

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ATIF BABAR MALIK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

DO COURTS LACK SUBJECT MATTER JURISDICTION WHEN ALLEGED CONDUCT FALLS OUTSIDE THE SCOPE OF THE CHARGED STATUTE?

LIST OF PARTIES

All parties are listed in the caption of this case.

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Petitioner, Atif Babar Malik, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Atif Babar Malik*, No. 18-4688, Dkt. #45.

OPINION BELOW

The order of the United States Court of Appeals for the Fourth Circuit is found at *United States v. Malik*, 18-4688, Dkt. #45. The opinion is reproduced in the Appendix. App. at A1.

JURISDICTION

Jurisdiction in the United States Court of Appeals for the Fourth Circuit was based on 28 U.S.C. §1291. The Fourth Circuit issued an order in Dr. Malik's case on May 15, 2019. This Court has jurisdiction to review the Fourth's Circuit's decision pursuant to 28 U.S.C. §1254(1). *See also* S. Ct. R. 10(c).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Article III, Section 2 the United States Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

18 U.S.C. §3231 provides: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

STATEMENT OF THE CASE

I. Procedural History

On June 28, 2016, Dr. Atif Babar Malik was charged in a multiple-count superseding indictment along with several alleged co-conspirators with, among other things, one count of conspiracy to violate the Anti-Kickback Act and the Travel Act, in violation of §18 U.S.C. 371, and four counts of violating the Travel Act, in violation of 18 U.S.C. §1952(a)(1) & (a)(3). The superseding indictment specified that the conspiracy to violate the Travel Act, as well as the substantive Travel Act counts, were committed in violation of the New Jersey State Commercial Bribery Statute, N.J. Stat. Ann. § 2C:21-10.

On September 8, 2017, Dr. Malik filed a motion to dismiss the conspiracy count, in part, and all four Travel Act counts, and to strike any related allegations from the indictment. Dr. Malik argued that the alleged conduct underlying the Travel Act charges did not violate New Jersey's commercial bribery statute and that those charges must therefore be dismissed. On October 6, 2017, the court issued a memorandum opinion in which it denied the motion.

Dr. Malik appeared for a trial by jury beginning on October 11, 2017. On October 27, 2017, the jury returned a guilty verdict on all counts that had been presented to the jury, including Count 1, the conspiracy count, and three Travel Act

counts, Counts 14, 16, and 17 of the superseding indictment.

On June 25, 2018, Dr. Malik entered into an agreement with the government in which he agreed to enter a guilty plea to a charge of Conspiracy to Defraud the United States that had been severed from the remaining counts prior to trial. App. at A2. The plea agreement contains a statement of facts and a jointly proposed guideline calculation encompassing conduct underlying the Conspiracy to Defraud count, as well as conduct proven through evidence introduced at trial in support of the guilty verdicts returned by the jury. The agreement contains a waiver of Dr. Malik's rights to appeal all counts of conviction, including those sustained at trial.

On June 25, 2018, Dr. Malik was sentenced to 96 months in prison, a 3-year period of supervised release, and restitution over \$1.3 million. On September 23, 2018, Dr. Malik filed a timely notice of appeal. The only issue Dr. Malik intended to raise in his appeal was whether his alleged course of conduct in violation of New Jersey's commercial bribery statute fell outside the reach of that statute. If this was the case, he intended to argue, the bribery statute could never have been the basis of the alleged Travel Act violations and the District Court lacked jurisdiction to convict and sentence him for that offense.

On April 26, 2019, the United States filed a motion to dismiss Dr. Malik's appeal, arguing that the waiver contained in Dr. Malik's plea agreement encompassed the

argument he intended to raise on appeal. App. at A3. On May, 1, 2019, Dr. Malik filed his opening brief, containing only the above-described argument. App. at A4. On May 16, 2019, Dr. Malik replied to the government’s motion to dismiss. App. at A5. The government filed a reply on May 23, 2019. App. at A6. On June 20, 2019, the Court of Appeals issued a two-page order dismissing Dr. Malik’s appeal. App. at A1.

II. Factual Statement

A. Dr. Malik’s Argument in Support of His Direct Appeal

Dr. Malik was convicted of multiple offenses arising from a scheme in which he and other men affiliated with a medical practice in Maryland received money from a laboratory in New Jersey in exchange for sending their Maryland patients’ urine to that laboratory for testing. In his opening brief, Dr. Malik presented only the narrow issue of whether the district court erred in maintaining jurisdiction over the offenses charged under 18 U.S.C. §1952, the Travel Act. App. at A4. The Travel Act prohibits travel in interstate commerce or the use of the mail or another facility in interstate commerce with the intent to distribute the proceeds of, further, or carry on any unlawful activity. The unlawful activity—a violation of a state extortion, bribery, or arson statute—is an element of the Travel Act offense and where it is legally impossible for the alleged activity to violate the underlying state law, a Travel Act charge cannot stand.

