No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

JOHN GREGORY ALEXANDER HERRIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: July 25, 2019

QUESTION PRESENTED

WHETHER THE NINTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO ASSUME INTERLOCUTORY APPELLATE JURISDICTION OVER PETITIONER'S FIFTH AMENDMENT GRAND JURY INDICTMENT CLAUSE AND STATUTE OF LIMITATIONS CLAIMS UNDER THE COLLATERAL ORDER DOCTRINE.

OR STATED DIFFERENTLY:

WHETHER PETITIONER HAS "A RIGHT NOT TO BE TRIED" IN THE PERTINENT SENSE OF *MIDLAND ASPHALT CORP. v. UNITED STATES*, 489 U.S. 794, 802 (1989) WORTHY OF PRETRIAL PROTECTION WHERE THE GOVERNMENT OPENLY INTENDS TO ESTABLISH PETITIONER'S GUILT AT TRIAL ON FEDERAL OFFENSES IT DID INDICT BY PROVING A FEDERAL OFFENSE IT FAILED TO INDICT AND ON WHICH THE STATUTE OF LIMITATIONS HAS RUN.

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Petitioner, John Gregory Alexander Herrin, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case that dismissed his interlocutory appeal to that court for lack of jurisdiction.

OPINIONS/ORDERS BELOW

The Ninth Circuit's January 14, 2019 Order to Show Cause directing petitioner to dismiss his appeal or justify interlocutory appeal jurisdiction under the collateral order doctrine is in the Appendix at pages 1-2.

The Ninth Circuit's June 5, 2019 order denying petitioner's request that the jurisdictional claim raised in this petition be heard initially *en banc* by that court is unpublished and set forth in the Appendix to this petition. (Appendix at page 3).

The Ninth Circuit's June 26, 2019 decision terminating and dismissing petitioner's appeal in that court is likewise unpublished and set forth in the Appendix to this petition. (Appendix at page 4).

The pertinent rulings of the district court on the claims raised in this petition are both written and oral but each is unpublished. The district court's summary written order dated January 10, 2019 denying petitioner any pretrial relief is in the Appendix at pages 5-6.

Insofar as the pertinent oral rulings of the district court are concerned, which are incorporated by reference in the last cited January 10, 2019 district court written order, a complete transcript of the pretrial hearing where those oral rulings were delivered is in the Appendix at pages 7-130.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's order dismissing petitioner's call for initial *en banc* review of the jurisdictional question presented by this Petition was filed on June 5, 2019 (Appendix at pages 3). The Ninth Circuit's subsequent order dismissing petitioner's interlocutory appeal as non-final under 28 U.S.C. §1291, and under its

reading of *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), was filed on June 26, 2019 (Appendix at page 4).

Counting forward from the date the Ninth Circuit dismissed petitioner's appeal (*i.e.* June 26, 2019) this Court's jurisdiction arises under 28 U.S.C. §1254(1) and is timely because it was placed in the United States mail, first class postage pre-paid, and he filed the same electronically, within 90 days for filing set for the in the rules of this Court (*see* Rule 13, ¶1).

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Grand Jury Indictment Clause and the Due Process Clause set forth in the Fifth Amendment to the United States Constitution which provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . nor be deprived of life, liberty or property without due process of law . . .

FEDERAL STATUTORY PROVISIONS INVOLVED

This petition involves the following statutory provisions:

18 U.S.C. §3282

§ 3282. Offenses not capital
Currentness

(a) **In general.**--Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

. . . .

18 U.S.C. §2113(b)

§ 2113. Bank robbery and incidental crimes

. . . .

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

. . . .

18 U.S.C. §2314

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting
Currentness

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

. . . .

18 U.S.C. §1957(a)

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity
Currentness

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

. . . .

STATEMENT OF THE CASE

(A) District Court Proceedings

On October 26, 2016 the grand jury for the District of Montana handed up a fourteen count federal Indictment charging petitioner with one count of interstate transportation of stolen money, twelve counts of money laundering and one count for attempted witness tampering. (Appendix at pages 131-139). Factually the Indictment centers on the apparent theft of $390,000.00 of armored truck bank money that was in transit between Helena and Kalispell, Montana, carried by an armored security transport company called GardaWorld on November 20, 2013. After departing Helena the GardaWorld truck stopped first at Missoula, Montana, thereafter proceeding to the Polson/Kalispell area. On arrival up in Polson/Kalispell the driver of the armored truck (Mr.McAlpin) unlocked a locker inside the armored truck to retrieve sacks of money totaling some $390,000.00 that

he had supposedly put in that locker when the truck was loaded in Helena that morning. There was no money in the locker.

