No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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JOHN PATRICK VESCUSO,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When assessing if a defendant was prejudiced by a district court's imposing a sentence greater than the maximum authorized by the charge in the indictment, may a reviewing court base its decision on the weight of trial evidence with respect to an uncharged aggravating sentencing factor (as six circuits have held), or does the imposition of a sentence greater than that authorized by the charge in the indictment require reversal without regard to the trial evidence (as five circuits have held)?

STATEMENT OF RELATED CASES

United States v. John Patrick Vescuso, No. 3:14-cr-2863-W-2, United States District Court for the Southern District of California. District court proceeding in which the sentence that is the subject of this petition was imposed. Judgment was entered on November 21, 2016.

United States v. John Patrick Vescuso, No. 16-50441, United States Court of Appeals for the Ninth Circuit. Direct appeal deciding issue raised in this petition. Judgment was entered on August 2, 2019.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

INTRODUCTION

The question presented deals with the manner in which a reviewing court should assess prejudice when a district court erroneously sentences a defendant above the statutory maximum authorized by the charge in the indictment, based on an aggravating sentencing factor that was not charged in the indictment. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) ("any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment") (quotation and citation omitted). That question was left open in *United States v. Cotton*, 535 U.S. 625, 627 (2002). At this point, every circuit court except the D.C. Circuit has decided the issue. Five of those circuits have held that a defendant is prejudiced – under either the harmless error test or the "affected substantial rights" prong of the plain error test – if the district court imposed a sentence above the maximum authorized by the indictment's charge, regardless of the evidence introduced during trial.[1] On the other side of the split, six circuits have held that a defendant is not prejudiced by a sentence that exceeds the maximum authorized by the indictment's charge if there was "overwhelming" trial evidence of an aggravating factor that supports a sentence above the maximum authorized by the indictment's charge.[2] Because this case is a good vehicle for resolving that entrenched circuit conflict, the petition for a writ of certiorari should be granted.

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[1] *See United States v. Lewis*, 802 F.3d 449, 455-58 (3d Cir. 2015) (*en banc*); *United States v. Promise*, 255 F.3d 150, 160 (4th Cir. 2001) (*en banc*); *United States v. Adkins*, 274 F.3d 444, 454 (7th Cir. 2001); *United States v. Maynie*, 257 F.3d 908, 919 (8th Cir. 2001); *United States v. Lott*, 310 F.3d 1231, 1242-44 (10th Cir. 2002).

[2] *See United States v. Mojica-Baez*, 229 F.3d 292, 307-11 (1st Cir. 2000); *United States v. Confredo*, 528 F.3d 143, 156 (2d Cir. 2008); *United States v. Robinson*, 367 F.3d 278, 285-87 (5th Cir. 2004); *United States v. Stewart*, 306 F.3d 295, 321-23 (6th Cir. 2002); *United States v. Salazar-Lopez*, 506 F.3d 748, 755 (9th Cir. 2007); *United States v. Suarez*, 313 F.3d 1287, 1293-94 (11th Cir. 2002).

ORDERS AND OPINION BELOW

On November 18, 2016, the district court rejected Vescuso's argument that his sentence for violating the general conspiracy provision in 18 U.S.C. §371 was limited to a maximum of one year under the rule of *Apprendi*, and sentenced Vescuso to thirty-three months custody. *See* 11/18/16 Reporter's Transcript (RT) at 15, 25 (attached in appendix at 6, 16).

On August 2, 2019, the Ninth Circuit filed an unpublished opinion affirming the district court's sentence. *See United States v. Vescuso*, 783 Fed. App'x 666, 669 (9th Cir. 2019) (attached in appendix at 27-29).

On October 18, 2019, the Ninth Circuit denied Vescuso's petition for panel rehearing or rehearing *en banc*. *See* 10/18/19 Order (attached in appendix at 30).

JURISDICTION

The Ninth Circuit's opinion was filed on August 2, 2019, and Vescuso's petition for rehearing was denied on October 18, 2019. On December 12, 2019, Justice Kagan granted Vescuso an extension of time to file this petition, until February 17, 2020. *See* No. 19A660. Accordingly, this Petition is timely, and the Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states, "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 . . . ."

