No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DEE GILMORE, JR.

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BRESNEHAN
Law Offices of Michael J. Bresnehan, P.C.
1761 East McNair Drive, Suite 101
Tempe, AZ 85283-5002
Telephone: (480) 345-7032
mbresnehan@hotmail.com
Attorney for Petitioner

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QUESTIONS PRESENTED

1. In failing to require the government to meet its heavy burden to show that defendant's post–invocation waiver of his *Miranda* rights, including his Sixth Amendment right to counsel, was voluntary, did the Ninth Circuit Court of Appeals establish a troubling precedent that is clearly inconsistent with the Supreme Court's holdings in *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Lego v. Twomey*, 404 U.S. 477 (1972)?

2. Did the Ninth Circuit Court of Appeals' conclusion that HSI interrogators' threats and promises were not improper establish a far–ranging and troubling precedent that is clearly inconsistent with the Supreme Court's holding in *Hutton v. Ross*, 429 U.S. 28 (1976)?

3. Did the Ninth Circuit Court of Appeals' decision to allow the unindicted personal–use methamphetamine found in defentant's pocket to support a lesser–included verdict of simple possession of methamphetamine violate defendant's Fifth Amendment right to an indictment, and establish a far–ranging and troubling precedent that is clearly inconsistent with the Supreme Court's holding in *Stirone v. United States*, 361 U.S. 212 (1960)?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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The Petitioner, James Dee Gilmore, Jr. ("Gilmore"), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner's positions asserted herein.

OPINION BELOW

The underlying conviction and sentence was entered on October 2, 2018. (Appendix A, hereto)

The Ninth Circuit Court of Appeals issued a Memorandum Decision denying relief on April 29, 2020. (Appendix B, hereto) On June 11, 2020, Gilmore filed a petition for panel rehearing and rehearing *en banc*. That petition was denied on July 17, 2020. (Appendix C, hereto) The district court's minutes and orders are unreported.

JURISDICTION

The Order of dismissal of the United States Court of Appeals for the Ninth Circuit denying relief was entered on April 29, 2020. That Court had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides as follows:

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.

STATEMENT OF THE CASE

On June 13, 2017, an indictment was filed in the United States District Court, District of Arizona, charging Gilmore with one count of Importation of Methamphetamine, in violation of 21 U.S.C. §§ 952(a) and 960(a) and (b)(1)(H), one count of Possession with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii), and forfeiture allegations, pursuant to 18 U.S.C. § 981, 21 U.S.C. §§ 853 and 881, and 28 U.S.C. § 2461(c).

Gilmore's case went to trial on September 12, 2017. After the trial, the jury found Gilmore guilty on both counts of the indictment, as originally charged.

On January 29, 2018, Gilmore filed a timely motion for new trial (CR 117; ER VOL. II, pp. 235-252) (CR 122; ER VOL. II, pp. 233-234), arguing that the court's various pretrial evidentiary rulings were improper, as was the "deliberate ignorance" jury instruction. Gilmore added that the district court improperly allowed the jury to deliberate on a third, unindicted crime, to wit: simple possession of the methamphetamine found in Gilmore's pocket. The district court denied Gilmore's motion for a new trial.

On October 1, 2018, the district court sentenced Gilmore to 151 months custody at the Bureau of Prisons on each of Counts 1 and 2 of the indictment, to run concurrently, with credit for time served, and each to be followed by a consecutive 60-month term of supervised release, those terms to run concurrently. A special

assessment of $200.00 was imposed.

CASE HISTORY

The government alleged that during the afternoon hours of May 16, 2017, Gilmore, a United States citizen, applied for admission from the Republic of Mexico into the United States through the San Luis, Arizona, Port of Entry. Gilmore provided a negative customs declaration around the same time that a Customs and Border Protection ("CBP") canine alerted to the spare tire of the truck he occupied. The spare tire also produced a high reading from a density detector ("buster") employed by one of the CBP officers. Gilmore was removed from the truck and placed in handcuffs. Officers conducted a pat down of Gilmore prior to escorting him to a secondary inspection area. During the pat down, officers discovered a small plastic bag in Gilmore's pocket containing a white crystalline substance that was later determined to be methamphetamine.

