No. 19-6087

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ATIF BABAR MALIK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

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ARGUMENT

I. This Court should grant certiorari because *United States v. Cotton* and almost all of the cases that have followed involve indictment omissions; this Court has never addressed a situation in which an indictment alleges conduct that falls outside the scope of the charged statute.

A careful review of the cases relied on by the government in its response reveals only one opinion not previously identified by Dr. Malik in which a court of appeals applied *United States v. Cotton,* 535 U.S. 625 (2002), to a case in which the facts alleged

in the indictment fell outside the scope of the charged statute. *See* Gov. Resp. at 10, citing, *United States v. Delgado-Garcia*, 374 F. 3d 1337, 1341-1342 (D.C. Cir. 2004) (defendants argued that the district court lacked subject matter jurisdiction because the conduct alleged in the indictment took place outside the United States and the statute does not apply to extra-territorial acts).

The only other opinion relied on by the government in furtherance of its claim that lower courts apply a broad reading of *Cotton* is *VanWinkle v. United States*, 645 F.3d 365, 368-369 (6th Cir. 2011). In that case, the Sixth Circuit relied on the fact that the indictment alleged both the use of a UPC code (which is not an access device) and the use of merchandise credit cards (which are), to conclude that there was no indictment defect, but only a sufficiency of the evidence question, for which the defendant had procedurally defaulted. *Id.*

Dr. Malik's petition to this Court cited the other cases relied on by the government and each of these cases involved indictment omissions. *See United States v. George*, 676 F.3d 249, 259-260 (1st Cir. 2012) (indictment omitted an allegation that the defendant accepted bribes or kickbacks in an honest services fraud case); *United States v. Rubin*, 743 F.3d 31, 36-38 (2d Cir. 2014) (indictment omitted an allegation that the defendant had actual knowledge and control over bets and wagers in an unlawful internet gambling case); *United States v. Scruggs*, 714 F.3d 258, 262-264 (5th Cir. 2013) (indictment omitted an allegation that the defendant made or accepted a bribe in an honest services fraud case).

Thus, contrary to the government's claim, the circuit split is not narrow. Two circuits have applied *Cotton* to cases like Dr. Malik's, in which the facts alleged are outside the scope of the charged statute, one circuit has expressly rejected that approach, and the rest have applied *Cotton* only in cases involving indictment omissions. This level of disagreement warrants this Court's review.

That the majority of courts apply *Cotton* only where the defendant raises an indictment omission makes sense in light of the fact that the question this Court presented in *Cotton* was a narrow one: whether "the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeal' vacating the enhanced sentence." *Cotton*, 535 U.S. at 627. Moreover, while this Court overruled *Ex parte Bain*'s holding that indictment defects are jurisdictional, it qualified this holding by stating that we are now, "[f]reed from the view that indictment omissions deprive a court of jurisdiction." *Id.* at 631, citing, *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887).

Limiting Cotton's ruling to indictment omissions also makes sense because issues like those raised by Dr. Malik's—where the facts alleged in an indictment can never support a finding of guilt—are unusual. In the rare case in which this does happen, a defendant's decision to plead guilty and waive all rights to appeal, or even a jury's verdict, cannot alone create a jurisdictional basis that was never present in the first place.

The *VanWinkle* case, relied on by the government, is illustrative. *VanWinkle*, 645 F.3d 365. In *VanWinkle*, the defendant was charged with committing access

device fraud based, in part, on his use of a UPC code. *Id.* If the indictment in *VanWinkle* made it clear that the only factual basis alleged by the government to support the charge was the use of a UPC code, and no other devices were alleged to have been used, no court should have been permitted to hear the case and the defendant should not have been subject to prosecution because a UPC code is not an access device under the relevant statute. *VanWinkle*, 645 F.3d at 368-369.

This is a jurisdictional question that a defendant should be able to raise at any time, even if he erroneously pleads guilty and waives his rights to challenge his conviction. A court's jurisdiction to adjudicate an offense cannot be dependent on a defendant's consent; it must come from a charging document that provides some basis to believe that the alleged crime has actually been committed.

II. The resolution of the question presented will affect the outcome of this case.

The government argues that "[e]ven under the narrow reading of *Cotton* advocated by petitioner and articulated in *Peter* and *Brown*. Petitioner does not appear to raise a 'jurisdictional' challenge to the indictment," because *Peter*'s holding only applies where the alleged conduct "undoubtedly" falls outside the scope of the charged statute. Gov. Resp. at 14, citing *United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2012); *United States v. Brown*, 752 F.3d 1344, 1353 (11th Cir. 2014). The government then goes on to engage in the same mistaken analysis that it did in the Court of Appeals, citing to all of the connections made in the indictment between Dr. Malik, the other participants in

his fraudulent activities, and the state of New Jersey. Gov. Resp. at 15. Then, the government erroneously summarizes Dr. Malik's position as being that the New Jersey statute only proscribes bribes solicited or accepted while in the States of New Jersey. Id.

This is not what Dr. Malik argued in the Court of Appeals. Dr. Malik argued that the New Jersey commercial bribery statute does not prohibit New Jersey physicians from accepting a benefit in exchange for consideration given while practicing medicine in another state, regardless of where the bribes are offered or accepted. Pet. at 6. Thus, the alleged conduct—that Dr. Malik practiced medicine at his pain management clinic in Frederick, Maryland in exchange for bribes —undoubtedly falls outside the scope of the Travel Act charge of the indictment.

CONCLUSION

For the foregoing reasons, this Court should grant Dr. Malik's petition for a writ of certiorari.

Respectfully submitted,

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