The Sixth Amendment to the Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

Section 371 of Title 18 of the United States Code is titled, "Conspiracy to commit offense or to defraud United States," and states:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 641 of Title 18 of the United States Code is titled, "Public money, property or records," and states, in relevant part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof . . .
>
> Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

I. District Court Proceedings

John Vescuso is forty-four years old and prior to this case he had never been in trouble with the law. In 2005, he got involved in collecting and selling scrap metal. That eventually led him to a scrap yard that Cecil Garr ran on the Camp Pendleton Marine Corps base. Vescuso purchased metal from Garr dozens of times over the ensuing years, believing Garr had authority to sell the metal, but Garr did not. When Garr was eventually caught for his wrongdoing, agents pressured him to help himself by telling him, literally, to "pin the blame" on Vescuso, and Garr was later given extravagant sentencing benefits by the government to do exactly that. But when Garr testified as the government's key witness during Vescuso's federal trial, the district court erroneously precluded

Vescuso from informing the jury about that pressure and those benefits, and several other things that undermined Garr's credibility (including a felony rape conviction). On appeal, the Ninth Circuit recognized the error but held it was harmless because defense counsel could have done something – the court didn't say what – to alleviate the prejudice from the error. *See United States v. Vescuso*, 783 Fed. App'x 666, 668 (9th Cir. 2019) (attached in appendix at 27-29). Though that harmless error assessment is clearly contrary to this Court's case law, *see, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 683 (1986), that is not the issue raised in this petition. Instead, this petition focuses on *Apprendi* error, which the Ninth Circuit held was also harmless.

Vescuso was charged in a two-count indictment. The first count charged a conspiracy under the general conspiracy statute, 18 U.S.C. §371, and alleged that the object of the conspiracy was "theft of government property in violation of 18, United States Code, Section 641." App'x at 33. Section 371 states that the maximum sentence for a conspiracy conviction under that statute is five years unless "the offense, the commission of which is the object of the conspiracy, is a misdemeanor only," in which case "the punishment . . . shall not exceed the maximum punishment provided for such misdemeanor." The object of the conspiracy charged in count one, 18 U.S.C. §641, can be a misdemeanor (punishable by a maximum of one year imprisonment) or a felony (punishable by up to five years), depending on whether the value of the property involved exceeded $1,000. Count 1 did not charge that the object of the conspiracy was to commit theft of property valued at more than $1,000, and thus authorized no more than a one-year sentence. *See Apprendi*, 530 U.S. at 476 ("any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment") (quotation and citation omitted).

In contrast, the indictment's second count charged a substantive violation of §641, and charged the $1,000 aggravating factor that increases §641's maximum penalty from one year to ten years. Specifically, count 2 charged:

> Beginning on or about April of 2010 . . . and continuing without interruption until in or around June of 2012 . . . defendants Cecil Garr and John Patrick Vescuso did willfully and knowingly embezzle, steal and purloin, and without authority sell and dispose of property of the United States Marine Corps . . . to which they knew they were not entitled, to wit: *brass shell casings having a value exceeding $1,000*, in violation of 18, United States Code, Section 641.

App'x at 38 (emphasis added).

After a jury trial, Vescuso was convicted on both counts. However, in pre- and post-trial motions Vescuso moved to dismiss count 2 – the substantive §641 charge – because it was duplicitous and improperly alleged an undefined number of continuing offenses. *See* ER Vol. 4 at 873-78.[3] Following trial, the government agreed that count 2 was riddled with error and should be dismissed, and the district court dismissed that count. *See id.* at 970.

