No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

DOMINIQUE MACK,
Petitioner.

VS.

UNITED STATES OF AMERICA,
Respondent.

_____

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

_____

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Should the Court should grant certiorari in order to consider whether this Court's jurisprudence concerning the admission of statements against interest was violated by the district court's admitting into evidence the jailhouse informant Farmer's testimony that co-defendant Miller had told him that Mack killed Francis?

2. Should the Court should grant certiorari in order to resolve a conflict among the circuits as to whether plain error is established where an indictment fails to set forth an essential element of an offense, the district court fails to instruct a jury as to an essential element of an offense, and a jury returns a verdict of guilty without any finding that an essential element of the offense has been proven beyond a reasonable doubt?

3. Should the Court should grant certiorari in order to consider a glitch in the sentencing statutes, where the statutes impose a mandatory life sentence "in the case of a killing" and the defendant has been convicted of a conspiracy to murder in which there was no killing?

4. Does the imposition of mandatory life sentences for convictions of conspiracies to murder where no one has suffered physical harm violate the Fifth Amendment guarantee of due process, the Eighth Amendment

prohibition against cruel and unusual punishment, and the separation of powers doctrine?

List of Parties

Mr. Mack's co-defendants in the district court were Kerron Miller and Tyquan Lucien. Both pleaded guilty and neither appealed his conviction or sentence.

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No. _____

In the

Supreme Court of the United States

October Term, 2020

DOMINIQUE MACK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Petitioner Dominique Mack respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated May 27, 2020.

Opinions and Proceedings Below

The decision of the Court of Appeals docket no. 16-3734-cr, is set forth in a reported decision, *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020), set forth at App. 001, and in an unpublished summary affirmance set forth at App. 019.

The district court case was *United States v. Miller et al*, District of Connecticut docket no. 3:13-cr-0054 (MPS).

Jurisdiction

The decisions of the Court of Appeals were entered on April 2, 2020. App. 1, 19. On April 7, Dominique Mack moved to extend the time within which to file a petition for rehearing. ECF # 193. His motion was granted on April 15. ECF # 197. App. 021. Mr. Mack moved for a further extension of time on April 27, which was granted on April 27, 2020. App. 022. He filed his Petition for Rehearing/Rehearing En Banc on April 27, 2020. ECF # 203. The Court of Appeals denied the Petition for Rehearing on May 27, 2020. ECF # 207, App. 020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The basis for subject matter jurisdiction in district court was 18 U.S.C. §3231 (jurisdiction over offenses against the United States). The basis for the jurisdiction of the court of appeals was 28 U.S.C. § 1291 (appeals from final judgments of district courts), Rule 4(b), Fed. R. App. Proc. (appeals from criminal convictions), 18 U.S.C.§ 3557 and 18 U.S.C. § 3742 (appeals from sentences) and Rule 35, Federal Rules of Appellate Procedure (en banc determinations).

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Constitution, Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 922(g)

(g)It shall be unlawful for any person—

(1)who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2)

2)Whoever knowingly violates subsection (a)(6), (d), (g), (h), (I), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 1111 (set forth in Appendix)

18 U.S.C. § 1112 (set forth in Appendix)

18 U.S.C. § 1512 (set forth in Appendix)

Statement of the Case

Dominique Mack was convicted in the District of Connecticut on two charges of conspiracy to commit witness tampering by first-degree murder and two counts of possession of a firearm by a convicted felon. 954 F.3d at 555.

The government's theory of the first conspiracy charge was that a co-defendant, Keronn Miller, had lured Ian Francis to Sigourney Street in Hartford on

the pretext of returning to Francis a borrowed firearm. Mack, who was the subject of an outstanding federal arrest warrant, had there shot Francis because he feared that Francis' girlfriend might reveal his location to law enforcement. 954 F.3d at 556. The defense theory of the case was that Miller had lured Francis to Sigourney Street where Miller's friend, co-defendant Tyquan Lucien murdered Francis because Miller did not want to, or was unable to, return Francis' firearm.

The government's theory of the second conspiracy charge was that Mack and Lucien, prisoners together at the Wyatt Detention Center, had conspired to murder Charles Jernigan, who, they feared, would be a witness against them. Lucien's cellmate had reported the plot and investigators had inserted an undercover officer to impersonate a hitman. He negotiated directly with Lucien, recording their encounter. 954 F.3d at 557. The defense theory was that Mack, being innocent of the Francis murder, had no interest in killing Jernigan and the plot was solely Lucian's.

As noted, Mack was convicted of both conspiracies. He was, however, acquitted of the substantive charges of murdering Ian Francis.

Reasons for Granting the Petition

1. The Court should grant certiorari in order to consider whether the district court's admitting into evidence the jailhouse informant Farmer's testimony -- that Miller had told him that Mack killed Francis -- violated this Court's jurisprudence concerning statements against interest.

Factual and procedural background: The government undertook exceptional efforts to prevent Mack's co-defendant Miller from testifying in the

Dominique Mack trial. It entered into a plea agreement that "deeply troubled" the Court of Appeals. 954 F.3d at 562, App. 007. The agreement bound the district court to sentence Miller, who faced mandatory life imprisonment, to no more than 210 months' incarceration. Miller would be free to withdraw his plea if the court ultimately decided that it could not go along with the deal. Plea Agreement (ECF #163), App. 058, 062.