Loss of the $390,000.00 was reported immediately to GardaWorld supervisory personnel. At first Mr. McAlpin, and his now deceased truck messenger/helper Mr. Olson, guessed that the money bags might have been transferred by mistake to another GardaWorld truck during a routine two truck rendezvous in Missoula, Montana earlier in the day. Unfortunately the driver of the Missoula GardaWorld truck (Mr. Ailer), and his truck messenger/helper Mr. Molahon, reported back that the missing money bags had not been transferred by mistake during the earlier Missoula exchange.

The $390,000.00 was never recovered.

GardaWorld conducted an internal investigation and the matter was also referred to the local Missoula police for investigation. Missoula Detective Stacy Lear conducted the local investigation and initially concluded that the theft had likely been committed by the driver of the Missoula truck (Mr. Ailer) as a crime of opportunity:

. . . .

> 2. CHRIS MOLZHON, the messenger for the Missoula truck, accepted delivery from the Shuttle Truck of twelve (12) individually sealed bags containing cash intended to be delivered and loaded into ATMs in the Missoula area (the "Missoula Bags"), and also mistakenly accepted delivery from the Shuttle Truck of three (3)

individually sealed bags containing cash intended to be delivered to financial institutions in Kalispell (the "Kalispell Bags").

3. The total amount of cash in the Kalispell Bags was three hundred ninety thousand dollars ($390,000.00) in various denominations. That amount of cash as packaged would fit in a regular sized backpack or small cooler.

4. MOLZHON later told internal investigators from Garda it was his first day as a messenger on that bank route and he mistakenly accepted the Kalispell Bags because he did not recognize that the bag numbers being yelled aloud to him by the Shuttle Truck employee were not for Missoula ATMs.

5. ARNOLD EVERETT AILER, JR. was sitting in the driver's seat of the Missoula Truck when MOLZHON accepted the bags and would have been able to hear the bag numbers. AILER is a four-year Garda employee experienced with the route and would have reasonably recognized the Kalispell Bags should not have been accepted by the Missoula Truck and would not be signed for on the cash inventory manifest.

. . . .

17. Detective Lear has investigated numbers cases of theft and knows based on her training and experience that persons involved in spontaneous opportunistic thefts often use cellular telephones to contact associates to assist with criminal activities.

Appendix at Pages 140-145

When Detective Lear attempted to interview Mr. Ailer he referred her to his lawyer and ultimately chose to remain silent. In due course the matter was referred to the Missoula County Attorney for prosecution; but state prosecution against Mr. Ailer was declined. Notably Detective Lear's focus on Mr. Ailer as the suspect for the theft of the $390,000.00 was in part driven by the fact that the month before the

$390,000.00 went missing Mr. Ailer had been the suspect in another, different theft from GardaWorld involving about $30,000.00. Detective Lear was unable to make a case against Mr. Ailer in that matter either. (Appendix at page 42).

After the case against Mr. Ailer had been considered and dropped suspicious banking activity reports involving petitioner (himself a GardaWorld driver) surfaced. Those reports in combination with follow-up investigation suggested that petitioner made a large deposit of $20.00 bills in his Wells Fargo bank account totaling $120,000.00. This generated suspicion, since most of the $390,000.00 was in $20.00 bills. Likewise, petitioner allegedly told the teller accepting petitioner's large deposit that he had been to Las Vegas and won a lot of money gambling; and that although he (petitioner) had no job, he was a stock market day trader. Further FBI investigation indicated that defendant had been in Las Vegas and allegedly had gone there with a large sum of money. (*See e.g.* Appendix at pages 149-154).

Suffice it to say after scrutinizing petitioner's financial records, movements and alleged statements United States investigators focused on petitioner as the thief of the $390,000.00. However the government has no proof that money petitioner had or used, if any, was the same money missing from the armored truck on the November 20, 2013 transport trip, *i.e.* the $390,000. Instead the government intends to rely on circumstantial proof that petitioner was the thief.