With respect to sentencing on count 1, Vescuso argued that his maximum sentence was one year because count 1 did not charge that the object of the conspiracy was to commit a felony violation of §641, nor did the *petit* jury make such a finding. *See* ER Vol. 4 at 887-88. The district court rejected Vescuso's argument and imposed a sentence of thirty-three months, stating that it found count 1 was "properly pled as a felony" because it alleged "overt acts" that when aggregated exceed the $1,000 threshold. 11/18/16 RT at 15, 25 (attached in appendix at 6, 16). The court didn't address Vescuso's argument that this reasoning is contrary to *Apprendi* because the indictment didn't charge that the object of the conspiracy was to commit a felony violation of §641, and such an

[3] The ER cites in this petition are to the Excerpts of Record submitted in the Ninth Circuit, at docket #24 in case number 16-50441.

allegation is necessary to increase the maximum sentence from one to five years. *See id.* at 17-18 (attached in appendix at 8-9); *see also Joplin Mercantile Co. v. United States*, 236 U.S. 531, 535-36 (1915) (holding that an indictment's charge of a conspiracy's elements may not be broadened based on allegations in a separate overt acts section of the indictment). The court also didn't address the fact that in rendering its verdict on count 1, the *petit* jury had not been instructed that it had to make a finding with respect to the object of the conspiracy being a felony violation of §641, or the $1,000 threshold, and had not made any such findings. *See* App'x at 41-43 (portion of jury instructions given and verdict form).

II. Ninth Circuit Proceedings And Opinion

On appeal, Vescuso raised the *Apprendi* issues. *See* Opening Br. at 59-60 (docket #23 in case no. 16-50441). In its answering brief, the government didn't dispute that there was *Apprendi* error because the sentence exceeded the one-year maximum authorized by the indictment's charge, but argued that error was harmless because "the [trial] record contains 'overwhelming' and 'uncontroverted' evidence supporting" that the object of the alleged conspiracy was to commit a violation of §641 involving property valued at more than $1,000. Answering Br. at 70-72 (quoting *United States v. Zepeda-Martinez*, 470 F.3d 909, 910 (9th Cir. 2006)) (docket #34 in case no. 16-50441). That is, the government argued that the court of appeals could look to the trial evidence to find harmless the district court's imposing a sentence that exceeded what was authorized by the charge in the indictment.

In its opinion affirming, the Ninth Circuit said only, "any *Apprendi* error that occurred was harmless." *Vescuso*, 783 Fed. App'x at 669 (attached in appendix at 27-29).

REASONS FOR GRANTING THE PETITION

I. Introduction

In *United States v. Cotton*, 535 U.S. 625, 627 (2002), the Court addressed "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence," in violation of the rule of *Apprendi*, "justifies a court of appeals' vacating the enhanced sentence." Because the defendants in *Cotton* didn't raise that issue in the district court, the Court applied the four-prong plain error test established in *United States v. Olano*, 507 U.S. 725, 732 (1993). In *Cotton*, "[t]he government concede[d]" the first two prongs were satisfied, specifically "that the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered [the defendants'] enhanced sentences erroneous under the reasoning of *Apprendi*," and "that such error was plain." 535 U.S. at 632. With respect to the third prong – whether the error "affected substantial rights" – the defendants argued they satisfied that prong "because they were sentenced to more than the 20-year maximum that [was] authorize[d] without regard to drug quantity." *Id.* 632 n.2. The Court stated that it "need not resolve" that issue because, "even assuming [the defendants'] substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings," thus the fourth prong of plain error review was not satisfied. *Id.* at 632-33. The Court based this holding on its conclusion that the trial evidence with respect to the drug quantity necessary to support the enhanced sentence was "overwhelming" and "essentially uncontroverted." *Id.* at 633.

By leaving open the question of how to assess prejudice in this context under the third prong of the plain error test, the Court also effectively left open the question of how to assess whether such error, when preserved, should be considered harmless. That is because the yardstick for whether a given error is considered harmless or satisfies the third prong of the plain error test is the same – only

the burden shifts, with the government bearing the burden in the harmless error analysis, and the defendant bearing it in the plain error analysis.[4] *See, e.g., United States v. Vonn*, 535 U.S. 55, 62 (2002); *United States v. Stewart*, 306 F.3d 295, 322 (6th Cir. 2002); *United States v. Mojica-Baez*, 229 F.3d 292, 307 (1st Cir. 2000). The courts of appeals have split on how prejudice is established in the context presented here. The Third, Fourth, Seventh, Eighth, and Tenth Circuits have held that a defendant is prejudiced if the district court imposed a sentence above the maximum authorized by the indictment's charge, regardless of the evidence adduced during trial. The First, Second, Fifth, Sixth, Ninth, and Eleventh Circuits have held that a defendant is not prejudiced by a sentence that exceeds the maximum authorized by the indictment's charge if there was overwhelming trial evidence of an aggravating factor that supports a sentence above the maximum authorized by the indictment's charge. Because this entrenched circuit split involves an important question of constitutional law, and because this case is a good vehicle for resolving that question, the petition should be granted. *See* S. Ct. Rules 10(a) & (c). Below, Vescuso discusses the circuit split, and then explains why this case is a good vehicle for resolving that split.