There was, however, one catch.

Miller could not testify in the Mack trial.

Miller's plea agreement did not say "no testifying in Mack's trial" in so many words. Rather, it said:

> Should the defendant testify at any trial or other court proceeding (whether summoned by legal process or not) about the subject matter which forms the basis of the superseding indictment in this case , and provide testimony inconsistent with *or in addition to* the facts proffered and agreed to by the defendant as part of the plea colloquy, then the agreed upon sentencing range of 168 to 210 months' imprisonment and fine range of $17,500 to $175,000, is no longer binding on the parties or the Court, and the government is free to advocate for any sentence up to the maximum penalties provided by law, and the Court may impose any such sentence it finds fair and reasonable. The defendant acknowledges that these actions by him would constitute a breach of the plea agreement and he would not be permitted to withdraw his guilty plea.

Plea Agreement (ECF #163) at 5, App. 62. The facts that were "proffered and agreed" to were so limited, App.66, that Miller would have violated the agreement, and faced life imprisonment, with his answer to the second question posed to him during any testimony, which would have been the courtroom deputy's inquiry as to his address, his address being a fact *in addition* to "the facts

proferred and agreed to by the defendant as part of the plea colloquy." Miller could not have testified in the Mack trial without adding to the single paragraph proffer to which he was limited, so he could not testify at all, without violating the plea agreement and subjecting himself to life imprisonment. *See* 954 F.3d at 562-63, App. 006-007.

The government made no bones about what it was doing. In moving to delay Miller's sentencing until after the Mack trial, it represented: "The provision at page 5 of the plea agreement was negotiated with the intent to prevent defendant MILLER from providing false exculpatory testimony in his co-defendant's trial. Such an objective would be nullified if defendant MILLER's sentence were imposed prior to that trial." ECF #233 at 4. During the course of the hearing on the motion, the prosecutor frankly stated that the government was concerned that Mr. Miller might be a witness and in the trial of Dominique Mack and feared that Miller would take full responsibility for the murder, thus creating reasonable doubt as to Mr. Mack's involvement. 6/9/2015 Tr. (ECF #383) 7, App. 074.

The district court itself was under no illusions. It asked Miller's attorney "[Y]ou understood that what [the prosecutors] were getting at [in the plea agreement] was, look, we don't want him on the stand effectively, right? I mean, that's what it boils down to." *Id*. at 10, App. 077.

Having effectively eliminated any possibility that Miller could be called to give the lie to any claim by anyone as to what he might have done or said, the

government called Brandyn Farmer, a pretrial detainee who, although only twenty-four, had five felony convictions and eleven separate cases pending against him at the time of trial, many involving serious offenses. 4/15/2016 Tr. (Vol. V) 1047, 1061. Farmer had an extensive history of reporting to the Hartford police things that he claimed to have heard his fellow inmates say. 4/15/2016 Tr. (Vol. V) 1055, 1069, 1093-94. During his first meeting with federal authorities, he had cast a wide net, claiming to have heard incriminating statements about twelve other men in addition to Dominique Mack and Miller. *Id*. 1055. He was, in the vernacular, a jailhouse informant, a member of a fraternity widely recognized as the most deceitful and deceptive group of witnesses known to frequent the court. *See Zapulla v. New York*, 391 F.3d 462,470 n.3 (2004) ("As a general matter, we note that numerous scholars and criminal justice experts have found the testimony by 'jail house snitches' to be highly unreliable.").

When the government sought to introduce Farmer's testimony concerning things he claimed Miller had told him, the defense objected. It argued that the government was obliged to bring in Miller to court from the jail where he was awaiting sentencing and to inquire as to whether he really was unavailable, whether he would rely in his fifth amendment privilege, and the extent to which he would do so. During the course of such an inquiry, it was anticipated that Miller would have stated whether he intended to invoke his fifth amendment privilege, the extent to which he intended to invoke the privilege, the validity of the invocation, and whether he was refusing to testify because he feared losing he deal

the government had engineered.

The government opposed Mr. Miller's being presented in court. The prosecutor said that a year and four months previously, when Miller had pleaded guilty in a proceeding for which there was no transcript, his attorney had represented that Miller would take the Fifth at Mack's trial. Ten months before the trial, Miller's attorney had represented that Miller was concerned if he testified about "other matters that could be delved into." He had advised Miller to take the Fifth "and he's indicated to me that he would heed that advice."6/9/2015 Tr. (ECF #383) 10, App. 77.

That was enough to the district court. It overruled the defense objections, did not bring Miller in from jail, and found that he was unavailable. The Court of Appeals held that this ruling was not an abuse of discretion. 954 F.3d at 561-62, App. 10-11.

Having found Miller unavailable, the district court, over objection, allowed Farmer to testify that about two weeks after Francis's funeral, he had talked with Keronn Miller about the murder.

> Q. And what did Mr. Miller tell you about the shooting of Ian Francis?
>
> A. That he was there.
>
> ***Q. What else did he tell you, if anything?***
>
> ***A. That Little Sweets[1] shot him.***

[1]Mr. Mack's nickname.

Q. Did he give you the details as to how that came about?

A. Yes.

Q. What did he say?

* * * *

A. That Ian brought him there. . . . Told him so he could get his gun back.[2]

Q. And did Mr. Miller tell you if he knew what was going to happen or not to Mr. Francis when he brought him to Sigourney Street?

