IN THE SUPREME COURT OF THE UNITED STATES

==========

BULMARO CONTRERAS-FIGUEROA
aka, Israel Contreras,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

==========

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

==========

Stephen R. Hormel
Hormel Law Office, L.L.C.
17722 East Sprague Avenue
Spokane Valley, WA 99016
Telephone: (509) 926-5177
Facsimile: (509) 926-4318

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Is the Fifth Amendment right to a grand jury violated when a defendant enters a guilty plea to an indictment that alleges a conspiracy to commit an offense against the United States, the factual allegations specific to a general conspiracy offense under 18 U.S.C. § 371, but the district court sentences the defendant for a conspiracy to violate subchapter 1 of the Controlled Substance Act under 21 U.S.C. § 846, and such sentence exceeds the five-year maximum penalty for a general conspiracy offense under § 371?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authority

Constitutional Provision

Federal Statutes

Other References

No. _____

IN THE UNITED STATES SUPREME COURT

BULMARO CONTRERAS-FIGUEROA,
aka, Israel Contreras,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

Petitioner, BULMARO CONTRERAS-FIGUEROA (hereinafter Contreas-Figueroa) respectfully prays that a writ of certiorari issue to review the unpublished memorandum of the United States Court of Appeals for the Ninth Circuit entered on October 21, 2020, affirming the district court's imposition of a 220 month prison sentence.

OPINION BELOW

On October 21, 2020, the Ninth Circuit Court of Appeals entered an unpublished memorandum affirming the district court's sentence. The unpublished memorandum is attached in the Appendix (App.) at pages 1-4. The Ninth Circuit denied Contreras-Figueroa's petition for rehearing on November 24, 2020. App. 4. This petition is timely.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, 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. Const., amend. V.

Section 371 of Title 18 of the United States Code states:

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

18 U.S.C.A. § 371.

Section 846 of Title 21 of the United States Code states:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C.A. § 846.

STATEMENT OF THE CASE

Contreras-Figueroa pleaded guilty pursuant to a plea agreement with the government to an offense alleging a conspiracy to distribute 500 or more grams of methamphetamine before the United States District Court for the Eastern District of Washington. App. 9-21. The district court imposed 220 months in prison for the conspiracy, utilizing the 10 years to life in prison maximum penalty set out in 21 U.S.C. § 841(b)(1)(A)(viii), based on a conspiracy to distribute a controlled substance pursuant the Controlled Substances Act (CSA), 21 U.S.C. § 846.[1] App. 22-23.

Contreras-Figueroa appealed his sentence. A panel of the Ninth Circuit Court of Appeals affirmed that sentence. App. 1-4.

Count 1 of the superseding indictment alleged that Contreras-Figueora and others "conspired ... to commit the following offense against the United States."[2] App. 8. Count 1

---

[1] Contreras-Figueroa also pleaded guilty to Count 46 charging illegal alien in possession of a firearm in violation of 18 U.S.C. § 922. The district court imposed a 10 year term of imprisonment on Count 46 to run concurrently with the 220 month term of imprisonment for Count 1. Counts 35 and 36 were dismissed at sentencing. The question here relates to Count 1.

[2] Count 1 charges:

> Beginning on a date unknown but at least by on or about September 21, 2016, and continuing until on or about December 13, 2017, in the Eastern District of Washington and elsewhere, the Defendants ... BULMARO CONTRERAS-FIGUEROA [and others] ... did knowingly and intentionally combine, conspire, confederate and agree together with each other and with persons, both known and unknown, *to commit the following offense against the United States*: distribution of 500 grams or more of a mixture or substance containing a detectible amount of methamphetamine ... in violation of 21 U.S.C. § 841, all in violation of 21 U.S.C. § 846.

listed distribution of a methamphetamine, a Schedule I controlled substance, pursuant to 21 U.S.C. § 841(a)(1) as the substantive offense underlying the conspiracy. *Id.*

While Count 1 also referenced 21 U.S.C. § 846, the statutory citation for a controlled substance conspiracy under subchapter 1 of the CSA, the grand jury returned an indictment explicitly alleging that Contreras-Figueroa and the others conspired to commit an offense against the United States, the operative language in 18 U.S.C. § 371. App. 8.