II. Review Of The Cases On Each Side Of The 5-6 Circuit Split

A. Circuit Courts That Hold *Apprendi* Error Is Prejudicial If The District Court Imposed A Sentence Exceeding That Authorized By The Indictment's Charge

Of the five circuit courts that hold a district court's *Apprendi* error is prejudicial if the sentence imposed exceeded the statutory maximum authorized by the charge in the indictment, the lead cases are the Third and Fourth Circuits' *en banc* opinions in *United States v. Lewis*, 802 F.3d 449 (3d Cir. 2015) (*en banc*), and *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (*en banc*).

[4] The nature of that burden also varies based on the type of error, but that is irrelevant here.

In *Lewis*, the defendant "was sentenced for a crime with a seven-year mandatory minimum – brandishing a firearm during and in relation to a crime of violence [under 18 U.S.C. §924(c)] – notwithstanding the fact that" he "was never even indicted for the crime of brandishing," and "a jury had not convicted him of that crime. Instead, he had been [indicted and] convicted of the crime of using or carrying a firearm during and in relation to a crime of violence, which has a five-year mandatory minimum."[5] *Id.* at 451. As the Third Circuit emphasized, "[t]he error here was a sentencing error, as nothing was wrong with Lewis's indictment or trial." The court explained:

> The indictment charged Lewis with an offense – using or carrying – and did not omit any elements of that charge. At trial, the jury received the proper instructions for the using or carrying offense. The jury properly entered a verdict finding Lewis guilty of that offense, so Lewis was properly convicted of that offense. But, then, the District Court sentenced Lewis for the offense of brandishing.

Id. at 455. The conclusion that the error was sentencing error affected the court's assessment of how to determine whether the error was harmless:

> Harmless-error review for a sentencing error turns on whether the error did or did not "contribute to the [sentence] obtained." *Sochor v. Florida*, 504 U.S. 527, 539 (1992) (alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In other words, harmless-error review for a sentencing error requires a determination of whether the error "would have made no difference to the sentence." *Parker v. Dugger*, 498 U.S. 308, 319 (1991). This analysis contrasts with the analysis appropriate for trial errors, which turns on whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). Because we are confronted here with a sentencing error, we do not conduct the analysis reserved for trial errors.

Lewis, 802 F.3d at 456. Accordingly, to assess whether the error was harmless the court "ask[ed] whether Lewis's sentence would have been different had he been sentenced for using or carrying, rather than brandishing." *Id.* at 458. The answer was "[o]bviously" yes, because "Lewis received 84 months for brandishing – the seven-year mandatory minimum – whereas the mandatory minimum

[5] This is the type of *Apprendi* error identified in *Alleyne v. United States*, 570 U.S. 99 (2013).

for using or carrying is two years less. Therefore, Lewis ha[d] been sentenced to an extra two years as a result of" the *Apprendi* error. *Id.*

The Fourth Circuit's opinion in *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (*en banc*), is to the same effect. There, the district court imposed a sentence above the twenty years authorized by the indictment's charge, and the *petit* jury's findings, based on the district court's drug quantity finding. Like the Third Circuit (although in the context of assessing the third prong of the plain error test), the Fourth Circuit reasoned that the indictment was not invalid, nor was there error during the trial:

> We conclude that the error was not in Promise's conviction. The indictment charged Promise with conspiring to possess with the intent to distribute "a quantity of cocaine and cocaine base." J.A. 33. Thus, Promise was properly charged with conspiring to violate 21 U.S.C. §841. And, there can be no dispute that the jury was properly instructed regarding the elements of the charged offense. Accordingly, we conclude that Promise was properly charged with, and convicted of, conspiring to possess with the intent to distribute cocaine and cocaine base.