A. Yes.

Q. What did he say?

A. To get shot.

Q. Did Mr. Miller tell you who was going to shoot him.

A. Little Sweets.

* * * *

Q. And what, if anything, did Mr. Miller say happened when he and Mr. Francis arrived on Sigourney Street that night?

A. He say he got out of the car to use the bathroom ***and watched Little Sweets walk up and shoot him.***

4/15/2016 Tr. (Vol. V) 1026-28, App. 90-91. [The objected-to testimony is emboldened and italicized.]

Farmer was also permitted to testify, over objection, that about a week before the shooting, Miller had offered to trade a black nine millimeter handgun

[2] *I.e.,* that the decedent had driven Miller to Sigourney Street so that Miller could return to him the handgun that he had borrowed.

for Farmer's .40 caliber Smith & Wesson. Farmer was not interested. A week or two after Francis was shot, Farmer testified, Miller made another offer. This time, Miller offered to throw in an extra $200 on his side of the trade.

> Q. What, if anything, did Mr. Miller say as to why he wanted to trade the gun, his gun for yours on the second occasion?
>
> A. Because he didn't want it no more.
>
> * * * *
>
> ***Q. Yes or no, did Mr. Miller mention anybody else in that conversation?***
>
> * * * *
>
> ***A. Little Sweets.***
>
> ***Q. How did he mention Little Sweets?***
>
> ***A. Said it was his gun.***

Id. 1039-40, App. 103. (Again, the objected-to testimony is italicized and emboldened.)

Discussion: Rule 804, Federal Rules of Evidence, provides that "statements against interest" are not excluded by the rule against hearsay, so long as the declarant is unavailable as a witness. A statement against interest is a statement that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Id., Rule 804(b)(3). A declarant is considered to be unavailable as a witness if the declarant "is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies." *Id*. Rule, 804(a)(1).

Unavailability: This Court has noted that "it is the duty of a court to determine the legitimacy of a witness's reliance upon the Fifth Amendment. A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give." *Roberts v. United States*, 445 U.S. 552, 560 n. 7 (1980). Furthermore, "[a]s to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a `real danger' of further crimination." *Rogers v. United States*, 340 U.S. 367, 374 (1951). The government and the district court declined to bring Miller in from jail and inquire if he still intended to claim the privilege. It did not determine the nature of the "other matters that could be delved into" about which Miller was apparently concerned. It did not decide "[h]ow narrowly the . . . questions should be circumscribed to avoid impairing [Miller's] fifth amendment privilege and what the consequences of that would be," *United States v. Bowe*, 698 F. 2d 560, 566 (2d Cir. 1983).

Unavailability procured by the government: There is a further, more troubling factor in the trial court's finding that Miller was unavailable.

Rule 804(a), Fed. R. Evid. provides that out-of-court statements of

unavailable witnesses are not admissible "if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying" – precisely the situation created here by the government's plea agreement. Concerted efforts by prosecutorial authorities to prevent a witness from testifying may violate the due process guaranteed by the fifth amendment. *See, e.g., United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976) (after witness indicated her willingness to testify for the defendant, prosecutor and investigating agents repeatedly threatened her with a perjury prosecution and she invoked the privilege; immunity should have been granted). *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir. 1988) (listing and describing cases of alleged prosecutorial misconduct with respect to witnesses); *United States v. Dolah*, 245 F. 3d 98, 104 (2d Cir. 2001) (Rule 804(a) applies to circumstances where the Government takes positive action to preclude the witness from testifying).

Here, as the trial court observed without contradiction, the prosecution's view was "look, we don't want him on the stand." 6/9/2015 Tr. (ECF #383) 10, App. 077. The government made sure Miller did not take the stand by arranging, with the participation of the district court, that he would face a life sentence if he did. The prosecution thus, in the words of Rule 804(a), procured the declarant's unavailability in order to prevent the declarant from testifying.

The Court of Appeals, as noted, was "deeply troubled by the government's use of such a provision. . . which significantly constricted [Miller's] testimony by

requiring that it be identical to the facts elicited in is proffer." 954 F.3d at 562, App. 007. Nevertheless, the Court of Appeals declined to hold that the government had caused the unavailability of the witness in large part because the issue was not raised below and review was limited to plain error. 954 F.3d at 562-63, App. 006-007.

The issue, however, *was* raised below, perhaps not *in haec verba* but at least in substance. The defense demanded that Miller be brought before the district court so that the court could conduct an inquiry as to his intentions concerning testimony. At such a hearing, the court would have determined: Did Miller intend to invoke the privilege? As to all questions? Or was he just worried about violating his plea agreement? The Court of Appeals and the Court should reconsider the Court of Appeals's holding the defense at fault for failing to raise an issue when the district court refused to conduct the hearing at which the issue could be raised.

Statement against interest: Admission of out-of-court statements under Rule 804(b)(3) is strictly circumscribed by the Supreme Court's holding in *Williamson v. United States*, 512 U.S. 594, 599 (1994).