For example testimony shows that the Indictment was based on the assumption that petitioner was the thief, despite the absence of any direct evidence that the money petitioner supposedly had was the same money taken from the armored truck. (Sealed Appendix at Bates 001382). Furthermore in its district court briefing the government laid out in detail all the evidence suggesting why petitioner was the thief, including that petitioner had explained to another Garda employee how a broom handle could be used to open an unattended armored truck. (Appendix at pages 146-163 and in particular pages 152-153). Moreover in its briefing the government also rhetorically posed this question and answer:

> Having made the decision not to allege a violation of bank embezzlement, the remaining questions are whether the government can introduce evidence the money was stolen from Garda and that Herrin was the thief. The answer to both questions is yes.
>
> Appendix at page 156

Early in the case counsel for the parties exchanged emails on the topic of whether or not the government was obliged to indict petitioner as the thief under 18 U.S.C. §2113(b) to prove he was the thief. This email traffic was included in the Ninth Circuit record with petitioner's request that it be judicially noticed. (9th Circuit Docket Entry #8-1 at page 3, n. 1). The Ninth Circuit did not rule on our judicial notice request. We now set forth and include that same email traffic here and ask this Court to judicially notice it:

From: Michael Donahoe <Michael_Donahoe@fdorg>

Sent: Wednesday, December 5, 2018 5:12 PM
To: Racicot, Tim (USAMT) <TRacicot2@usa .doj.gov>
Subject: Herrin

Sorry for the email confusion ..... it's been acting up all day.

The theft of the money should have been charged under 18 usc sec 2113(b) see eg. USA v Manfas, 701 F2d 83 (9th cir 1983) and USA v King, 178 F3d 1376(11th cir 1999).

Section 3282 (SOL) says a person can't be prosecuted, tried or punished for an offense not capital unless brought within 5 years

So your theory is he stole the money but you did not indict that crime

Was that oversight or design?

How can you prove a crime that includes the elements of another crime when you did not indict the other crime on time?

Will you produce the grand jury minutes without a motion?

From: Racicot, Tim (USAMT) <Tim.Racicot2@usdoj.gov>
Sent: Thursday, December 06, 2018 12:54 PM
To: Michael Donahoe
Subject: RE: Herrin

First, you say the theft of money "should have" been charged under 2113(b). I'll agree it "could have" been charged, but the conduct also violates state law.

Second, without committing to any particular theory, for the purposes of this discussion it's fair to say that we believe your client was somehow involved in the theft of the money, but we did not present that charge to the grand jury and that decision was by design as opposed to oversight.

> Third, the pattern instruction for interstate transportation of stolen property, 8.189, lays out the elements we need to prove for count I. We have to prove the property was stolen and that your client knew it was stolen when he transported it outside Montana. If the jury believes the money he took to Las Vegas is money from the Garda truck, and he knew it was money from the Garda truck, then they can convict if the other elements are satisfied. There is no requirement to charge the underlying theft. The pattern instruction specifically notes that "the government need not prove who stole the [money]." If we don't have to prove your client took the money off the truck, we can't be required to include that charge in the indictment. See also *USA v. Whaley,* 788 F.2d 581 , 582 (9 th Cir. 1986), which notes that Congress passed this statute "to extend the National Motor Vehicle Theft Act to cover all stolen property over a certain value which is knowingly transported across state or international boundaries." The federal hook for this crime is the interstate transportation, not the nature of the underlying crime. If I teal your car I'm only committing a state crime. But if I drive it to Idaho, I'm violating 18 USC 2314. The same rationale applies here. As far as I can tell, the fact we could have charged the underlying theft from Garda has no bearing on our ability to prove the elements of count I. . . .
>
> Thanks,
>
> (Emphasis added)
> (Appendix at pages 164-165)

On petitioner's motion to exclude any evidence at trial that petitioner was the thief the district court ruled from the bench (orally) at the conclusion of the pretrial hearing, held on January 10, 2019 to address petitioner's motion. (Appendix at 7-130).

Although the district court's oral ruling covers over five pages of transcript three key passages from the district court's ruling warrant special attention:

> (1) The government, on the other hand, contends this evidence has relevancy . . . because it touches upon and deals with both the question of who took the money and whether or not the defendant intended to deprive the true owner of the money with its use and possession on a permanent basis.
>
> (Appendix at page 125)
> (emphasis added).