Promise, 255 F.3d at 160. Given these circumstances, the court explained, the error was in the sentence, and was prejudicial:

> The problem, therefore, lies with Promise's sentence. The facts alleged in the indictment and found by the jury supported a maximum penalty of 20 years imprisonment. Based on a determination of drug quantity by the district court, however, Promise was sentenced to 360 months imprisonment – ten years more than the applicable maximum. We therefore conclude that Promise has demonstrated that this error *affected his substantial rights*.[6]

Promise, 255 F.3d at 160 (emphasis added). The court summed up its holding, "the failure to charge a specific threshold drug quantity in the indictment or to instruct the jury regarding threshold drug quantity was not the error committed by the district court; on the contrary, the indictment, jury

[6] The court nonetheless declined to grant relief under the fourth prong of the plain error test, but that is irrelevant in Vescuso's case because he preserved the claim of error.

instructions, and conviction here are all valid. What was not valid was the sentence imposed, which exceeded the applicable maximum for the facts charged and proven."[7] *Id.* at 160 n.8.

The Eighth Circuit came to the same conclusion in *United States v. Maynie*, 257 F.3d 908 (8th Cir. 2001), a drug case in which the indictment's charge authorized a maximum sentence of thirty years, but the defendants were sentenced to life. Assessing the application of the third prong of the plain error test, the court said, "[a] defendant's rights are substantially affected when the error prejudicially influenced the outcome of the district court proceedings. . . . In previous cases where a sentence has been challenged on a previously unraised ground, we have found a defendant's substantial rights were affected where correction of the error would result in a lesser term of imprisonment." *Id.* at 919 (quotation and citation omitted). The court then concluded, "Had the district court sentenced defendants under [21 U.S.C.] §841(b)(1)(C), as we now know was constitutionally required, defendants would be facing 30 years instead of life in prison. We hold that this greater, and improper, infringement of defendants' liberty substantially affected their rights." *Id.*

The Seventh and Tenth Circuits are in accord with the opinions discussed above. In *United States v. Adkins*, 274 F.3d 444, 454 (7th Cir. 2001), the defendant received a sentence of twenty-seven years, though the indictment's charge authorized a maximum of twenty years. Addressing the third prong of plain error review, the court held that "the error, which added seven years to Adkins's sentences, affected a substantial right . . . ." *Id.* at 455. In *United States v. Lott*, 310 F.3d 1231,

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[7] *See also United States v. Robinson*, 390 F.3d 833, 837-38 (4th Cir. 2004) ("the Appellants satisfy the third prong of the *Olano* plain error analysis"); *United States v. Johnson*, 26 Fed. App'x 111, 117 (4th Cir. 2001) ("[w]ith respect to the third prong of the plain error inquiry, we have found that a sentence in excess of the authorized statutory maximum to which a defendant would not otherwise be subject affects his substantial rights") (unpublished opinion).

1242-44 (10th Cir. 2002), the Tenth Circuit employed the same analysis but held that the defendant's substantial rights were not affected because the district court could "stack" – that is, run concurrent – sentences on multiple convictions to reach an aggregate sentence that exceeded the statutory maximum sentence on a single count.[8] *See also United States v. Cernobyl*, 255 F.3d 1215, 1220 (10th Cir. 2001) (same).

Turning to Vescuso's case, and using the words of the Third Circuit in *Lewis*, the error was sentencing error, as nothing was wrong with Vescuso's indictment or trial.[9] Count 1 of the indictment charged Vescuso with an offense – misdemeanor conspiracy – and did not omit any elements of that charge. At trial, the jury received correct instructions for misdemeanor conspiracy, and it properly entered a verdict finding Vescuso guilty of that offense. But, then, the district court sentenced Vescuso for a felony conspiracy, twenty-one months above what was authorized by the indictment's charge (and the *petit* jury's finding). It is obvious – legally and logically – that this error prejudiced Vescuso.

