768.

Similar to *Kane*, the First Circuit held in *Collamore* that a district court's decision to bifurcate a trial did not fall within 18 U.S.C. § 3731, but that its consequences did. *Collamore*, 868 F.2d at 26-27. The *Collamore* bifurcation order would have excluded evidence of prior convictions if the United States failed to prove beyond a reasonable doubt that the defendant possessed a firearm. *Id.* at 26-27. Consequently, the First Circuit held that, because the district court's court order deprived it of jurisdiction under 18 U.S.C. § 3731 over the exclusion of evidence, mandamus was appropriate to protect the United States' appellate rights. *Id.* at 27.

Consequently, to the extent that the First Circuit has held that the United States may seek a writ of mandamus for matters outside the scope of 18 U.S.C. § 3731, it has consistently required either an alternative statutory basis for the writ or a showing of harm to the United States' appellate rights under 18 U.S.C. § 3731. The United States has not even attempted to argue either situation in this case, and the Second Circuit did not attempt to find a similar connection under 18 U.S.C. § 3731.

The United States fares no better in interpreting of Seventh and Tenth Circuit precedent. In the Seventh Circuit, the United States is correct in pointing out that *United States v. Horak* court presumed that it had jurisdiction under the All Writs Act to issue a writ of mandamus even though it found that no permissible basis for an interlocutory appeal existed under 18 U.S.C. § 3731. 833 F.2d 1235, 1248 (7th Cir. 1987). What the *Horak* court said, however, was telling. Acknowledging that the

United States had argued that a consequence of a conviction, complete forfeiture, was mandatory under the applicable substantive statute, it stated that the United States was likely right, but it declined to issue a writ of mandamus because it could not say that the United States' position was clear and indisputable. *Id.* at 1250. Consequently, the United States advanced a permissible basis for an appeal under 18 U.S.C. § 3137 that gave the Seventh Circuit jurisdiction over its application for a writ of mandamus, and the Seventh Circuit recognized it. Additionally, the Seventh Circuit's decision in *United States v. Vinyard*, 539 F.3d 589, 590 (7th Cir. 2008) does not authorize the United States to pursue mandamus when it does not have a 18 U.S.C. § 3731 basis for an appeal. Instead, the Seventh Circuit simply stated that "appellate jurisdiction under 18 U.S.C. § 3731 is problematic, since the district court did not issue any of the orders described by that statute," and it expressly reserved the question of whether it could have accepted the case as an ordinary appeal under § 3731, thus avoiding an express finding that there was no permissible basis for jurisdiction under § 3731 and using mandamus as a standalone.[2] *Id.* at 590.

The Tenth Circuit does not help the United States either. In *United States v. McVeigh*, the Tenth Circuit rejected the United States' arguments that it had a permissible basis for an appeal of witness sequestration under 18 U.S.C. § 3731 and declined to use mandamus to expand its appellate rights. 106 F.3d 325, 333 (10th Cir.

[2] The Court's decision in *Will* provides sufficient justification for the *Vinyard*'s mandamus under 18 U.S.C. § 3731 because the district court overreached its judicial power and denied the government the "rightful fruits of a valid conviction." *Will*, 389 U.S. at 97-98. Again, the United States claims no such harm in the instant case.

1997). It echoed this Court's language from *Will* in declining to adopt a categorical rule precluding any mandamus review of matters that might fall outside of 18 U.S.C. § 3731. *Id.* at 333. While the United States claims that the Tenth Circuit has determined in an unpublished 2009 order, *In re United States*, 578 F.3d 1195 (Mem) (10th Cir. 2009) (order appended to dissent), that mandamus may issue even when there is no basis for it under 18 U.S.C. § 3731, it neglects Tenth Circuit Local Rule 32.1(A), which explicitly states: "Unpublished decisions are not precedential…." The Tenth Circuit's order is not binding, and it also contains no jurisdictional analysis.

Consequently, the United States has failed to disprove that a genuine circuit split exists over whether mandamus should issue when the United States cannot supply a basis for appellate jurisdiction under 18 U.S.C. § 3731. The Court should grant the petition to resolve this question, which it expressly reserved in *Will*.

III. The Issue of Whether *Will* and 18 U.S.C. § 3731 Limit The United States' Ability To Seek Mandamus Is Properly Preserved For The Court's Review Because The Second Circuit Clearly Passed On It.

The United States correctly points out that the Court's precedent "precludes a grant of certiorari when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal citation and quotation omitted). Its claim, however, that the Second Circuit did not directly address whether the United States must establish a right to an appeal under 18 U.S.C. § 3731 lacks merit.[3] *See* Resp. Br., pp. 18-19.

[3] Mr. Manzano does not dispute that, in the haste of briefing his mandamus matter, he did not raise his jurisdictional argument under 18 U.S.C. § 3731.

In its discussion of the United States' lack of other adequate means to obtain the relief sought, the Second Circuit specifically cited 18 U.S.C. § 3731 to support its conclusion that the United States had no other adequate remedy: "The regular appeals process will be unavailable to the government if Manzano prevails at trial, because double jeopardy will have attached and the government will not be able to appeal the jury's verdict of acquittal. *See* U.S. Const. amend. V; 18 U.S.C. § 3731." App.14. The Second Circuit further indicated that whether the United States had a right of appeal was "was relevant to the mandamus inquiry." App.14-15. As Judge Parker properly pointed out, the majority's analysis "contains no analytic limitation on the types of pretrial rulings on arguments or trial management issues that can or cannot be the subject of mandamus…." App.52.