On appeal, Contreras-Figueroa claimed that his Fifth Amendment right to a grand jury was violated by imposition of a sentence for a conspiracy offense under the CSA, 21 U.S.C. § 846. He maintained that the district court should have imposed a sentence under the general conspiracy statute, 18 U.S.C. § 371. A § 371 conspiracy has a five-year maximum penalty, whereas, Contreras-Figuearoa faced a minimum sentence of ten years up to life in prison for a conspiracy under § 846 of the CSA.

Contreras-Figueroa claimed that the grand jury returned an indictment actually charging him with a § 371 general conspiracy. App. 2. If the grand jury returned the superseding indictment charging a general conspiracy under § 371 in Count 1, then Contreras-Figueroa's 220 term of imprisonment exceeds the five-year maximum term of imprisonment set out in § 371. *See*, 18 U.S.C. § 371. His 220 month prison sentence, Contreras-Figueroa claimed, violated his Fifth Amendment right to be punished for the offense actually charged by the grand jury in the superseding indictment.

App 8 (emphasis added).

The panel in the Ninth Circuit affirmed Contreras-Figueroa's 220 month term of imprisonment, holding that Contreras-Figueroa "pleaded guilty to violating 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)(viii), that is, conspiring to distribute drugs." App. 2. It reasoned that "[t]he grand jury's charge that Defendant intentionally conspired to violate that very statute was sufficient." App. 2 (citing *United States v. Cochrane*, 985 F.2d 1027, 1031 (9th Cir. 1993) (*per curium*) (holding that an indictment need only "provide the essential facts necessary to apprise a defendant of the crime charged") (quotations in original)).

The panel's decision ignores that fact that Count 1 explicitly alleged the operative language for a § 371 conspiracy. The grand jury returned a superseding indictment specifically alleging that Contreras-Figueroa and others "did knowingly combine, conspire, confederate and agree together with each other and with other persons, both known and unknown, *to commit the following offense against the United States...*" App. 8 (emphasis added).

The panel did not address the Court's prior decisions, *United States v. Miller*, 471 U.S. 130 (1985); *Stirone v. United States*, 361 U.S. 212 (1960); and *Ex parte Bain*, 121 U.S. 1 (1887), *overturned on other grounds*, *United States v. Cotton*, 535 U.S. 625 (2002)). App. 2. These decisions support Contreras-Figueroa's position that his Fifth Amendment right to a grand jury was violated by imposition of a sentence that exceeded the statutory maximum penalty for a violation of the federal general conspiracy statute in § 371.

REASONS FOR GRANTING THE WRIT

Resolution of the question of whether the Fifth Amendment right to a grand jury is violated when a defendant enters a guilty plea to an indictment that alleges a conspiracy to commit an offense against the United States, the factual allegations specific to a general

conspiracy offense under 18 U.S.C. § 371, but the district court sentences the defendant for a conspiracy to violate subchapter 1 of the CSA under 21 U.S.C. § 846, and such sentence exceeds the five-year maximum penalty for a general conspiracy offense under § 371 is important to promote the uniform and consistent application of prior decisions from the Court, and to protect a criminal defendant's rights under the Fifth Amendment. Furthermore, the Ninth Circuit decided this case in a way that conflicts with prior decisions from the Court and conflicts with decisions from other federal circuits. This case presents an ideal vehicle for the Court to again address an important question involving a criminal defendant's right to a grand jury as guaranteed by the Fifth Amendment.[3]

As an initial matter, the panel affirmed the district court's sentence on Count 1, reasoning the Contreras-Figueroa "pleaded guilty to violating 21 U.S.C. §§ 846, 841(a)(1) ... that is, conspiring to distribute drugs." App. 2. In other words, the panel's decision rested on the fact that Count 1 included a citation to § 846 and the plea agreement set out § 846 as the statute violated. *Id.*; App. 9-10, 12.

Prior decisions from the Court, the Ninth Circuit and other circuits, however, hold that a determination of what offense the grand jury actually charged turns on the facts contained in the indictment. It does not turn on the statutory citations set out in the indictment. Long ago, the Court held,

> It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin

---

[3] The Fifth Amendment states in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury..." U.S. Const., amend V.

> of the indictment constitutes no part of the indictment, and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and, if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute.

Williams v. United States, 168 U.S. 382, 389 (1897).

The Court reaffirmed this principle in *United States v. Hutcheson*, 312 U.S. 219 (1941). *Hutcheson* held, "[i]n order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial." *Id.* at 229 (citing *Williams*, 168 U.S. 382).