That conclusion is supported by the discussion in *Apprendi* of the historical role of an indictment, which drove the holding in that case. The Court cited several cases and treatises that said, in absolute terms, that the indictment fixed the sentence that could be imposed if the defendant were convicted. For example, discussing the role of the indictment "during the years surrounding

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[8] That reasoning does not apply to Vescuso, who was sentenced on one count.

[9] The conclusion that the error involved here is sentencing error is also supported by the fact that a defendant has no reason to object unless and until a district court indicates that it intends to impose a sentence above the maximum authorized by the indictment's charge. *See, e.g., United States v. Stewart*, 306 F.3d 295, 310 (6th Cir. 2002) (stating that "it would be imprudent for defense counsel to object to an indictment which, by all rights, is facially sound," and "the proper time for a defendant to raise a challenge to his sentence is at the time the actual violation occurs – at the time of sentencing").

our Nation's founding," the Court said that "[a]s a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing 'all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and *that there may be no doubt as to the judgment which should be given, if the defendant be convicted*.'" *Apprendi*, 570 U.S. at 478 (quoting J. Archbold, *Pleading and Evidence in Criminal Cases* 44 (15th ed. 1862)). The Court explained that this practice ensured "[t]he defendant's ability to predict with certainty the judgment from the face of the felony indictment . . . ." 570 U.S. at 478.

The Court in *Apprendi* also explained that this historical practice was the same under common law and statutory law:

> This practice at common law held true when indictments were issued pursuant to statute. Just as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements *to be alleged in the indictment*, *so too were the circumstances mandating a particular punishment*. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, *an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision*. [2 M. Hale, Pleas of the Crown *170]." Archbold, *Pleading and Evidence in Criminal Cases*, at 51.

Apprendi, 530 U.S. at 480 (emphasis added).[10] The holdings discussed above are consistent with this historical practice. The same cannot be said with respect to the opinions discussed next, which

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[10] Justice Thomas's concurrence in *Apprendi* provided an even more in-depth discussion of the historical role of the indictment in limiting the sentence that could later be imposed. *See Apprendi*, 530 U.S. at 502-13 (Thomas, J., concurring). The majority opinion in *Alleyne* covered much of the same ground. *See, e.g., Alleyne*, 570 U.S. at 110 (reviewing case law and stating that "[a] number of contemporaneous treatises similarly took the view that a fact that increased punishment *must be charged in the indictment*") (emphasis added).

obviate the indictment's sentence-capping function in the only context in which it could possibly matter: when the district court believes there was strong trial evidence of an uncharged aggravating sentencing factor.

B. Circuit Courts That Hold A Sentence Above That Authorized By The Indictment's Charge Is Not Prejudicial If Trial Evidence Of An Uncharged Aggravating Sentencing Factor Was "Overwhelming"

Six circuit courts have held that a sentence that exceeds the maximum authorized by the indictment's charge may be found non-prejudicial if trial evidence of an uncharged fact that supports an increased maximum sentence was "overwhelming." Nearly all of those circuits arrived at that holding by first framing the question as whether the error is (1) "trial error," and thus subject to review for prejudice, or (2) "structural error," which requires automatic reversal without any assessment of prejudice. The First Circuit's opinion in *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000), is emblematic.

In that case, the defendant was charged with using a firearm during a crime of violence, 18 U.S.C. §924(c)(1)(A)(i), which subjected him to a five-year minimum sentence. At sentencing, however, the government sought, and the district court imposed, a ten-year minimum sentence under §924(c)(1)(B)(i), which applies if a semi-automatic assault weapon was used. *See id.* at 297, 306. With respect to the third prong of the plain error test, the Third Circuit framed the issue as follows:

> The defendants' main argument . . . is based upon the fact that the indictment only charged them with a violation of §924(c)(1) for use of a firearm during the robbery, but did not specifically charge them with a violation under subsection (B) of the statute or state that a semiautomatic assault weapon was used in the robbery. They urge, therefore, that this is not an instance merely of trial error. This requires, they say, that their convictions for the § 924(c)(1) violation be reversed, because such indictment errors are not subject to harmless or plain error analysis. In other words, they claim that the indictment was fatally deficient, and that this, per se, requires reversal.