In *Williamson*, officers discovered suitcases filled with cocaine in a vehicle driven by Reginald Harris. In post-arrest interviews, Harris told officers that he had been transporting the cocaine to Atlanta for Williamson, and that Williamson, driving in front of him, had observed the motor vehicle stop that had led to the discovery of the cocaine. Called as a witness at Williamson's trial, Harris was

granted immunity, refused to testify, and was held in contempt. 512 U.S. at 598. His post-arrest statements were introduced as statements against interest, admissible pursuant to Rule 803(b)(3).

This Court held that Rule 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." 512 U.S. at 600-01. Harris' statement that he knew that there was cocaine in the suitcase was admissible under Rule 804(b)(3), but other parts of his confession, especially the parts that implicated Williamson, were not: "A reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability, as least as far as sentencing goes. Small fish in a big conspiracy often get shorter sentences than the people who are running the whole show. . . ." 512 U.S. at 604.

The Court ruled similarly in *Lilly v. Virginia*, 527 U.S. 116 (1999). Three men had carried out a crime spree that ended up in a car-jacking and murder. After arrest, Mark Lilly told the police that his brother, the petitioner Benjamin Lee Lilly, had masterminded the crime spree and had been the one who had killed the victim. Mark was called as a witness at his brother's trial but invoked his privilege against self-incrimination. The state then introduced as statements against interest the tape recordings and written transcripts of Mark's post-arrest statements admitting his participation and naming his brother as the mastermind and shooter. 527 U.S. at 122-23.

This Court held that Mark's out-of-court statements were improperly admitted. "It is clear that our cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability.' *White* [*v. Illinois*, 502 U.S. 346, 357 (1992)]." 527 U.S. at 117.

While the facts of the cases are different, it is impossible to distinguish Miller's statements implicating Mack from Harris' statements implicating Williamson or Mark Lilly's implicating his brother. Miller had a strong self interest in falsely implicating Mack. A shooter is generally viewed as more culpable than a facilitator. *See Williamson v. United States*, 512 U.S. 594, 604 (1994) (opinion of O'Connor, J.); *United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007) (statement of one co-defendant that implicated another was admissible because "declarant was not attempting to minimize his own culpability, shift blame onto" his co-defendant). At the time of the statement, Miller had, in the words of the Rule, "proprietary and pecuniary interests" even more pressing than some ultimate penal sentence. At Francis' funeral, the mourners had cast dangerous looks Miller's way, because they thought that Miller had killed Francis. 4/15 Tr. (vol.V) (ECF#469) 1024. Farmer himself was contemplating killing the killer of Francis. 4/15 Tr. (vol.V) (ECF#469) 1045. It was strongly in Miller's interest to shift blame to someone else, and Mack was a convenient patsy.

The Court of Appeals also erred in finding that there were corroborating

circumstances indicating "both the declarant's trustworthiness and the truth of the statement." *United States v. Lumpkin*, 192 F.3d 280, 287 (2d Cir.1999). [T]he inference of trustworthiness from the proffered 'corroborating circumstances' must be strong, not merely allowable." *United States v. Salvador*, 820 F.2d 558, 561 (2d Cir. 1987); *accord*, *United States v. Dupree*, 870 F.3d 62, 80 (2017). Where the declarant makes conflicting assertions, the proponent fails to satisfy the corroboration requirement of Rule 804(b)(3)(B). *United States v. Jackson,* 335 F. 3d 170, 179 (2d Cir. 2003). Where a declarant seeks to minimize his own culpability or shift blame onto another, the statement is not against interest. *United States v. Williams*, 506 F. 3d 151, 155 (2d Cir. 2007). "To effectuate [the] purpose [of the rule], we require corroboration of "both the declarant's trustworthiness as well as the statement's trustworthiness." *United States v. Bahadar*, 954 F.2d 821, 829 (2d Cir.1992) (emphasis in original).

As to the trustworthiness of Miller's statements, "a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Lee v. Illinois*, 476 U. S. 530, 541 (1986) (internal quotation marks omitted). Miller had, moreover, made an alarming variety of inconsistent statements. He had told the 911 dispatcher that he had not seen the shooter. 4/11 Tr. (v.I) (ECF #465) 81. He told Francis's girlfriend at the hospital that he been upstairs in a house, heard gunshots, and came down to find Francis wounded. 4/12 Tr. (v.II)(ECF #466) 459-60. He told Detective Mendoza that Francis had been driving and he had asked Francis to pull over so that he could relieve himself

beside a building. 4/11 Tr. (v.I) (ECF #465) 73. He told Farmer the day after the murder that he did not know with whom Francis had been when he was shot. 4/15 Tr. (v.V) (ECF#469) 1023.

As to Farmer's credibility, he was, as we have noted, a twenty-four year old who had already earned five felony convictions and had eleven separate pending cases, a jailhouse informant with a history of seeking to curry favor in exchange for accusations against fellow inmates. While preparing for his testimony, Farmer told the prosecutors that he had committed other crimes about which they did not know and with which he had not been charged. 4/15 Tr. (v.V) (ECF#469) 1079-80. (The prosecutors had responded "Don't tell us about them." 4/15 Tr. (v.V). (ECF#469) 1080.)

Before discussing this case during his regular periodic meetings with law enforcement authorities, he had discussed the murder with Tyquan Lucien, Charels Jernigan, and other inmates. 4/15 Tr. (v.V) (ECF#469) 1072, 1076, 1111. He only thereafter provided information to the police – in August, 2011, eight months after the murder. 4/15 Tr. (v.V) (ECF#469) 1044.

