No. 20-1295

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY ZACHARY GREEN

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

REPLY BRIEF FOR THE PETITIONER

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Respondent does not dispute that the court of appeals' decision in this case implicates questions that this Court is currently considering in *Greer* v. *United States*, No. 19-8709 (argued Apr. 20, 2021). Nor does respondent dispute that, if the controversy in this case remains live, it would be appropriate for this Court to hold the petition for a writ of certiorari pending the Court's decision in *Greer*, and then dispose of the petition as appropriate in light of that decision. See Resp. Br. in Opp. 7. Instead, respondent's sole argument (*id.* at 3-7) for denial of the petition is that the case has become moot because the court of appeals refused to stay the issuance of its mandate, resulting in dismissal of the indictment on remand in the district court. See Pet. App. 7a (ordering "remand with instructions to the district court to enter judgment dismissing this count without prejudice"); C.A. Doc. 57 (Oct. 23, 2020) (denying motion to stay mandate). That argument—under which the lower courts could frustrate

this Court's ability to consider a petition for a writ of certiorari unless the Court itself grants emergency relief—is unsound.

1. This Court has long recognized that a "[p]etitioner's obedience to the mandate of the Court of Appeals and the judgment of the District Court" implementing that mandate "does not moot [a] case" presented for this Court's review. *Mancusi* v. *Stubbs*, 408 U.S. 204, 206 (1972). In the criminal context specifically, such a case remains live because "reversal of [the lower court's] decision would reinstate the judgment of conviction and the sentence entered by the District Court." *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

A district court's compliance with a court of appeals' directive to dismiss an indictment during the time prescribed for seeking a writ of certiorari does not moot a case because it does not prevent reinstatement of the conviction and sentence. See *Villamonte-Marquez*, 462 U.S. at 581 n.2 ("Under [the Court's] reasoning in *Mancusi* * * * , the absence of an indictment does not require a contrary conclusion.") (citation omitted). "[I]t is settled law that the preliminary steps in a criminal proceeding are 'merged' into a sentence once the defendant is convicted and sentenced." *Ibid.* (citation omitted). Accordingly, a "separate reinstatement of the original indictment" would be "unnecessary" if this Court were to vacate the court of appeals' decision and the court of appeals were, on remand, to affirm respondent's conviction and sentence. *Ibid.*

2. Respondent's contrary argument rests (Br. in Opp. 6-7) on Justice Brennan's dissent in *Villamonte-Marquez*, *supra*, which in turn rested on this Court's decision in *Ex parte Bain*, 121 U.S. 1 (1887). See

Villamonte-Marquez, 462 U.S. at 597-598 & n.5 (Brennan, J., dissenting) (discussing *Bain*). In *Bain*, the defendants filed a demurrer to an indictment; the district court sustained it; and the court granted the government's motion to amend the indictment, after which the court proceeded with the case. 121 U.S. at 5. This Court held that because of the amendment made by the district court, "the indictment on which [Bain] was tried was no indictment of a grand jury," and that in the absence of a valid indictment returned by the grand jury, "the court has no right to proceed any further in the progress of the case." *Id.* at 13. Based on *Bain*, the dissent in *Villamonte-Marquez* took the view that "[o]nce [an] indictment is dismissed, * * * this Court is entirely without power to revive it, or the convictions or sentences that arose out of it and died with it." 462 U.S. at 597-598. Respondent's reliance on *Bain* and the *Villamonte-Marquez* dissent is misplaced for two reasons.

a. The primary difficulty that respondent faces is that a majority of the Court rejected the dissent's view of the implications of *Bain* in *Villamonte-Marquez* itself. See 462 U.S. at 581-582 n.2. The Court determined that because "the judgment of conviction and the sentence" could be reinstated without "reinstatement of the original indictment," the intervening dismissal of the indictment in that case did not render the case moot. *Id.* at 581 n.2.

Respondent seeks (Br. in Opp. 6) to limit the majority's reasoning to cases in which the dismissed indictment was "valid," contending that "[w]here the indictment is invalid, however, it does not merge into the judgment, and dismissal of the indictment moots the case." But neither the majority nor the dissent in

Villamonte-Marquez indicated that an indictment returned by the grand jury yet deemed deficient by the lower courts fails to merge into a final criminal judgment reviewable by this Court, and respondent cites no authority for such a principle. See *ibid.*

It is only *because* an invalid indictment merges into the final judgment that a defendant can challenge the indictment as invalid on appeal following conviction and sentencing. See *Parr* v. *United States*, 351 U.S. 513, 518-519 (1956); *Villamonte-Marquez*, 462 U.S. at 581 n.2 (citing *Parr*, *supra*); see also *Villamonte-Marquez*, 462 U.S. at 597 (Brennan, J., dissenting) (observing that the fact that an indictment merges into the final judgment explains why "the indictment can be attacked on appeal from the conviction"). The distinction that the Court in *Villamonte-Marquez* drew between that case and *Bain*—which it recognized as "long ago limited to its facts"—was that in *Bain*, the defendant had not been tried on an indictment returned *by a grand jury* at all. *Villamonte-Marquez*, 462 U.S. at 582 n.2; see also *Bain*, 121 U.S. at 13 ("[T]he indictment on which [Bain] was tried was no indictment of a grand jury."). Respondent does not suggest any such error here.

b. Moreover, even if respondent *had* made such a suggestion, it would be unavailing in light of this Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2002). *Bain*'s holding was premised on the view that the "change in the indictment *deprived the court of the power of proceeding* to try the petitioner and sentence him to the imprisonment provided for in the statute." *Bain*, 121 U.S. at 13 (emphasis added). But in *Cotton*, this Court overruled *Bain* in relevant part, holding that "defects in an indictment do not deprive a court of its power to adjudicate a case." 535 U.S. at 630; see *id.* at

631 ("Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled."). Thus, even assuming that *Villamonte-Marquez* could be read to permit respondent's argument here, the argument would not have survived *Cotton*. Because "defects in an indictment do not deprive a court of its power to adjudicate a case," *id.* at 630, the defects that respondent identifies in the indictment here do not render it "impossible for the Court to grant the government any relief," Resp. Br. in Opp. 5. This case accordingly is not moot, and the Court should hold the petition for a writ of certiorari pending a decision in *Greer*, *supra*, then dispose of the petition as appropriate in light of that decision.

* * * * *

The petition for a writ of certiorari should be held pending this Court's decision in *Greer* v. *United States*, No. 19-8709 (argued Apr. 20, 2021), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

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