These are the elements of bank theft from an armored car, which courts have ruled is a federal offense under 18 U.S.C. §2113(b); but for which appellant has not been indicted. *United States v. King*, 178 F.3d 1376, 1377 (11th Cir. 1999) (listing elements that need to be proved to convict on an allegation of theft brought under 18 U.S.C. §2113(b)). *Also see, United States v. Mafnas*, 701 F.2d 83, 85 (9th Cir. 1983) (armored car theft by car driver is theft from bank and covered by 18 U.S.C. §2113(b)).

* * * * * * *

> (2) . . .and it is the court's determination, [that proof appellant was the thief] . . . [t]hat is, the taking of the money that had been stolen. Not specifically that defendant took it . . . . The government simply does not have to prove that the defendant was the thief, although there may be evidence that would tend to support that conclusion, yet to be developed at the time of trial.
>
> (Appendix at pages 127-128)
> (emphasis added).

Here the district court equates what the government need not prove under the indictment *with* a totally separate federal crime the government intends to prove at trial but failed to indict. This is apples to oranges.

* * * * * * *

> (3) Therefore, the motion, as framed, whether characterized as a motion to dismiss or to suppress or as a motion in limine, is denied. The evidence may be presented to the extent that the court finds it otherwise admissible under the Rules of Evidence to be applied. That is the ruling of the court. . . .
>
> (Appendix at page 128)
> (emphasis added).

Items (1)-(3) above, together with the government's briefing and the testimony and argument developed at the pretrial hearing (Appendix at pages 7-130), make it abundantly clear that both the district court and the government intend to prosecute appellant for a federal offense that is neither in the indictment, nor has ever been presented to a grand jury. In fact in its pretrial brief discussed above the government states categorically that ". . . the indictment contains no allegation that [petitioner] did or did not take the cash off the Garda truck." (Appendix at page 158, fn 1 *continued*). And this is despite the fact that this record is replete with government admissions, evidence, and a district court ruling that allows proof petitioner was the thief, a federal crime on which the statute of limitations set forth in 18 U.S.C. §3282 has run because the theft occurred on November 20, 2013 and petitioner has not been indicted for it by government "design." (*See* email above from AUSA Racicot at page 10).

(B) Ninth Circuit Proceedings

On timely appeal to the Ninth Circuit of the district court's ruling intending to allow the government to cast petitioner as the thief during trial the Ninth Circuit issued an order to show cause requiring petitioner to dismiss his appeal or otherwise justify appellant jurisdiction. That order is included in the Appendix at pages 1-2.

The Ninth Circuit both refused to hear the jurisdiction issue initially *en banc* and it dismissed petitioner's appeal for lack of jurisdiction in a summary order containing no analysis, citing this Court's decision *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989). (Appendix at pages 3 and 4).

REASONS FOR GRANTING THE WRIT

Pursuant to 28 U.S.C. §1291 the right to appeal to a federal court of appeals is limited to "final decisions of the district courts." Section 1291 does however sanction a limited class of collateral order doctrine appeals "that do not terminate the litigation, but must . . . nonetheless be treated as 'final.'" *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Absence of a grand jury indictment in violation of the Grand Jury Indictment Clause of the Fifth Amendment "does indeed confer a right not to be tried (in the pertinent sense)" of the collateral order doctrine. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989). This rule is applicable because petitioner has not been indicted as

the thief by government design. Moreover this Court characterizes absence of an indictment as "fatal error" to a decision to admit evidence and/or instruct the jury on a charge the grand jury never made against the accused. *Stirone v. United States*, 361 U.S. 212, 219 (1960). Although it pre-dates this Court's decision in *Midland Asphalt Corp.* the Ninth Circuit's decision in *United States v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 (9th Cir. 1980) prefigured the *Midland Asphalt* rule by holding that a Fifth Amendment Grand Jury Indictment Clause claim meets all three components of the collateral order exception authorizing interlocutory review. Unfortunately in this case the Ninth Circuit refused to follow its own rule.