He claimed to have been privy to three crucial pieces of evidence: (1) that Miller told him that Mack had done it; (2) that Francis told him that Mack had been angry at the Wynter Ruse; and (3) that Miller had tried to sell him a Ruger he said belonged to Mack.

Although he had regularly met with Hartford police (he estimated that he met with them approximately ten times, 4/15 Tr. (v.V) (ECF#469) 1054), he had

never disclosed to the Hartford police items 2 & 3; nor had he disclosed items 2 & 3 in his three meetings with federal investigators before he testified in the grand jury; nor did he disclose items 2 & 3 in the grand jury; nor did he disclose items 2 & 3 in his first five interviews following his grand jury testimony. 4/15 Tr. (vol.V) (ECF#469) 1098-99. He "forgot." He only remembered when he was being prepped as a witness for trial. 4/15 Tr. (vol.V) (ECF#469) 1102-03. By the time of trial, it had become obvious that motive was a problem: although Francis had discussed the Wynter Ruse with Wynter, Brinson and Ben Francis, Jr., he had never told anyone that Mack was displeased by it. By the time of trial, it was obvious, too, that it was going to be difficult to pin the Ruger to Mack, given that it had been used over and over by Tyquan Lucien. Like all great linebackers and jailhouse informants, Farmer perceived a gap and jumped in to fill it.

Finally, there is a significant probability that whatever information Farmer had about the Francis murder he had learned from Tyquan Lucien when they were together in jail. Farmer admitted that he had spoken with Lucien about the murder, but said that the conversation consisted of his telling Lucien to stop telling everyone about the murder. 4/15 Tr. (vol. V) (ECF#469) 1076. What Lucien (and Jernigan) had told him about the murder, Farmer claimed he already knew. 4/15 Tr. (vol.V) (ECF#469) 1111. The case agent, too, testified that during his first interview, Farmer had admitted that he had talked with Lucien about the murder when they were in jail together, and that the agent had checked jail records to make sure that they had been in jail together. 4/21/2016 Tr. (v. IX) 1977.

For his part, Tyquan Lucien admitted that he and Francis had discussed shootings while they were in jail together, but denied that they had discussed the Francis shooting. A 194-98.

The jury, at least, did not find that the circumstances corroborating Miller's statements compelling: after consideration of all the evidence, it acquitted Dominique Mack of the murder.

The Court of Appeals found that Farmer's claim that Miller said that Mack shot Francis was harmless -- was unimportant in relation to everything else in the record. A witness's testimony that someone involved in a murder told him that he saw the defendant commit the murder can hardly be harmless, and the "everything else in the record" to which the Court of Appeals referred was the testimony of the other co-defendant, Tyquan Lucien. *See* 954 F.3d at 564-65.

Lucien, like Mack and Miller, faced a mandatory life sentence. He entered into an agreement with the government to cooperate, eventually being sentenced to sixteen years for his efforts. Between the Francis shooting on December 20, 2010, and June 15, 2011, when the Ruger was seized by law enforcement, Lucien used the murder weapon about ten times. 4/18 Tr. (vol.VI) (ECF#470) 1404. (He may have used the murder weapon on more than the ten occasions when forensic evidence was able to link a shooting to the murder weapon. He could not remember. 4/18 Tr. (v.VI) (ECF#470) 1478.) Fortunately, Lucien was a bad shot

and all the shootings resulted in a single wounding.[3]

The Court of Appeal's affirmance of the district court's finding that Miller was an unavailable witness, that the government did not procure the absence of Miller, that Miller's statements that Mack shot Francis were self-inculpatory, and that Farmer's testimony that Miller said Mack shot Francis was credible, and that the testimony harmless has so far departed from this Court's jurisprudence concerning admission of statements against interest as to call for an exercise of the Court's supervisory power. The Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

2. The Court should grant certiorari in order to resolve a conflict among the circuits as to whether the failure to set forth in an indictment an essential element of an offense, the failure of a district court to instruct a jury as to an essential element of an offense, and a jury's verdict of guilty without any finding that an essential element of the offense has been proven beyond a reasonable doubt, constitute plain error.

Factual and procedural background: Dominique Mack was convicted of two counts in violation of 18 U.S.C. § 922(g), which provides that "[i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or

[3]The shootings are described in detail at pp.9-11 of our principal brief. Prior to the Francis murder, Lucien had committed at least three armed robberies, but he denied that he had used the Ruger during these robberies and claimed that he had used other weapons (a Glock and a shotgun, the whereabouts of which he did not know) in order to commit the robberies. 4/19 Tr. (v.VII) (ECF#471) 1440-42. He also claimed that he did not know that when he was shooting at people with the Ruger, that he was using the murder weapon, although he testified that the Ruger had been brought out of Jernigan's closet and shown to him in the meeting in Jernigan's apartment just before Francis was killed.

affecting commerce, any firearm." The indictment did not allege one essential element of the offense -- that the defendant knew he belonged to the relevant category of persons (in this case, convicted felons) who were forbidden from possessing a firearm. The district court did not instruct the jury that the government was required to prove that Dominique Mack knew that he belonged to a category of persons barred from possessing a firearm. 954 F.3d at 558.