The underlying state law charged in Dr. Malik’s indictment is New Jersey’s

commercial bribery statute, which prohibits the solicitation or acceptance of any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity; in this case, Dr. Malik’s duty as a physician. However, it is legally impossible for Dr. Malik to have violated this law because the only practice of medicine alleged by the government in this case took place in the state of Maryland. The New Jersey commercial bribery statute does not prohibit physicians licensed in New Jersey from accepting a benefit in exchange for consideration given while practicing medicine in another state. The district court recognized this, describing the duty of fidelity under New Jersey law as “not fully defined,” and failing to cite a single authority in support of its decision to reject Dr. Malik’s motion to dismiss the indictment.

In his opening brief, Dr. Malik argued that the district court’s decision to interpret the undefined duty of fidelity in New Jersey’s law in a manner that is adverse to Dr. Malik violates the rule of lenity. The court’s decision made Dr. Malik responsible for a violation of a statute with uncertain terms and allowed the district court to define a New Jersey legal standard that neither New Jersey’s courts nor its legislature have defined themselves.

That Dr. Malik, his co-conspirators, and the kickback scheme itself had significant ties to New Jersey cannot create liability under the New Jersey commercial bribery statute. While connections with another state are required for the interstate

commerce nexus element of a Travel Act offense, the violation of an underlying state law is an element that must be separately alleged and proven. As other cases analyzing the Travel Act reveal, even the most ethically or morally repugnant conduct may not sustain a Travel Act charge if that conduct does not violate the predicate state law. While there were many bases for criminal liability for Dr. Malik’s conduct, the Travel Act is not one of them. As a result, Dr. Malik argued, the district court erred in denying his motion to dismiss the indictment. The district court never had jurisdiction over the Travel Act charges and therefore Dr. Malik asked the Court of Appeals to vacate his Malik’s Travel Act convictions and remand the case for resentencing.

B. The Government’s Motion to Dismiss Dr. Malik’s Appeal

The government argued in its motion to dismiss Dr. Malik’s appeal that Dr. Malik knowingly and voluntarily agreed to the appellate waiver contained in his plea agreement, and that Dr. Malik’s challenge to his Travel Act convictions fell within the scope of that waiver. App. at A3. The government argued further that none of the exceptions that Courts have identified as providing a justification for withholding enforcement of an otherwise valid appellate waiver are present here, and that Dr. Malik’s jurisdictional argument is “wholly lacking in merit.” Id. at 12. More specifically, the government argued that an indictment’s failure to state an offense does not deprive

the district court of subject matter jurisdiction, relying for that proposition on *United States v. Cotton*, 535 U.S. 625 (2002).

C. Dr. Malik’s Response to the Government’s Motion to Dismiss

In his response, Dr. Malik argued that his case did not involve a failure to state an offense through an omission, which was the basis of the Supreme Court’s holding in *United States v. Cotton*, 535 U.S. 625, 631 (2002) (“Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test.”). App. at A5. Instead, Dr. Malik explained, the District Court lacked jurisdiction over his case because the Government affirmatively alleged a specific course of conduct that is outside the reach of the Travel Act statute that he was alleged to have violated. App. at A5. Dr. Malik cited several opinions from courts outside the Fourth Circuit Court of Appeals, post-*Cotton*, in which those courts held that similar challenges were jurisdictional in nature. *Id.*

III. The Appellate Opinion

On June 20, 2019, the Court of Appeals issued a two-page order dismissing Dr. Malik’s appeal. App. at A1. The order stated only that, “Upon review of the record, Malik’s appellate brief, and the submissions relative to the Government’s motion to dismiss the appeal, we conclude that Malik knowingly and voluntarily waived his right to appeal and that the challenge he seeks to raise on appeal falls squarely within the

compass of the valid and enforceable appeal waiver. Accordingly, we grant the Government’s motion to dismiss the appeal.” *Id.* The Court of Appeals did not address any of the conflicting out-of-circuit case law cited by Dr. Malik in his opening brief.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari To Resolve An Important Question Left Open In *United States v. Cotton*: Does A Court Lack Jurisdiction Where Alleged Conduct Falls Outside The Scope Of The Charged Statute?

In *United States v. Cotton*, 535 U.S. at 627, this Court considered whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies vacatur of the enhanced sentence, even though the defendant did not object to its imposition. In holding that it did not, this Court overruled the Court of Appeal’s conclusion that the omission was a jurisdictional defect requiring vacatur regardless of whether the issue had been adequately preserved below. *Id.* at 628-631.

This Court confirmed that subject-matter jurisdiction, “because it involves a court’s power to hear a case,” can never be forfeited or waived. *Id.* at 630. This Court went on to explain that it had long-ago departed from the view originally established in *Ex Parte Bain*, 121 U.S. 1 (1887), that indictment defects deprive a court of jurisdiction. *Id.* at 630-631. In applying the presumption that indictment defects do not deprive a court of jurisdiction, however, this Court addressed only indictment omissions, and

specifically analyzed the omission of the drug quantity from the indictment in that case.