Until now, the Ninth Circuit has historically and consistently followed *Williams* and *Hutcheson*. *United States v. Gordon*, 641 F.2d 1281, 1287 (9th Cir. 1981) (citing *United States v. Clizer*, 464 F.2d 121, 124 (9th Cir. 1972); *Steinert v. United States District Court for District of Nevada*, 543 F.2d 69, 70 (9th Cir. 1976); *United States v. Wuco*, 535 F.2d 1200, 1202 (9th Cir. 1976); *United States v. Clark*, 416 F.2d 63, 64 (9th Cir. 1969)). In *Wuco*, the Ninth Circuit noted:

> It is the statement of facts in the pleading, rather than the statutory citation, that is controlling, and if an indictment or information properly charges an offense under the laws of the United States it is sufficient, even though the United States Attorney or the grand jury may have supposed that the offenses charged were covered by a different statute.

Wuco, 535 F.2d at 1202 n. 1 (citing 1 C. Wright, Federal Rules of Criminal Procedure (1969) 228).

Other circuits follow *Wuco*. *See, United States v. Hooker*, 841 F.2d 1225, 1227-28 (4th Cir. 1988) ("*it is the statement of facts in the pleading, rather than the statutory citation that is*

controlling....") (quoting *Wuco*, 535 F.2d at 1202 n. 1)(emphasis added); and *United States v. Garcia*, 954 F.2d 273, 276 (5th Cir. 1992) (citing *Hutcheson*, 312 U.S. at 229 and *Wuco*, 535 F.2d 1200) ("the longstanding notion [is] that the written statements contained in an indictment, not the citation to statute, are the controlling feature of the indictment."). Other circuits' authority follow the *Williams* and *Hutcheson* line of cases. *See*, *Paz Morales v. United States*, 278 F.2d 598, 599 (1st Cir. 1960); *United States v. Chestnut*, 533 F.2d 40, 45 (2d Cir. 1976); *United States v. Bazzell*, 187 F.2d 878, 885-86 (7th Cir. 1951); *Smith v. United States*, 145 F.2d 643, 644-45 (10th Cir. 1944) ("the validity of the indictment is determined by the facts therein alleged, and not the law to which reference may be made, either by the notations in the indictment itself or extraneous statements of the pleader."). This historical principle is applicable in this case.

The fact that Count 1 and the plea agreement referenced 21 U.S.C. § 846 and not 18 U.S.C. § 371 is wholly immaterial. *See*, App 8. Nor is it material that Contreras-Figueroa may have believed he was pleading guilty to a § 846 conspiracy as the panel noted. App. 2. As set out above, the Court has historically held that the facts alleged and returned by a grant jury in an indictment are what defines the offense charged. The panel's decision strays from this longstanding principle.

Count 1 did not allege that Contreras-Figueroa "conspire[d] to commit an[] offense defined in [] subchapter [1]" of the CSA. App. 8. The grand jury here returned an indictment that specifically alleged that Conrtreras-Figureoa and others "conspired ... *to commit the following offense against the United States*" - these are operative facts necessary to charge a § 371 conspiracy. *Id.* (emphasis added); *see*, 18 U.S.C. § 371.

The substantive offense underlying the § 371 conspiracy is the distribution of 500 grams or more of methamphetamine in violation of 21 U.S.C. 841(a)(1). App. _. The *Williams* and *Hutcheson* line of cases hold that the fact that Count 1 also includes a citation reference to 21 U.S.C. § 846 is immaterial.[4]

The question here involves Contreras-Figueroa claim that his 220 month prison sentence on Count 1 violated his Fifth Amendment right to a grand jury. The *Miller, Stirone* and *Bain* decisions are important and support Contreras-Figueroa's claim.

In *Stirone*, the Court held generally that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. at 216. *Stirone* relied on the Court's decision in *Bain*. *Id.* at 216-17 (citing *Bain*, 121 U.S. at 13). Later, the Court in *Miller* analyzed both *Stirone* and *Bain*, in conjunction with other decisions by the Court, and defined further the confines of the right to a grand jury.