When the truck was inspected, CBP officers discovered 46 clear, vacuum sealed packages hidden within the spare tire. The white crystalline substance in those packages had a total weight of approximately 20 kilograms, and was later determined to contain methamphetamine. (See, e.g., CR 19, ER VOL. VII, pp. 1120-1122) [1]

[1] The abbreviation "CR" refers to the Clerk's record, and will be followed by the event number designated in the Clerk's file. The abbreviation "ER" refers to the excerpts of the record, and will be followed by the relevant page number referenced

After being placed in custody, Gilmore invoked his right to counsel and to remain silent. Later, rather inexplicably, Gilmore changed his mind, and submitted to a video-taped interrogation by Homeland Security Investigation ("HSI") agents.

Gilmore filed a pretrial motion to suppress certain statements he made to federal agents after he was arrested, and for a hearing to determine the voluntariness of those statements. (CR 20; ER VOL. VII, pp. 1048-1118)

Gilmore filed a motion in limine (CR 30; ER VOL. VII, pp. 1030-1043) asking the court to preclude the government from introducing at trial other-act evidence, including evidence that Gilmore had a small quantity of methamphetamine in his pocket when he was arrested.

After an evidentiary hearing, the court ordered all of Gilmore's statements made to federal agents prior to receiving his *Miranda* warnings suppressed, while denying Gilmore's motion as to all subsequent statements. (CR 67; ER VOL. I, pp.104-105)

The court denied Gilmore's motion in limine regarding the personal-use methamphetamine found in Gilmore's pocket, finding that it was inextricably intertwined with the charged crimes, and that it was also admissible under Rule

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in Appellant's Excerpts of the Record. "RT" refers to the Court Reporter's transcript, and will be followed by the relevant date and page number of the transcript. The abbreviation "HE" refers to pretrial hearing exhibits and will be followed by the exhibit number. "TE" refers to trial exhibits and will be followed by the exhibit number.

404(b), Fed.R.Evid. (CR 107; RT 9/07/17, pp. 21-22; ER VOL. I, pp. 113-114)

At trial, the government introduced evidence establishing that on May 16, 2017, Gilmore applied for admission into the United States through the San Luis, Arizona, port of entry. Gilmore was the driver and sole occupant of a 2002 Chevy Truck. Gilmore provided a negative customs declaration around the same time that a drug interdiction canine alerted to the spare tire that was connected to the undercarriage of the truck. Officers conducted a pat down of Gilmore prior to escorting him to the secondary inspection area. During the pat down, the officers discovered a small plastic baggie in Gilmore's pocket containing roughly three grams of methamphetamine. (CR 108; RT 9/12/17, pp. 173-176; ER VOL. V, pp. 731-734)

When the truck was inspected, CBP officers discovered 46 clear, vacuum sealed packages hidden within the spare tire. The white crystalline substance in those packages had a total weight of approximately 20 kilograms, and was later determined to contain methamphetamine.

At trial, a slightly redacted version of the video-taped post-invocation interrogation of Gilmore was admitted into evidence, and played for the jury. (Gov. TE 1) During that interrogation by HSI agents, Gilmore asserted that he was in Mexico visiting his girlfriend at a hotel near the United States/Mexico border. He needed to get back to his home in Yuma, and didn't have a working vehicle to get him there. A nearby mechanic who had previously worked on Gilmore's truck offered to

loan Gilmore a pickup truck provided he deliver it to the mechanic's brother in Phoenix. Gilmore planned to use the truck to return briefly to Yuma before delivering the truck to Phoenix. He further asserted that out of an abundance of caution, he searched the truck for contraband, and found a small baggie of methamphetamine in the bed of the truck which he put in his pocket. He steadfastly asserted that he knew nothing about the methamphetamine hidden in the spare tire of the truck. During that interrogation, Gilmore gave other, apparently conflicting, stories about the status and location of his own truck, but attributed some of that confusion to the pain he was experiencing. (Gov. TE 1)

Pictures of the seized baggie and its contents were admitted at trial, over Gilmore's objection. (CR 108; RT 9/12/17, pp. 185-187; ER VOL. V, pp. 743-745) (Gov. TEs 35, 36, 45) The government's expert (forensic chemist) testified regarding the presence of methamphetamine in the baggie found in Gilmore's pocket, and in the packages found in the spare tire, together with the weight and purity of same. (CR 109; RT 9/13/17, pp. 50-51; ER VOL. IV, pp. 456-457)

No forensic evidence was introduced in any pretrial proceeding, or at trial, establishing that the methamphetamine found in the spare tire, and that found in Gilmore's pocket, originated from the same source.