Mojica-Baez, 229 F.3d at 307-08. The court distilled this point down to the assertion that "[t]he argument that the sentences should be vacated is premised upon the distinction between 'trial error, which is reviewed for prejudice . . . and the more fundamental 'structural error,' which is per se prejudicial." *Id.* at 309. Having framed the issue this way, the Third Circuit reasoned that the error was not structural because it was no more serious than the error in *Neder v. United States*, 527 U.S. 1, 9 (1999), in which this Court held that the failure to submit an element to the jury is trial error, subject to harmless error review. *See Mojica-Baez,* 299 F.3d at 311.

The Fifth Circuit framed its analysis the same way, in *United States v. Robinson*, 367 F.3d 278, 285 (5th Cir. 2004), though in that case the claim of error was preserved. The court began by stating that it "must consider whether *Apprendi* error – here the failure of an indictment specifically to charge aggravating factors regarded as elements because they increase the maximum available punishment – is susceptible to harmless error review," or is "structural error" and thus "per se reversible." Like the Third Circuit, the Fifth Circuit relied heavily on *Neder* to conclude that the error was not "structural:"

> The conclusion that this type of error is susceptible to harmless error review follows from . . . *Neder v. United States*, 527 U.S. 1, 8 (1999), in which the Court noted that harmless error review applies in all but a limited class of cases involving "structural errors." Such cases "contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* (citation omitted). The Court illustrated the point by providing a list of cases in which a structural error was found; notably, the Court failed . . . to mention a defective indictment as being a structural error. *Id.*

Robinson, 367 F.3d at 285. The Sixth and Ninth Circuits also apply this *Neder*-based analysis to conclude that a district court's sentencing a defendant above the maximum authorized by the indictment's charge is trial error. *See United States v. Salazar-Lopez*, 506 F.3d 748, 751-52 (9th Cir. 2007) (stating that the court was "faced with the question of whether this error is amenable to

harmless error review or is instead a 'structural error' automatically entitling Salazar-Lopez to a resentencing," and finding the error was not structural because it was akin to the failure to submit an element to the jury error in *Neder*); *United States v. Stewart*, 306 F.3d 295, 321 (6th Cir. 2002) ("[w]e . . . decline to categorize the omission from the indictment that occurred in these cases as structural error" that "requires automatic reversal" because "the error . . . .is not among those listed in *Neder* that classify as structural").

In addition to the *Neder*-based analysis, the Fifth and Sixth Circuits rely on this Court's opinion in *Cotton* to hold that a district court's erroneous sentencing of a defendant beyond the maximum authorized by the indictment's charge is not "structural," and thus is amenable to harmless error review. They reason as follows: (1) "structural" errors require automatic reversal; (2) the Court addressed the *Apprendi* error at issue here in *Cotton*, and relied on the fourth prong of plain error review to deny relief; therefore (3) the error cannot be structural. *See Robinson*, 367 F.3d at 285-86; *Stewart*, 306 F.3d at 321.[11]

Having relied on one or both of the reasons set out above to conclude that the error at issue here is not structural, those courts of appeals conclude it must be a "trial error," and therefore they apply the prejudice test applicable to trial error. For example, with no explanation as to why the test for trial error should apply to an error that did not occur during trial, the Fifth Circuit in *Robinson* said:

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[11] The Second Circuit also relies on *Cotton*, but it simply states, without analysis, "The Supreme Court has ruled [in *Cotton*] that an *Apprendi* violation concerning an omission from an indictment is not noticeable as plain error where the evidence is overwhelming that the grand jury would have found the fact at issue," and "[w]e think the same analysis should apply to harmless error." *United States v. Confredo*, 528 F.3d 143, 156 (2d Cir. 2008). The Eleventh Circuit came to the same conclusion in an even more summary manner. *See United States v. Suarez*, 313 F.3d 1287, 1293-94 (11th Cir. 2002).