In *Miller*, the Court resolved the question of "whether the Fifth Amendment's grand jury guarantee is violated when a defendant is tried under an indictment that alleges a certain fraudulent scheme but is convicted based on trial proof that supports only a significantly narrower and more limited, though included, fraudulent scheme." 471 U.S. at 131. There, the grand jury returned an indictment that alleged mail fraud against the defendant for attempting to defraud an insurance company after a burglary in the defendant's business. *Id.*

---

[4] On direct appeal, the government responded by noting that Count 1 did not allege an overt act as set out in § 371. (DktEntry 19 at 27). An issue relating to failure to allege an element of the offense is not before the Court. Contreras-Figueroa did not move to dismiss Count 1 for failure to allege an essential element of the crime. The critical fact here is that the grand jury specifically alleged in Count 1 a conspiracy to commit an offense against the United States from § 371.

The indictment included two separate theories on how the fraud occurred. The indictment alleged that the defendant consented to the burglary in order to obtain an insurance recovery. In addition, the indictment alleged that the defendant inflated the loss from the burglary in order to obtain more insurance proceeds than he was entitled to receive. *Id.* at 132. Before trial, the government moved to strike the theory that the defendant had consented to the burglary in order to obtain insurance proceeds. The petite jury returned a verdict of guilty based solely on proof at trial that the defendant inflated the amount of loss. *Id.* at 133-34.

The defendant appealed to the Ninth Circuit, claiming that the proof at trial "fatally varied from the scheme alleged in this indictment." *Id.* The Ninth Circuit agreed and reversed the conviction.

The Ninth Circuit concluded that the defendant's right to a grand jury had been violated when the theory of defendant's prior knowledge and consent to the burglary was removed from the petite jury's consideration. The Ninth Circuit reasoned that the grand jury may have refused to return the indictment had it been presented with over-inflation of loss as the sole basis of the mail fraud. *Id.* at 134. The Court reversed the Ninth Circuit. *Id.* 131 and 145.

The Court observed that "Miller's indictment properly alleged violations of 18 U.S.C. § 1341, and it fully and clearly set forth a number of ways in which the acts alleged constituted violations." *Id.* at 134. Therefore, "[t]he facts at trial clearly conformed to one of the theories of the offense contained in the indictment, for the indictment gave Miller *clear notice* that he would have to defend against an allegation that he 'well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company.'" *Id.* (citation omitted) (emphasis added)

(quotations in original).

Miller addressed the Ninth Circuit's reliance on *Stirone* and *Bain*. *Id.* at 135. The Court recognized that the Ninth Circuit's reasoning and conclusion conflicted with several other circuit courts' decisions. *Id.* at 135-36.

In resolving the conflict, the Court observed that "[c]onvictions generally have been sustained as long as the proof upon which they are based corresponds to an to an *offense that was clearly set out in the indictment*." *Id.* at 136 (emphasis added). Significantly, the Court wrote: "'[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may be treated as 'a useless averment' that 'may be ignored.'" *Id.* at 137 (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927)).

The Court then analogized the facts in *Miller* with the facts in *Salinger v. United States*, 272 U.S. 542 (1926)). In *Salinger*, the grand jury returned an indictment clearly charging mail fraud, but also included facts alleging "'several relatively distinct plans for fleecing the intended victims.'" *Miller*, 471 U.S. at 137 (quoting *Salinger*, 272 U.S. at 546). Just like *Miller*, the evidence at trial in *Salinger* conformed to just one of the "distinct plans" set out in the mail fraud allegation. As a result, the trial judge in *Salinger* withdrew all other plans from the petite jury's consideration and the defendant was convicted by evidence on the one remaining distinct plan. Just as in *Miller*, the defendant in *Salinger* appealed and that appeal found its way to the Court.

The Court resolved the question of whether the trial court "violated [Salinger's] right to have had a grand jury screen any alleged offenses upon which he might be convicted at trial," due to the "variance between the broad allegations in the indictment and the narrower proof at trial." *Miller*, 471 U.S. at 137. The Court "unanimously rejected Salinger's argument on the ground

that the offense proved was fully contained with the indictment." The Court concluded that "'[n]othing had been added to the indictment' which, in the Court's view, 'remained just as it was returned by the grand jury.'" *Id.* at 137.