After failing to keep from the jury evidence of Gilmore's personal-use methamphetamine, Gilmore, through counsel, requested and received a "lesser

included" jury instruction, allowing the jury to find Gilmore guilty of simple possession of methamphetamine on Count 2, and allowing the jury to find, through its verdict form on Count 1, that the quantity of methamphetamine imported was less than 50 grams. This was obviously based on the erroneous assumption that the grand jury indicted on both the methamphetamine hidden in the spare tire, and the methamphetamine found in Gilmore's pocket. (CR 109; RT 9/13/17, pp. 141-145, 148-150; ER VOL. IV, pp. 547-551, 554-556) (CR 76; ER VOL. III, pp. 379-406) However, the grand jury transcript clearly shows that the grand jury indicted only on the methamphetamine hidden in the truck's spare tire. Thus, the unindicted methamphetamine in Gilmore's pocket was improperly merged with, and became part of, both counts of the indictment.

After the trial, the jury found Gilmore guilty on both counts of the indictment, as originally alleged.

On January 29, 2018, Gilmore filed a timely motion for new trial (CR 117; ER VOL. II, pp. 235-252) (CR 122; ER VOL. II, pp. 233-234), arguing that the court's various pretrial evidentiary rulings were improper. Gilmore added that the district court improperly allowed the jury to deliberate on a third, unindicted crime, to wit: simple possession of the methamphetamine found in Gilmore's pocket. The district court denied Gilmore's motion for a new trial.

On October 1, 2018, the district court sentenced Gilmore to 151 months custody

at the Bureau of Prisons on each of Counts 1 and 2 of the indictment, to run concurrently, with credit for time served, and each to be followed by a consecutive 60-month term of supervised release, said terms to run concurrently. A special assessment of $200.00 was imposed.

Gilmore filed a timely notice of appeal on October 2, 2018. On appeal, Gilmore raised the following claims:

A. The district court erred in denying Gilmore's motion to suppress his post-arrest statements to government agents;

B. The district court erred in denying Gilmore's motion in limine to preclude evidence that Gilmore possessed a small quantity of personal-use methamphetamine at the time of his arrest;

C. The district court erred in permitting the government's expert to testify regarding the structure and operation of drug trafficking organizations;

D. The district court erred in giving a "deliberate ignorance" jury instruction;

E. The district court erred in allowing the jury to deliberate on an unindicted criminal allegation, to wit: simple possession of the methamphetamine found in Gilmore's pocket;

F. The district court erred in denying Gilmore's motion for a new

trial; and

G. The district court erred in its application of the Sentencing Guidelines, resulting in a substantively unreasonable sentence.

In a Memorandum decision, a panel of the Ninth Circuit Court of Appeals denied relief. (See Memorandum decision attached hereto as Appendix "A") The panel held, *inter alia*, that Gilmore's post-arrest statements were made after knowingly, intelligently and voluntarily waiving his *Miranda* rights. The panel further held that a rational jury could have found that the government proved knowing possession of drugs, absent a finding of an intent to import or distribute them, and, therefore, the lesser included offense instruction was proper. On June 11, 2020, Gilmore filed a timely petition for panel rehearing and rehearing *en banc*. That petition was denied on July 17, 2020.

REASONS FOR GRANTING THE WRIT

In failing to require the government to meet *its* heavy burden to show that defendant's post-invocation waiver of his *Miranda* rights, including his Sixth Amendment right to counsel, was voluntary, the Ninth Circuit Court of Appeals has decided an important federal question in a way that is clearly inconsistent with the Supreme Court's holdings in *Edwards v. Arizona* 451 U.S. 477 (1981) and *Lego v. Twomey,* 404 U.S. 477 (1972*).*

In concluding that HSI interrogators' threats and promises were not

improper, the Ninth Circuit Court of Appeals has decided an important federal question in a way that is clearly inconsistent with the Supreme Court's holding in *Hutton v. Ross*, 429 U.S. 28 (1976).