Id.

This holding, and its analysis, does not resolve the issue raised by Dr. Malik in his opposition to the Fourth Circuit's dismissal of his appeal. Dr. Malik's argued below that if he succeeds in arguing that the practice of medicine in the state of Maryland cannot violate the fiduciary duty of a physician under New Jersey's commercial bribery statute, then his conduct, as alleged, will fall outside the sweep of the Travel Act; it can never, no matter how it is alleged in the indictment, constitute an offense in violation of the laws of the United States. This is not a failure to state an offense through an omission as there is nothing that could be changed about Dr. Malik's indictment to make his conduct a crime. This is a situation not addressed by this Court in *Cotton*, and thus this Court should address it here by granting Dr. Malik's petition.

II. This Court Should Grant Certiorari Because There Is A Circuit Split On The Breadth Of This Court's Holding In *Cotton* And On Whether It Applies Where The Facts Alleged Describe Conduct That Is Not Proscribed By The Charging Statute.

Lower court decisions applying *Cotton* fall into three camps. Most of the Circuits that have applied *Cotton*'s holding have done so where the indictment defect was an omission of a required element or factual allegations. See *United States v. Rubin*, 743 F.3d 31 (2nd Cir. 2014) (indictment omitted an allegation that the defendant had actual knowledge and control of bets and wagers, as is required for a financial

transaction provider to incur liability under the Unlawful Internet Gambling Enforcement Act of 2006); *United States v. George*, 676 F.3d 249 (1st Cir. 2012) (indictment failed to include an allegation that the defendant accepted bribes or kickbacks in an honest-services fraud prosecution); *United States v. Scruggs*, 714 F.3d 258 (5th Cir. 2103) (indictment failed to allege the making or taking of a bribe as required by the honest services fraud statute).

The Tenth Circuit decision in *United States v. De Vaughan* is the only case relied on by the government below that expressly broadens *Cotton*'s holding beyond indictment omissions, rejecting contrary law from the Eleventh Circuit as “overly narrow.” 694 F. 3d 1141, 1148 (10th Cir. 2012), citing, *United States v. Peter*, 310 F. 3d 709 (10th Cir. 2012). However, it is *De Vaughan* that overstates the breadth of *Cotton*'s holding, and it is the reasoning in *Peter* that this Court should apply to Dr. Malik's appeal.

In *Peter*, the Eleventh Circuit recognized that *Cotton* rejected the view that “all indictment defects are ‘jurisdictional.’” *Peter*, 310 F.3d at 713, citing, *Cotton*, 535 U.S. 625, 122 S.Ct at 1785. However, its analysis of *Cotton* did not lead it to the extreme view urged by the government that *no* indictment defects are jurisdictional. *Peter* began by recognizing that *Cotton* framed the question presented as whether “the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a

court of appeals' vacating the enhanced sentence." *Peter*, 310 F.3d at 713, *citing*, *Cotton*, 535 U.S. 625, 122 S.Ct at 1783. The court then delved into the facts of *Cotton*, noting that the indictment in *Cotton* "unquestionably described the offense of conspiring to distribute and to possess with intent to distribute cocaine;" it merely omitted information about threshold drug quantities that were relevant to sentencing. *Peter*, 310 F.3d at 714. Most important, *Peter* concluded that "the Supreme Court did not address whether the insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges . . . describe conduct that is not proscribed by the charging statute."

Id.

The Eleventh Circuit has reiterated the critical distinction between indictment omissions and indictments charging non-criminal conduct in the years since its decision in *Peter*. *See United States v. Brown*, 752 F. 3d 1344, 1347 (11th Cir. 2014) (A jurisdictional defect exists when the indictment affirmatively alleges conduct that does not constitute a crime at all because that conduct falls outside of the sweep of the charging statute); *United States v. Vargas*, 563 Fed. Appx. 684, 686 (11th Cir. 2014) (Indictments that affirmatively allege conduct that does not represent a federal offense contain jurisdictional defects because Congress's grant of jurisdiction to the district courts in criminal cases extends only to offenses against the laws of the United States). These cases offer a compelling alternative to the Tenth Circuit's overly broad reading of *Cotton*.

Where conduct is alleged that can never, no matter how it is pled or proven, violate the case or controversy over which the district court is presiding, then the district court cannot retain jurisdiction over the adjudication of that case or controversy. This Court should grant Dr. Malik's petition so that it can resolve this circuit split.

CONCLUSION

Dr. Malik's petition raises an important issue that was left unresolved by a previous decision of this Court and on which the lower courts are divided. Dr. Malik respectfully asks this Court to grant his petition so that this important issue may be resolved.

Respectfully submitted,

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APPENDIX