Thus, there was no constitutional violation of the right to a grand jury. *Id.* at 137-38. *Miller* concluded that the result reach by the Ninth Circuit conflicted with *Salinger*, *Ford* and other prior decisions from the Court. *Id.* at 138.[5]

The Court in *Miller* rejected the Ninth Circuit's reliance on *Stirone* in concluding that Miller's right to a grand jury had been violated. *Id.* The Ninth Circuit used *Stirone* for the proposition that the defendant's right to a grand jury had been violated because the defendant's conviction was based on "a criminal plan narrower than, but fully included within, the plan set forth in the indictment." *Id.* The Court, however, held that "*Stirone* ... stands for a very different proposition." *Id.*

Of significance here, the Court found that "[i]n *Stirone* the offense proved at trial was *not* fully contained in the indictment, for trial evidence had 'amended' the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment." *Id.* (quotations in original) (emphasis in original). Upholding convictions in the line of cases like *Ford* and *Salinger* turned on the fact that the "trial evidence [] narrowed the indictment's charges *without adding any new offenses*." *Id.* (emphasis added).

The key from *Miller* in determining if a conviction violates the right to a grand jury is to determine "whether [a defendant] [is] convicted of an offense *not charged in the indictment.*" *Id.*

---

[5] Also citing, *Hall v. United States*, 168 U.S. 632, 638-40 (1898); and *Crain v. United States*, 162 U.S. 625, 634-36 (1896).

at 138-39. Here, Contreras-Figueroa contends he was punished for "an offense not charged in the indictment." The facts in *Stirone* illustrate the point.

In *Stirone*, the defendant was indicted and convicted for violation of the Hobbs Act by unlawfully interfering with interstate commerce. *Miller.* 471 U.S. at 139 (citing 18 U.S.C. § 1951). The indictment alleged that the defendant interfered with interstate commerce by "obstruct[ing] shipments of sand from outside Pennsylvania into that State, where it was used in the construction of a steel mill." *Id.* Proof at trial went beyond that single allegation involving importing sand, and included evidence "that Stirone had obstructed the steel mill's eventual export of steel to surrounding States." *Id.*

"Because the conviction might have been based on evidence of obstructed steel exports, *an element of an offense not alleged in the indictment*, an unanimous Court [in *Stirone*] held that the indictment had been unconstitutionally 'broadened.'" *Miller*, 471 at 139 (emphasis added). The Court concluded, that "Miller has shown no prejudice of his 'substantial right to be tried only on charges presented in an indictment returned by a grand jury[,]'" since Miller "was convicted on an indictment that *clearly* set out the offense for which he was ultimately convicted." *Id.* at 140 (citing *Stirone,* 361 U.S. at 217) (emphasis added).

The Court found "some support" for the defendant's position in *Miller* from the Court's decision in *Bain*. The Court recognized that *Bain* framed "two distinct propositions." *Miller*, 471 U.S. at 142.

"Most generally, *Bain* stands for the proposition that a conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment." *Id.* However, "more specifically," the Court also found that "*Bain* can support the proposition that the striking

out of parts of an indictment invalidates the whole of the indictment, for a court cannot speculate as to whether the grand jury had meant for any remaining to stand independently, even if that remaining offense clearly was included in the text of the original." *Id.*

Miller reaffirmed the first general and longstanding proposition from *Bain* that "'after an indictment has been returned its charges may not be broadened through an amendment except by the grand jury itself.'" *Miller*, 471 U.S. at 143 (quoting *Stirone*, 361 U.S. at 217). The Court concluded that this general proposition did not apply in *Miller*, "for the offense that formed the basis of Miller's conviction was *clearly and fully* set out in the indictment." *Miller*, 471 U.S. at 144 (emphasis added).

The Court also found that the second and more specific proposition in *Bain* "did not long survive *Bain*." *Id.* The Court recognized that "[m]odern criminal law has generally accepted that an indictment will support each offense contained in it." *Id.* The Court rejected the proposition that "it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is *clearly contained within it*." *Id.* (emphasis added).

The facts relating to question presented here does not involve *Bain*'s second and more specific proposition. The panel's decision ignores, and never addressed, the fact that the grand jury in this case returned an indictment tracking the operative language contained in the general conspiracy statute, 18 U.S.C. § 371. App. 2. Count 1 specifically alleged that Contreras-Figuerao and the others "*did knowingly and intentionally ... conspire ... to commit the following offense against the United States*." App. 8 (emphasis added). Count 1 then alleged the offense committed against the United States was the "distribution of 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine ... in violation of 21 U.S.C. §

841(a)(1),(b)(1)(A(viii)..."[6]

Count 1 did not allege that Contreras-Figueroa and the others "conspired to commit the following offense defined in subsection 1 of the CSA: the distribution of 500 or more grams of a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. § 841(a)(1)." The panel's decision effectively takes out the language in the indictment for the offense actually returned by the grand jury, and replaces it with an offense that the government, the district court and the panel believed the grand jury really meant to charge.