In upholding the district court's ruling allowing the unindicted personal–use methamphetamine to support a lesser–included verdict of simple possession of methamphetamine, the Ninth Circuit Court of Appeals decided an important federal question in a way that is clearly inconsistent with the Supreme Court's holding in *Stirone v. United States*, 361 U.S. 212 (1960).

ARGUMENT

> **In failing to require the government to meet its heavy burden to show that defendant's post–invocation waiver of his *Miranda* rights, including his Sixth Amendment right to counsel, was voluntary, the Ninth Circuit Court of Appeals has decided an important federal question in a way that is clearly inconsistent with the Supreme Court's holdings in *Edwards v. Arizona* 451 U.S. 477 (1981) and *Lego v. Twomey,* 404 U.S. 477 (1972*)*.**

Here, Gilmore asserted his right to counsel during a first (aborted) interrogation, and was taken to a holding cell, awaiting transport to a nearby county jail. While the investigation of the drugs found in the spare tire continued, Gilmore had contact with CBP Officer Lara, accompanied by a CBP cohort. The video footage of the holding area outside of Gilmore's holding cell establishes that CBP Officer Lara and his cohort were the only persons who were likely in a position to

know that Gilmore had changed his mind, and wished to speak with the original interrogators without counsel being present. (Gov. HE 4, 9/07/17) Yet, at the suppression hearing, Lara denied discussing with Gilmore his post-invocation change of mind. (CR 107; RT 9/07/17, pp. 46-49; ER VOL. VI, pp. 875-878) The government failed to present *any* evidence at the suppression hearing regarding how Gilmore conveyed that change of mind to a yet-to-be-identified CBP officer, who, in turn, conveyed that request to the HSI interrogators, and what, if any, conversation occurred between Gilmore and CBP personnel that prompted Gilmore's change of mind. Thus, the government failed to even attempt to meet its heavy burden to show that Gilmore's post-invocation waiver of his *Miranda* rights, including his Sixth Amendment right to counsel, was voluntary. In *Edwards v. Arizona, supra*, this Court held, in pertinent part, as follows:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights….[He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. 451 U.S., at 484-485, 101 S.Ct. 1880.

In *Lego v. Twomey, supra*, this Court held that the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. *Id.* at 489.

In denying relief, the Ninth Circuit Court of Appeals effectively ruled that the government had no such duty – a troubling precedent running against the grain of clear Supreme Court precedent.

> **The Ninth Circuit Court of Appeals' conclusion that HSI interrogators' threats and promises were not improper established a far–ranging and troubled precedent that is clearly inconsistent with the Supreme Court's holding in *Hutton v. Ross*, 429 U.S. 28 (1976).**

During the second interrogation, and after obtaining Gilmore's purported waiver, the interrogators continued to press Gilmore to make incriminating statements, and to incriminate others, despite his persistent denials of prior knowledge of the presence of drugs in the spare tire. The agents told him they were not interested in him, but in others who were to receive the drugs on the United States side of the border. They told him he could help himself by confessing what he knows. In fact, the agents repeatedly insinuated that things would go better for him were he to simply tell them what they wanted to hear. (Gov. HE 2, 9/07/17)

The following excerpts are from the transcript of the second interrogation:

> …
>
> Q: Nothing's adding up.
>
> A: (Unintelligible). I mean if…
>
> Q: And I don't under so…
>
> A: And…

Q: You wanted to talk to us so just…

A: Yeah I mean, to clarify this up because I mean…

Q: (Unintelligible) reason to just – I *can't help if you lie*.

A: I'm not lying to you. I mean…

…

Q1: …I think somethings goin' on. You seem, um, you seem to kinda be distant or whatever. I'm not sure if it's the medical issue or it's like bills. I know a lot of people who get behind on bills and stuff, like, that but the bottom line is its all stacked up against you.