First, under *Yellow Freight System, Inc.* denial of petitioner's district court motion finally determines petitioner's Fifth Amendment Grand Jury Indictment Clause claim in the trial court, inasmuch as that ruling paves the way for the government to cast petitioner as the thief at trial without having indicted petitioner under 18 U.S.C. §2113(b) for that crime. Second, petitioner's entitlement to be indicted by a Grand Jury before being prosecuted as the thief is collateral to and independent of the issue of petitioner's guilt on the underlying charges in the indictment. And third petitioner's Grand Jury Indictment Clause claim involves a right that would be irretrievably lost if petitioner were forced to stand trial for the theft before appeal. *See* 637 F.2d at 1251. Indeed *Midland Asphalt Corp.* holds

this expressly: "[the Grand Jury Indictment Clause] does indeed confer a right not to be tried (in the pertinent sense) when there is no grand jury indictment." 489 U.S. 794, 802 (1989).

Therefore, inasmuch as petitioner has not been indicted as the thief under 18 U.S.C. §2113(b) he cannot be tried for that offense. *Cf. Stirone, supra*, 361 U.S. at 219: "Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error." Thus the Ninth Circuit's dismissal of petitioner's Grand Jury Indictment Clause claim for lack of jurisdiction in violation of the *Midland Asphalt* rule represents such a departure from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's supervisory power. *See* Supreme Court Rule 10(a).

Furthermore, whatever power a defense counsel may have to waive a defendant's constitutional right to grand jury "a prosecutor has no such power" *Carter v. United States*, 530 U.S. 255, 274 (2000). In *Carter* the defendant was charged with robbery by force under 18 U.S.C. §2113(a). Carter pled not guilty to contest the force element. Before and at trial Carter requested the jury be instructed on the crime of bank theft as a lesser included offense, a violation of 18 U.S.C.

§2113(b), which was not separately indicted by the government. Important to our purpose here this Court made two separate but related rulings.

One, that bank theft under 18 U.S.C. §2113(b) is not a lesser included offense of 18 U.S.C. §2113(a). And, two, that it would defy constitutional logic to allow the defense to waive unilaterally the valuation element of "exceeding $1,000" in 18 U.S.C. §2113(b) in order to secure a lesser included instruction for a separate crime that had not been indicted, where the prosecutor had no such reciprocal right:

> Since subsection (a) contains no valuation requirement, a defendant indicted for violating that subsection who requests an instruction under subsection (b)'s first paragraph would effectively "waive. . . his [Fifth Amendment] right to notice by indictment of the 'value exceeding $ 1,000' element. But this same course would not be available to the prosecutor who seeks the insurance policy of a lesser included offense instruction under that same paragraph after determining that his case may have fallen sort of proving the elements of subsection (a). *For, whatever authority defense counsel may possess to waive a defendant's constitutional rights,. . . a prosecutor has no such power.*
>
> *See Carter, supra*, 530 U.S. at 274 (citations omitted) (emphasis added).

Granted, a different context but the same principle should apply here as did in *Carter*. The prosecutor has no right to waive a defendant's constitutional right to grand jury indictment. But that is exactly what is occurring here. The government has taken the rule which says it need not prove who stole the money, in order to prove an interstate transportation of stolen money under 18 U.S.C. §2314, in order

to dispense with its obligation to indict petitioner for bank theft under 18 U.S.C. §2113(b), which it fully intends to prosecute at trial.

Also as an independent matter the Ninth Circuit erred in not accepting petitioner's statute of limitations claim under the collateral jurisdiction doctrine. On this point relevant Ninth Circuit's decisions are in conflict with each other and with decisions of this Court, providing another basis for granting the writ in this case.

First is the Ninth Circuit's decision in *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1111 (9th Cir. 2002). There, the Ninth Circuit analyzes this Court's this Court's decisions in *Midland Asphalt* and *Digital Equipment Corp.*, *supra*, *see* 283 F.3d at 1110. Then the Ninth Circuit exercises collateral order jurisdiction based on an artificial distinction between statutes of limitations and statutes of repose. 283 F.3d at 1111. The problem with this distinction however (as recognized in Judge Paez's *Bell Helicopter Textron* dissent) is that there is "no relevant distinction between the text of [the statute of issue *Bell Helicopter Textron*] . . . and the text [of 18 U.S.C. §3282]." 283 F.3d at 1115, n. 3. Also another reason the statute of limitations issue should go forward in this Court is because the Third Circuit rejects the majority analysis in *Bell Helicopter Textron* and instead adopts Judge Paez's dissenting opinion in that case. *See Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 172-173 (3rd Cir. 2006).