The allegation that Contreras-Figueroa and others "conspired ... to commit the following offense against the United States," should not "be ignored," and is not a "useless averment" *See, Miller*, 471 U.S. at 137 (quoting *Ford*, 273 U.S. at 602). Count 1 specifically includes the language from § 371 that defines that particular conspiracy offense.

The Court has emphasized that lower courts cannot change an indictment in this fashion. In *Bain*, the Court announced the following:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed."

Miller, 471 U.S. at 142–43 (quoting *Bain*, 121 U.S. at 10).

---

[6] The panel rested its holding on the fact that Count 1 referenced 21 U.S.C. § 846. As set out above, the fact that Count 1 and the plea agreement also included citation to § 846 is irrelevant to a determination of what offense the grand jury actually returned. *See*, *Williams* and *Hutcheson*, *supra*.

The question presented here asks the Court to determine whether the district court's 220 month prison sentence, and the panel's decision affirming the district court's sentence, runs contrary to *Bain*'s first and longstanding general proposition. If so, the district court's imposition of a prison sentence of almost four times the five-year maximum penalty for a general § 371 conspiracy violated Contreras-Figueroa's right to be punished for the offense actually returned by the grand jury.

This case presents the Court with an ideal vehicle to revisit *Miller* and its progency. *Miller*, *Stirone*, *Bain* and other decisions by the Court resolved questions relating to the validity of the defendants' convictions after trial. This case uniquely presents the Court with a question relating to application of the Fifth Amendment right to a grand jury in the context of punishment imposed after a guilty plea.

The same propositions should apply regardless of whether a defendant is seeking to overturn a conviction, or the defendant is challenging the punishment imposed after entering a guilty plea. Both circumstances involve important questions relating to the federal court's application of the constitutional protections that flow from the Fifth Amendment's right to a grand jury.

The facts here present another unique circumstance that offers the Court an opportunity to further refine *Miller*. In *Miller* the Court reaffirmed that notion that unnecessary facts in an indictment may be removed from consideration by the petite jury, so long as the remaining allegations in the indictment clearly and fully charge an offense. *Miller* does not support a proposition that specific language necessary to charge an offense can be ignored or removed in order to prosecute or punish the defendant for an offense that has higher penalties, as was done in

this case.

For example, in *Miller*, *Salinger*, and *Ford*, after alleged facts that supported a properly charged offense were removed from the petite jury's consideration, the remaining facts still supported the same offense charged and alleged in the indictment. Thus, after the government proved beyond a reasonable doubt the facts remaining in the indictment that supported the offense charged, the defendants' convictions in those cases were affirmed.

Here however, when the language "conspired ... to commit the following offense against the United States" is ignored or removed from Count 1, a new and wholly different conspiracy offense is charged. Removing or ignoring the operative facts of the conspiracy charged in Count 1 changes the nature of the charged offense from a general conspiracy under 18 U.S.C. § 371, and transforms the offense into a CSA conspiracy under 21 U.S.C. § 846.

The Court in *Miller* did not countenance ignoring or removing factual allegations from an indictment that results in changing the nature of the offense actually returned by the grand jury. *Miller* is limited to circumstances where the government fails to prove at a trial all of the alternative ways set out in an indictment that an offense was committed, and holds that as long as the the government presents sufficient proof at trial on one of the ways the offense as returned by the grand jury was committed, a defendant's right to a grand jury is not offended.

This case presents a unique set of facts for the Court. This case offers the Court an opportunity to apply the right to a grand jury in a different context. This case offers the Court an excellent vehicle on which to further define for federal courts application of the Fifth Amendment right to a grand jury.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 21st day of April, 2021.

Respectfully submitted,

Stephen R. Hormel
17722 East Sprague Avenue
Spokane Valley, WA 99016
Telephone: (509) 926-5177
Facsimile: (509) 926-4318
Attorney for Contreras-Figueroa