A: Yeah.

Q1: *And you need to help yourself by bein' honest with us*.

…

Q1: Let's be honest about the whole part man.

A: I will. I'm being…

Q1: *You gotta help yourself here*.

A: Yeah. I'm just…

…

Q1: *Try to help yourself out*.

A: I'm tryin' to help myself out. I mean, that's why I'm in here talkin' to you now. I mean, because I know…

…

Q1: *So you-you wanna take the fall for them*? For the people on that side and this side?

A: No I don't wanna take the fall for them. I mean…

Q1: Well that's what you're doin. Because you have 40 pounds or somethin'.

…

Q1: Well that's a lot of dope so *if you don't wanna help yourself I cant make you help yourself*.

A: I mean, how do you want me to help?

You know, I-I…

Q1: Be tellin' us…

…

Q1: *Uh, I think this is your pretty much last chance to be honest*. Um, I think I'm pretty much done so…

Q: I'm done.

A: Okay. Well (unintelligible)…

Q: Anything else you have, you wanna add?

…

Q1: I already know you're drug trafficking. What I wanna know is who you're workin' for and, like, where he wanted you to take the drugs. Like, I said you seem, like a good dude. I'm not really – *I don't*

really care about, like, getting' you up on drug trafficking charges. Just kinda what goes along with it when you have drugs in your vehicle. It's just…

…

Q1: *Well as of right now you're gonna take the fall for everybody so*…

A: So what names do you-(unintelligible) me to give you other than that? I mean, I'm not a drug trafficking. I wasn't – I'm not bringing
drugs across. I…

…

Q1: …I just wish you'd be honest but I already-I already told you what, um, what I was lookin' for. Like, *I said we're not that really interested in-in you but I'm-if you just wanna take ownership of everything than that's what you're gonna do*.

A: I mean, I wasn't supposed to meet anybody over here. They didn't tell me to meet nobody.

Q1: *Well when-when we talk to prosecutors and we tell 'em that you cooperated-that helps you. If you give us information that helps you. Um, you know, all sorts of those things help you out*.

A: 'Kay.

…

Q1: Um, but right now, you know, *you're not doin' yourself any favors by protecting them so*…

A: I mean, (unintelligible)

Q1: Like, I said you seem, like, a good guy so I don't – I don't…

A: Its not really get me (unintelligible)…

Q1: I don't wanna be rude to you.

A: I…

Q1: I don't wanna be rude to you.

A: If I tell you the truth, - I mean, that's not gonna get me outta jail here either.

Q1: *Its gonna help you. It could help you though. That's what I'm sayin*'.

A: Help me in what way though?

Q1: *Like, I said when you give information we take responsibility for what happened, that helps you. Um, when you give information that helps you. Uh, if you wanna work with law enforcement, um, by providing infroamtion-all that stuff helps you out. You know the deal. You-you been through this*.
…

(Gov. HE 2, 9/07/17)

That interrogation also included the following threat:

…

Q1: So I'm sayin; what would think if I was sittin' in that seat tellin' you all this story?

A: You'd think – I'd think you're crazy.

Q1: Yeah. 'Cause it doesn't make sense does it?

A: Yeah. No it doesn't. And – and it
Probly - not (unintelligible) all open my mind but all I can tell you is there's certain times of the day and especially, like, right
now that I go through these pain spells with this thing and it – it just taken-taken
over. So I mean, I was lucky earlier. I was able to lay down and go to sleep for a little while. You know, and I was tired and I laid down, I went to sleep. I mean, I wasn't on anything like…

Q1: Yeah.

A: All I can tell you is on – I'm really driving. I mean, to be honest with you it just – I'm – I'm not aware of doin' it. I mean, just doin' what I can to get my pickup (unintelligible).

Q: (Unintelligible).

A: So them tellin' me that he can't find it in (Somerton) – so now I need to call the police and report it stolen.

Q1: *Well I'm gonna be honest with you. We're gonna call the AUSA after this*…

A: Mm-hm.

Q1: *…and we're gonna tell him everything that's happened*.

A: Mm-hm.

Q1: *Um, you're gonna be goin' to jail tonight*.