While Mack's appeal was pending, the Court decided *Rehaif v. United States,* 139 S.Ct.2191 (2019), in which it held that a noncitizen had to know his status as an illegal immigrant in order to be guilty of violating another subsection of 18 U.S.C. § 922(g), which prohibits "an alien. . . illegally or unlawfully in the United States" from possessing a firearm. Since *Rehaif*, courts have universally held that the knowledge-of-status *mens rea* element identified by *Rehaif* (which, for brevity's sake, we shall refer to as "*Rehaif knowledge")* encompasses convicted felons in possession of firearms, who must be proven to have known that they have been convicted of an offense punishable by more than one year's imprisonment in order to satisfy the elements of section 922(g).

Following the announcement of the *Rehaif* decision, Dominique Mack argued that the failure to include in the indictment *Rehaif*-knowledge as an essential element of the offense deprived the district court of jurisdiction requiring the dismissal of the indictment, and that the failure to instruct the jury as to one of the elements of the offense was plain error requiring a reversal of the conviction. 954 F.3d at 557-58.

After the supplemental briefs had been filed, the Court of Appeals decided *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019), holding that the Balde indictment's failure to allege that the defendant knew that he held the status of an illegal alien "does not mean that the indictment fails to allege a federal offense in the sense that would speak to the district court's power to hear the case." 943 F.3d at 91.[4] The *Balde* decision bound Mack's Court of Appeals and it rejected Mack's claim that the indictment's failure to allege *Rehaif* knowledge was a jurisdictional defect requiring dismissal. Summary Affirmance at 2-3, App. 015-16.

As to the failure to instruct the jury, the Court of Appeals reviewed the issue under the plain error doctrine, which considers whether (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. 954 F.3d at 557-58.

The Court of Appeals held that the first two prongs of plain-error review were satisfied. As to the third requirement, that the error "affected [Dominique Mack's] substantial rights," the Court of Appeals recognized that the question "is a difficult one, given the paucity of factual development at trial pertaining to a question that was not discerned before *Rehaif* was decided." 954 F.3d at 559.

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[4]Balde did not seek further review of this part of the ruling, because he prevailed on the question of whether he had suffered substantial harm as the result of the failure to include *Rehaif* knowledge as an element of the offense during his plea proceeding.

App. 004. The Court of Appeals chose to not reach a determination of the third element, finding instead that the fourth requirement for plain error – that the error seriously affect the fairness, integrity or public reputation of judicial proceedings – was not satisfied. 954 F.3d at 559-60, App. 004-005.

The Court of Appeals's decision as to fairness, integrity and public reputation was based upon the entire record of the proceedings below, not just on the trial record. During the second phase of the trial below, in which the firearm-possession counts were tried, Dominique Mack and the government had stipulated that "prior to December 21, 2010, Dominique Mack was convicted of a crime punishable by imprisonment for a term exceeding one year in Connecticut Superior Court, Judicial District of Hartford." 4/27/2016 Tr. (vol. XIII) 2224, Court Exhibit 3. That was the extent of the evidence introduced at trial and jury's knowledge about Mack's previous convictions.

The presentence report, however, stated that Mack had been convicted when he was seventeen for three felonies he had committed in a single incident at the age of sixteen. He had been sentenced to a total effective sentence of ten years suspended after three years.

In determining whether the *Rehaif* error had affected Mack's trial rights, the Court of Appeals was reluctant to consider evidence outside the trial record, but in determining whether the error the error seriously affected the fairness, integrity or public reputation of judicial proceedings, the Court of Appeals considered the information set forth in the PSR. The information reported in the PSR, in the

Court of Appeals's view, "removes any doubt that Mack was aware of his membership in § 922(g)(1)'s class ." Allowing the convictions to stand in these circumstances would not seriously affect the fairness, integrity, or public reputation of the court, 954 F.3d at 559-60, App. 004-005 -- despite the defendant's never having been charged with or found by a jury to have committed one element of the offense.

Discussion: The Court of Appeals's decision is in direct conflict with a published decision of the Court of Appeals for the Fourth Circuit, *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020).

Gary was a defendant similar in many respects to Dominique Mack. Gary had been convicted of second degree burglary and had been sentenced to eight years suspended after three years, of which he served 691 days. Unlike Dominique Mack, Gary pleaded guilty. There had been no acknowledgment during his Rule 11 canvass that *Rehaif* knowledge was an element of the offense and he had not admitted to such knowledge during the plea proceeding or elsewhere. 954 F.3d at 199. As it did with Mack, the government argued that evidence in the presentence report established that Gary must have been aware that he had been convicted of a crime punishable by imprisonment of more than a year. 554 F.3d at 201 n.5.

The Court of Appeals held that "[r]egardless of evidence in the record that would tend to prove that Gary knew of his status as a convicted felon," 954 F.3d at 207, the failure to inform Gary that by pleading guilty he was admitting the

Rehaif-knowledge element of the offense was structural error that affected substantial rights. Acceptance of such a plea would seriously affect the fairness, integrity or reputation of judicial proceedings. 954 F.3d at 207.