Thereby creating a conflict between two federal circuit courts of appeals on the same important matter. *See* Rules of the Supreme Court, Rule 10(a).

As for appellant's raising the statute of limitations vis-à-vis the federal offense of bank theft it is the government's burden to prove either that the relevant limitation period has been honored or the applicability of some pertinent exception. *United States v. DeLia*, 906 F.3d 1212, 1217 (10th Cir. 2018). Also even though appellant invokes this Court's jurisdiction under *Yellow Freight Sys.*, and *Midland Asphalt, supra*, on his grand jury clause claim, this Court's jurisdiction can and should also rest on the rule set forth in *Estate of Kennedy v. Bell Helicopter Textron*, 283 F.3d 1107, 1110 (9th Cir. 2002) (right not to be tried under statute of repose satisfies collateral order doctrine).

We recognize that *Bell Helicopter Textron* distinguishes criminal statute of limitations defenses as not being worthy of interlocutory review. *See* 283 F.3d at 1111, *citing and discussing United States v. Rossman*, 940 F.2d 535, 536 (9th Cir. 1991). But, again, as Judge Paez correctly notes in his dissent in *Bell Helicopter Textron*, in reality the criminal statute of limitations set forth in 18 U.S.C. §3282 is a statute of repose. *See* 283 F.3d at 1115, n.3, Judge Paez *dissenting*. And in fact this Court agrees with Judge Paez. *See Bridges v. United States*, 346 U.S. 209, 215 (1953) (criminal statute of limitations founded on policy of repose); *also see United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) ("The Court has indicated

that criminal statutes of limitation are to be liberally interpreted in favor of repose."). Hence there can be no principled distinction between *Bell Helicopter Textron, Inc.* and this case for interlocutory appeal jurisdiction purposes.

In addition, there is this Court's decision in *Stogner v. California*, 539 U.S. 607 (2003) to consider. In that case California enacted a new statute of limitations authorizing prosecution for sexual child abuse where the statute of limitations had expired, if such prosecution was begun within one year of the victim's report to the police. The Court ruled application of the statute unconstitutional under the ex post facto clause finding that such extension of the limitations period threatened the vary harm the ex post facto clause seeks to avoid by allowing "manifestly *unjust and oppressive*" retroactive effects. *Stogner*, 539 U.S. at 611 (emphasis in original), *citing Calder v. Bull*, (cite omitted). And relevant to our purposes here, this Court's explication in *Stogner* concerning the import of a statute of limitations in a criminal case is pertinent to our discussion here:

> Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. *See United States v. Marion*, 404 U.S. 307, 322, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971). And that judgment typically rests, in large part, upon evidentiary concerns--for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. *United States v. Kubrick*, 444 U.S. 111, 117, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979); 4 W. LaFave, J. Israel, & N. King, Criminal Procedure § 18.5(a), p 718 (1999); Wharton, Criminal Pleading and Practice § 316, at 210. Indeed, this Court once described statutes of limitations as creating "a presumption which renders proof

unnecessary." *Wood v. Carpenter*, 101 U.S. 135, 139, 25 L. Ed. 807 (1879).

Stogner, supra, 539 U.S. at 615-616.

If the fault line between a statute of limitations and a statute of repose is what the limitations period is designed to protect against (*Cf. Rossman*, with *Bell Helicopter Textron*) Judge Paez's reasoning referenced above is correct. There is simply "no relevant distinction" between the text of 18 U.S.C. §3282 and the constitutional right providing for Grand Jury indictment. One works hand-in-glove with the other and in any case this Court long ago characterized the federal statute governing limitations in a criminal case (§3282) as one of repose. *Toussie v. United States*, 397 U.S. 112, 115 (1970) (criminal statute of limitations"to be liberally interpreted in favor of **repose**" (emphasis added). Thus under *Bell Helicopter Textron, Yellow Freight Sys., Inc.,* or *Midland Asphalt,* or all three, the Ninth Circuit has jurisdiction over appellant's interlocutory appeal.

CONCLUSION

Wherefore, the Court should grant this petition and set the case down for full briefing and argument. Or simply grant the petition, vacate and remand so the Ninth Circuit can consider the merits.

Respectfully submitted this 25th day of July, 2019.

MICHAEL DONAHOE
Deputy Federal Defender
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