A: Okay.

Q1: *Um, he's gonna ask us, you know, the*

whole story.

A: Mm-hm.

Q1: *An I'm gonna tell him the story. And he's gonna say, "Well…*

A: Think I'm crazy too.

Q1: *…did he – did he, uh, take responsibility? Does he feel bad? Did he have any reasons…*

A: Yeah – I do feel bad.

Q1: *…for doin' all this stuff?" Um, and at this point I'm gonna say, you know, "He's lying to us*.

A: Yeah.

Q1: *Um, I don't think he feels bad. I don't know what's goin' on with him*.

A: (Unintelligible) I do feel bad.

Q1: He se(EMS), like, a good guy…

A: I mean…

Q1: *…but I think maybe he just he's protecting these people…*

A: I mean, – I mean what do you…

Q1: …for whatever reason".
…

(Gov. HE 2, 9/07/17)

The clear implication conveyed by the agents to Gilmore was that they were not

particularly interested in Gilmore's role in the trafficking of the methamphetamine, and that he would be treated more leniently if he helped them to determine the source and destination of the drugs. Conversely, he would be treated more harshly if he failed to cooperate. All of this occurred while Gilmore's resolve was likely compromised by the stomach pain he complained of throughout the interrogation.

The appellate panel's conclusion that HSI interrogators' threats and promises were not improper appears to be contrary to this Court's holding in *Hutton v. Ross*, 429 U.S. 28, 30 (1976) (the test of voluntariness is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, *however slight*, or by the exertion of any improper influence).

> **The Ninth Circuit Court of Appeals' decision to uphold the district court's ruling allowing the unindicted personal–use methamphetamine to support a lesser-included verdict of simple possession of methamphetamine established a far–ranging and troubling precedent that is clearly inconsistent with the Supreme Court's holding in *Stirone v. United States*, 361 U.S. 212 (1960).**

The grand jury transcript makes clear that the small quantity of methamphetamine allegedly found in the bed of the borrowed truck was *not* part of the indictment, and, therefore, could not become a lesser-included count for the jury to consider. Ignoring the fact that there was absolutely no evidence in the record allowing the jury to find a lesser included offense on the *indicted* methamphetamine,

the panel held, as follows:

> There is no error shown in the decision to charge the jury on the lesser included offense of simple possession. Simple possession is a subset of the charged offenses, containing many common elements. A rational jury could have found that the government proved knowing possession of the drugs, absent a finding of an intent to import or distribute them. See *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007).

The panel's conclusion here appears to overlook the fact that Gilmore, himself, crossed into the United States with the 40+ pounds of methamphetamine hidden in the spare tire of the truck he was driving, and that the baggie of methamphetamine found in Gilmore's pocket clearly was not part of the indictment. If Gilmore knew, or should have known, the indicted drugs were hidden in the truck – a conclusion the jury necessary reached – no rational jury could have found that the government proved knowing possession of the drugs, absent a finding of an intent to import or distribute them. Thus, the lesser-included instruction was clearly improper, and, for a variety of reasons, fatally prejudicial.

The lesser included jury instruction constituted a constructive amendment to the indictment. See *United States v. Daniels*, 252 F.3d 411, 413 (5th Cir. 2001). While a defendant may waive a grand jury indictment, Rule 7, Fed.R.Crim.Proc, there is no evidence in the record that Gilmore, himself, knowingly, voluntarily and intelligently, waived his right to a grand jury indictment on the personal use methamphetamine. His attorney proposed submitting the unindicted methamphetamine as a lesser included offense to Count 2 without making any record

establishing that Gilmore wished to make a fully informed waiver of his right to an indictment. The constructive amendment violated Gilmore's Fifth Amendment right to be tried only on charges presented in an indictment returned by a grand jury. See *Stirone v. United States*, 361 U.S. 212, 217-18 (1960). In footnote 3 of that opinion, this Court observed:

> 3. Yet the institution (the grand jury) was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial. *Ex parte Bain*, 121 U.S. 1, 11, 7 S.Ct. 781, 786, 30 L.Ed. 849. See also *Costello v. United States*, 350 U.S. 359, 362, 363, note 6, 76 S.Ct. 406, 408, 100 L.Ed 397.