Consequently, there is no question that, while the Second Circuit did not use precise language to relieve the United States of its burden to establish a right to mandamus under 18 U.S.C. § 3731 as the First Circuit required in *Kane*, it did expressly relieve the United States of that burden through its three-pronged mandamus analysis. Thus, the question is properly preserved for the Court's review because the Second Circuit passed on it. *Williams*, 504 U.S. at 41.

IV. The United States Had No Clear And Indisputable To The Writ Of Mandamus In The Instant Case.

The United States dismisses Mr. Manzano's argument that the Second Circuit failed to apply the proper mandamus standard of "clear and indisputable" as the "petitioner's qualms with the language of the court of appeals' opinion." *See* Resp. Br., p. 21-22. Mr. Manzano has fully articulated his position on the Second Circuit's error

in his petition as well as the circuit split concerning the "clear and indisputable" element of this Court's mandamus standard. *See* Pet., pp. 13-20.

Conspicuously absent from the United States' opposition to Mr. Manzano's petition, however, is any attempt to rebut Mr. Manzano's argument that the Sixth Amendment's original meaning clearly indicates that he has the constitutional right to argue for the jury to judge whether his prosecution is an act of heavy-handed, prosecutorial overreaching or not – jury nullification, in other words. The lack of any rebuttal, let alone meaningful rebuttal, is totally unsurprising. There is no possible rebuttal to the overwhelming evidence that supports a Sixth Amendment right to argue for jury nullification.

What does the United States have to hide in constantly avoiding the question of why it charged Mr. Manzano the way that it did? Any offense that mandates a minimum of a fifteen-year loss of liberty surely carries factual predicates that would easily justify the penalty. Congress established such serious penalties for the commercial sexual exploitation of minors in explicit films that travel in interstate commerce. *See* 18 U.S.C. § 2251(a) & 2251(e). The United States, however, is not confident that its charges against Mr. Manzano that is serious enough to justify the penalty, refusing to explain its charging decision at every stage of this case.

The Court has repeatedly recognized that criminal juries – guaranteed by the Sixth Amendment – exist for precisely the type of case at issue here: Juries stand as the last check against "a spirit of oppression and tyranny on the part of rulers" and as a "great bulwark of [our] civil and political liberties." *United States v. Booker*, 543

U.S. 220, 239 (2005) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)). When the United States abuses the criminal process or seeks an unusually harsh punishment for particular conduct, the Sixth Amendment jury's responsibility in our constitutional republic is to push back in "the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses."[4] *Jones v. United States*, 526 U.S. 226, 245 (1999).

The United States, the Second Circuit, the district court, and even Mr. Manzano have referred to this constitutional responsibility as jury nullification – a term that conjures up visions of juries rendering laws legal nullities. Nothing could be further from the truth. Juries that fulfill their Sixth Amendment responsibility do not judge the propriety of a law. They judge how the United States chooses to apply it. In other words, the United States must defend its decisions to a jury of the people it governs just as Mr. Manzano must defend his to a jury of his peers.[5]

Furthermore, as Mr. Manzano previously indicated in his petition, the right to argue for a jury to judge how the government chooses to apply the law was so treasured a right that Congress took the drastic step of initiating the only

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[4] Mr. Manzano respectfully refers the Court to pages 26 through 31 of his petition where he describes historical American and English instances of jury nullification for illustrations of juries exercising their responsibility properly.

[5] The fact that Article III of the federal constitution contains a jury clause further lends support to the principle that juries serve as a check on the power of the executive branch. *See* Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 Yale L.J. 1131, 1192-1194 (1991). The only way that juries can serve as a check upon the power of the federal executive branch is by judging the executive branch's prosecutorial decisions as the Court described in *Booker*, *Apprendi*, and *Jones*. The Court did not consider this principle in *Sparf v. United States*, 156 U.S. 51 (1895).

impeachment that has ever been initiated against a member of the Court. *See Case of Fries*, 9 F. Cas. 924 (1800). That justice, Samuel Chase, successfully defended himself against the impeachment allegations by acknowledging that a defendant had the constitutional right to argue to a jury that it should judge the government's application of the law to him and demonstrating that he had applied that right. Impeachment is a serious matter, and Justice Chase's impeachment demonstrates just how fundamentally ingrained a defendant's right to argue the law to the jury is.

This Court's holding in *Sparf v. United States*, 156 U.S. 51 (1895) did relieve federal judges of their obligation to instruct the jury that they could judge the law. It, however, expressly acknowledged that defendants could argue for a jury to judge both fact and law when a constitutional provision authorized it. *Id.* at 102 ("Undoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment as to what the law is and as to what the facts are, it may be the privilege of counsel to read and discuss adjudged cases before the jury").

The Sixth Amendment gives Mr. Manzano that right, and the district court properly recognized it. The Second Circuit, however, gave Mr. Manzano's Sixth Amendment right no treatment in its opinion, and it devoted no space to grappling with the Sixth Amendment's history, which would have rendered its decision logically unsustainable. Once the Sixth Amendment's history and original meaning is considered, there is no clear and indisputable right to the writ of mandamus that the United States sought, and the Second Circuit erred by not considering it. In other

words, a "firm conviction that the district court's view of the law was incorrect" is not clear and indisputable. Nor does the Second Circuit's or the United States' complete disregard for overwhelming historical evidence pointing to a defendant's right to argue the law to a jury approach the threshold of rendering a decision clear and indisputable.

This Court should grant this petition to engage with the history and the original meaning of the Sixth Amendment and resolve the question that it left open in *Sparf* – namely, does the Sixth Amendment give a defendant a right to argue for the jury to judge the law even if the jury does not have the right to?

CONCLUSION

For the foregoing reasons and those contained in Mr. Manzano's petition for a writ of certiorari, this Court should grant the petition for certiorari.

Respectfully submitted

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