The government's motion for rehearing en banc in *Gary* was denied on July 9, 2020. ECF # 64. The government immediately moved to stay the mandate. ECF # 65. In its motion, the government asserted that the Fourth Circuit's *Gary* decision

> has created two rapidly broadening circuit splits and 'an equally profound schism with the Supreme Court's whole approach to error review and remediation.' *United States v. Gary*, --- F.3d ----, 2020 WL 3767152, at *1 (4th Cir. July 7, 2020) (Wilkinson, J., concurring in denial of petition for rehearing en banc). Because a petition for a writ of certiorari, if authorized, would set forth two substantial questions for the Supreme Court, the Government respectfully requests this Court grant its motion to stay the mandate.

United States Motion for Stay of Mandate (ECF # 65) (filed July 8, 2020, granted July 9, 2020) at 5, App. 115.

This Court should grant the petition in order to resolve this conflict between the Court of Appeals for the Second Circuit and the Court of Appeals for the Fourth Circuit.

3. The Court should grant the petition in order to consider a glitch in the sentencing statutes, where the statute imposes a mandatory life sentence "in the case of a killing" and the defendant has been convicted of a conspiracy to murder in which there was no killing.

Factual and procedural background: The defense argued in the district court and on appeal that, given the jury's verdict and the limitations on judicial fact-finding in sentencing, the court was not statutorily authorized to impose life

sentences on counts one and four, the conspiracy counts. *See* ECF #411. The district court rejected the argument in a thorough opinion that recognized that there was no authority directly on point. 11/1/2016 Tr. 18-29, 35-36. The Court of Appeals affirmed. 954 F.3d at 566-68. App. 009-011.

Discussion: Mr. Mack was found guilty on counts 1 (conspiracy to murder Francis) and 4 (conspiracy to murder Jernigan), in violation of 18 U.S.C. § 1512(k). He was found not guilty on counts 2 and 3 (murdering Francis). ECF #344. The statutorily authorized punishment in these circumstances is not immediately obvious.

Section 1512(k) provides that Mr. Mack is "subject to the same penalties as those proscribed for the offense the commission of which was the subject of the conspiracy."

That offense, the indictment alleged, was he murder of Ian Francis in violation of 18 U.S.C. § 1512(a)(1)(c) and 2.

Those who violate 18 U.S.C. § 1512(a)(1)(c) "shall be punished as provided in paragraph (3) [of that section]."

Section 1512(a)(1)(c)(3) provides that "*in the case of a killing*," the punishment should be that provided in 18 U.S.C. § 1111 and 1112; in the case of an attempt to murder, a maximum of 30 years; in the case of attempted use of physical force against a person, 30 years; and in the case of threat of physical force, 20 years. No other punishment is provided by paragraph (3).

This presents a conundrum. The difficulty is most apparent in considering

count four, the conspiracy to murder Jernigan. There was no "killing" of Jernigan only talk of killing him.

The difficulty is every bit as real in considering count one because Mack was acquitted of killing Francis.

How could the jury acquit Mack or murder while convicting him of conspiracy to murder? The trial court instructed the jury that Mack should be found guilty if he actually committed the murder, or if he counselled that it should be done, if he commanded it, if he induced another to commit it, if he procured its commission, if he aided or abetted in its commission, if he associated himself in some way with the crime and participated in it by doing some act to help make that crime succeed. Jury Instructions (ECF # 337) at p. 34. The Court also instructed the jury that Mr. Mack did not need to have had a subjective intent to kill, and that it would be sufficient if there had been reckless and wanton conduct. Jury Instructions (ECF # 337) at p. 30. Despite being instructed concerning all the different ways that Mack could be guilty of killing, and all the different intents that would make him culpable, he was found not guilty of killing Francis.

The trial court also instructed the jury that "[i]ndeed, you may find the defendant guilty of the crime of conspiracy even though the substantive crime which was the object (or objective) of the conspiracy was not actually committed." Jury Instructions (ECF # 337) at p. 37. The instruction comports with well established law. *See United States v. Rosengarten*, 857 F. 2d 76, 79 (2d Cir. 1988); *United States v. Ingredient Technology Corp*., 698 F.2d 88, 98 (2d Cir.

1983).

While it is always perilous to attempt to parse a jury's verdict, the only way this verdict makes sense is that the jury found that Mack had conspired to murder Francis, but that the particular conspiracy into which he entered was not responsible for the killing. As the government wrote in its Memorandum in Opposition to Motion for Reconsideration (ECF # 407) at 9-10: "a jury could reasonably found that Mack conspired with others -- not necessarily Miller, to murder Francis" and Miller may have killed Francis as part of a different conspiracy involving Miller's unreturned gun. Or Mack could have conspired, but Francis may have been killed as a result of his feud with Karanja Thomas."

Whatever the rationale for the jury's verdict, one thing that is clear: The district court was not authorized to increase Mack's sentence by making its own factual finding that Mack was responsible for a killing. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Alleyne v. United States*, 570 US 99 (2013). The killing is a fact that, by law, increases the penalty for violations of 18 U.S.C. §1512(k). It is an "element" that must be submitted to the jury and found beyond a reasonable doubt. That element was submitted to the jury and the jury did not find that the killing had been proven.

There is thus a glitch in the statutory sentencing provisions for cases in which there has been a conspiracy to murder a witness that results in no actual killing.

The Court of Appeals perceived no glitch: it held that the statutory scheme

did not require an actual "killing": a conspiracy to murder a witness was punishable by a mandatory life sentence even if the conspiracy resulted in no harm to anyone. 954 F.3d at 566, App. 009-010.