The error was plain, if not structural, as it arguably tainted the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by Gilmore virtually impossible. *Elamania v. White*, 136 F.3d 1234, 1237 n.1 (9th Cir. 1998).

While the jury found guilt on both counts of the indictment as charged, and rejected the "lesser included" options described in the jury instruction regarding

Count 2, and the verdict forms covering Counts 1 and 2, the jury was allowed to consider, *for whatever purposes it wished* (e.g., propensity to commit the acts alleged in Courts 1 and 2), a third crime that was not charged in the indictment.

Moreover, by characterizing the possession of the methamphetamine in the baggie as a lesser-included offense within Count 2, and allowing the jury to convict on Count 1 based exclusively on the baggie of methamphetamine, the Court improperly signaled a linkage between the substance in the baggie, and the drugs found in the spare tire, likely altering the jury's view of whether Gilmore had knowledge of the hidden methamphetamine, and affecting the verdicts on both counts.

Other act evidence, by its very nature, can be highly prejudicial, and is permitted only in limited circumstances for limited purposes, largely because of the natural tendency for people to view such evidence as evidence of a defendant's propensity toward criminality. *United States v. Hodges*, 770 F.2d 1475, 1479 (5th Cir. 1979). Such evidence, absent a proper limiting instruction, can be devastating in a case that turns largely on the credibility of the defendant, as was the case here. At best, Gilmore was painted as a drug-dependent criminal.

The district court clearly abused its discretion in allowing the jury to deliberate on an unindicted charge. The error implicated defendant's right to an indictment and due process under the Fifth Amendment. That error was not harmless beyond a

reasonable doubt.

Additionally, since the substance found in Gilmore's pocket was not part of the indictment, there was no evidence presented at trial permitting a lesser-included instruction on Count 2 based on the methamphetamine that *was* part of the indictment. Here, the district court had a duty to deny the request for a lesser included jury instruction, and the requested verdict forms, and to provide the jury with an other-acts limiting instruction. The Court committed plain error in failing to do so. Those errors affected Gilmore's substantial right to an indictment and due process. *Stirone v. United States*, 361 U.S. at fn.3; *United States v. Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015) (when an error is constitutional in nature and implicates a "structural" right, the error affects substantial rights). They also affected the integrity and reputation of the judicial process, as they likely changed the outcome of the trial on both counts. *United States v. Olano*, 507 U.S. at 725, 732 (1993).

Again, the doctrine of invited error does not apply here, as the record is devoid of any evidence of a voluntary, knowing and intelligent waiver of Gilmore's right to an indictment on the personal-use methamphetamine.

Here, Gilmore was clearly prejudiced by the jury instructions and the verdict forms compelling the jury's consideration of the baggie of methamphetamine that was not charged in the indictment. In placing its imprimatur on the district court's clearly improper decision to allow the unindicted methamphetamine to support a

lesser-included offense, the Ninth Circuit Court of Appeals established a far-ranging and troubling precedent that is clearly inconsistent with the Supreme Courts holding in *Stirone v. United States, supra*.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and remand the case with instructions to vacate Gilmore's conviction and sentence, and grant a new trial.

RESPECTFULLY SUBMITTED this 14th day of October, 2020 by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING—PROOF OF SERVICE

Michael J. Bresnehan, Attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

In accordance with Sup.Ct.R. 29.2, I have on this 14th day of October, 2020, caused to be delivered by UPS overnight delivery the original and ten (10) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to the Clerk, Supreme Court of the United States, One 1st St. NE, Washington, D.C. 20543, within the period prescribed in Sup.Ct.R. 13.1; and

In accordance with Sup.Ct.R. 29.5, I have on this 14th day of October, 2020, caused two copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC 20530-0001, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to Peter S. Kozinets, Assistant United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Petitioner, James Dee Gilmore, Jr., Registration No. 74059-408, FCI Bastrop, Federal

Correctional Institution, Post Office Box 1010, Bastrop, Texas 78602.

EXECUTED this 14th day of October, 2020.

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Michael J. Bresnehan
Attorney for Petitioner