> To decide whether the error is harmless on the facts of this case, we use the test announced in *Chapman v. California*, 386 U.S. 18 (1967), because it is constitutional error. *See Neder*, 527 U.S. at 15. The question is whether the error affects substantial rights. Fed.R.Crim.P. 52(a). That is to say, we inquire whether it appears "beyond a reasonable doubt that *the error complained of did not contribute to the verdict obtained*." *Chapman*, 386 U.S. at 23. "An otherwise valid conviction will not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Robinson, 367 F.3d at 286-87 (emphasis added); *see also Stewart*, 306 F.3d at 323 ("[w]here a reviewing court, after examining the entire record, cannot conclude beyond a reasonable doubt that the *jury verdict* would have been the same absent the error . . . it should not find the error harmless") (quotation omitted) (emphasis added); *Salazar-Lopez*, 506 F.3d at 755 (same). The courts that employ this reasoning look to the trial evidence with respect to the aggravating fact that could support a sentence beyond the maximum authorized by the indictment's charge, and if they conclude the evidence of that aggravating fact is "overwhelming," they find the sentencing error to be non-prejudicial.

There are three glaring problems with the reasoning, and holdings, discussed above.

First, to the extent those opinions provide analysis, they start with the false premise that there are only two types of error, (1) "trial error" that is subject to review for prejudice, or (2) "structural error" that requires automatic reversal. That is a false dichotomy. As the cases discussed in Section II.A above explain, the error at issue here is logically seen as sentencing error, and the question of whether the error was harmless is logically assessed based on whether the sentence exceeded the maximum authorized by the indictment's charge.

Second, having relied on the false structural error/trial error dichotomy, and concluded the error involved here is "trial error," the opinions jump to applying the *Chapman* test for assessing trial error. That is, they ask what the verdict would have been if the jury had been properly instructed on

the aggravating sentencing factor, in light of the evidence adduced at trial. But that analysis makes no sense, because the error involves what the judge did at sentencing, not what occurred during trial.

Finally, although several of the opinions discussed in this section rely on *Cotton* for support, *Cotton* cuts against their holdings. In *Cotton*, the Court declined to address whether the defendant was prejudiced under the third prong of the plain error test, and instead denied relief under the fourth prong based on the "overwhelming" weight of the trial evidence with respect to the uncharged aggravating factor. 535 U.S. at 632-33. There is no reason the Court would have taken that approach if it believed it was appropriate to rely on the weight of the trial evidence to find that the defendant was not prejudiced under the third prong (*i.e.*, his substantial rights were not affected) – the Court would simply have relied on the trial evidence to deny relief under the third prong, rather than skipping to the fourth prong. Yet the opinions discussed in this section treat the analysis under the third and fourth prongs as identical.

III. This Case Presents A Good Vehicle For Resolving The Question Presented

This case presents a good vehicle for resolving the question presented because the only issue is how to assess whether the *Apprendi* was harmless (*i.e.*, was Vescuso prejudiced?). And given the longstanding, and nearly even, nature of the circuit split, there is no hope that this issue will resolve itself without the Court's intervention.

Furthermore, it is evident that the courts in the five-circuit minority have relied on much more persuasive reasoning to support their holdings, and that those holdings are consistent with the historical role of the indictment.

Additionally, Vescuso has a substantial liberty interest at stake, given that his as-yet unserved sentence will be reduced by at least twenty-one months if he prevails in this Court, and his felony

judgment will be amended to a misdemeanor judgment, which would have substantial consequences given his lack of any prior criminal convictions.

Finally, from a practical perspective this case starkly implicates the historical principle that a defendant should be able "to predict with certainty the judgment from the face of the felony indictment," leaving "no doubt as to the judgment which should be given, if [he] be convicted." *Apprendi*, 570 U.S. at 478 (quotations and citations omitted). When Vescuso was arraigned on the indictment, he was presented with (1) a misdemeanor charge on count 1, and (2) an invalid felony charge on count 2 that he promptly challenged and was eventually dismissed. The nature of those charges strongly influenced how Vescuso chose to proceed with the case, and it is unfair, as well as contrary to the historical role of the indictment (and grand jury), to ignore those expectations. *See also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (stating that the grand jury determines not only whether probable cause exists, but also whether to "charge a greater or a lesser offense [or] numerous counts or a single count . . . all on the basis of the same facts"). Considering all of this, the Court should grant review to determine if the *Apprendi* error was nonetheless "harmless."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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