In *United States v. Evans*, 333 U.S. 483 (1948), this Court affirmed the dismissal of an indictment where the statute of conviction did not contain any provision for punishment. The Court rejected the government's invitation to choose among various punishments possibly suggested by the legislative enactment. The Court held that where a statute did not specify among possible punishments, the Court was not authorized to correct the statutory deficiency.

An offense for which no imprisonment is authorized is an infraction. 18 U.S.C. § 3559(a)(9). A defendant may be fined for an infraction in an amount of not more than $10,000. A defendant may be imprisoned for an infraction for not more than five days. 18 U.S.C. §3581(b)(9). An infraction is a petty offense, 18 U.S.C.§ 19, and a term of supervised release is not authorized for petty offenses, 18 U.S.C. §3583(b). A term of probation of up to one year may be imposed. 18 U.S.C. § 3561(c)(3). The Court must assess a $5 special assessment. 18 U.S.C. §3013(1)(A)(1). Given the jury's verdict and the limitations on judicial fact finding at sentencing, this is the maximum punishment that can be imposed upon Dominique Mack for entering into the two conspiracies that violated 18 U.S.C. § 1512(k).

The question of whether a conviction for conspiracy to murder requires a

mandatory life sentence where no killing has occurred is an important question of federal statutory law that has not been but should be settled by this Court.

4. This Court should grant the petition in order to determine whether the imposition of mandatory life sentences in cases of conspiracies to murder where no one is harmed violate the Fifth Amendment guarantee of due process, the Eighth Amendment prohibition against cruel and unusual punishment and the separation of powers doctrine.

Factual and procedural background: In the district court, the defense argued that that the mandatory, automatic, non-discretionary life sentences that the district court believed that it was required to impose violated the fifth and eighth amendments and the constitutional separation of powers. ECF #400. The district court rejected these arguments and imposed concurrent life terms. 11/1/2016 Tr. (ECF # 487) 26-31, A276-281.

The Court of Appeals rejected those arguments as well, noting that this Court's cases on which we relied all turn on the fact that the defendant in those cases was a juvenile. 954 F.3d at 566-67, App. 009-010.

Discussion: Dominique Mack was sentenced to two terms of life imprisonment for talk that resulted in no physical harm befalling anyone. This is not to say that conspiracies to murder should not be punished. It is to say that conspiracies that result in no physical harm should not be punished by mandatory life sentences with no possibility of release and violate the Fifth and Eighth Amendments to the Constitution and the Separation of Powers Doctrine.

The sentences violate the Fifth Amendment because due process requires an individualized sentence that accounts both for the characteristics of the offense

and the offender when the defendant is exposed to life in prison without a chance for release.

The sentences violate the Eighth Amendment because our evolving standards of decency in society counsel that the imposition of a mandatory life sentence is "cruel and unusual" punishment under the decades-long recognition that punishment "should be graduated and proportioned" to both the offender and the offense," *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48, 59 (2010) – a calculation rendered impossible under mandatory sentencing schemes.

This Court has determined that the Eighth Amendment forbids the imposition of the death penalty on any juvenile offender, *see Roper v. Simmons*, 543 U.S. 551, 578 (2005), the imposition of life imprisonment without parole on a juvenile offender not convicted of homicide, *see Graham v. Florida*, 560 U.S. 48, 74 (2010), and the mandating of a sentence of life imprisonment without parole for a juvenile offender convicted of homicide, *see Miller v. Alabama*, 567 U.S. 460 (2012). The Court should grant the petition in order to consider whether the reasoning of those cases should be extended to Mr. Mack's. Considering "the gravity of [Mr. Mack's] offense and the harshness of the penalty," *Solem v. Helm*, 463 U.S. 277, 290–291 (1983) and for all of the reasons discussed in cases such as *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) and *Williams v. New York*, 337 U.S. 241 (1949), and with due consideration to "evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U. S.

86, 101 (1958), the constitutional imperative of individualized sentencing should be extended to those who face sentences of life in prison with no possibility of release for the crime of entering into conspiracies that have resulted in no physical harm.

In completely removing a sentencing judge's discretion to sentence conspirators who have caused no physical harm, Congress has unconstitutionally usurped the sentencing power of federal judges. This is not the case where Congress has announced a mandatory minimum or a range of possible sentences, from which a sentencing judge can start an individualized analysis of the offender and the offense to reach an appropriate sentence. Under § 1111(b), there is no range or minimum sentence. There is one mandated, mechanical sentence: life without the possibility of parole. Requiring skilled federal judges to impose mandatory life sentences under a structure that is objectively and subjectively mindless violates the most basic premise of the separation of powers doctrine.

We urge the Court to grant the petition in order to consider whether requiring a federal judge to impose a sentence of life without release where there has been a conviction for conspiracy to murder but no one has been harmed violates the fifth and eighth amendments, improperly interferes with judicial decision-making, and is an impermissible exercise of congressional authority to limit the scope of judicial discretion with respect to a sentence. *Cf. Mistretta v. United States*, 488 U.S. 361, 364 (1989) (discussing separation of powers in the context of establishment of the Sentencing Guidelines). This is an important

matter of federal law that has not been, but should be, settled by this Court.

CONCLUSION

For the above-stated reasons, the petitioner Dominique Mack respectfully requests that his petition for a writ of certiorari to the Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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Date: August 14, 2020