

IN THE SUPREME COURT OF THE UNITED STATES

VASSILY ANTHONY THOMPSON,

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

1. Does it offend the Fifth Amendment right to a grand jury for a court to ignore legally relevant elements of an offense charged by a grand jury in an indictment, and after the defendant is convicted, impose greater punishment for a more serious offense that remains in the indictment after the legally relevant elements of actual charged offense are ignored?

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
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Petitioner, VASSILY ANTHONY THOMPSON (hereinafter Thompson) respectfully prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered on March 3, 2021, affirming the district court's imposition of a 108 month prison sentence.

OPINION BELOW

On March 3, 2021, the Ninth Circuit Court of Appeals entered its Opinion affirming the district court's sentence. The Opinion is attached in the Appendix (App.) at pages 1-26. The Ninth Circuit denied Thompson's petition for rehearing and suggestion for rehearing *en banc* on June 3, 2021. App. 4-5. 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.

Title 18, United States Code, Section 371 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.

Title 18, United States Code, Section 1343 states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs

in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.A. § 1343.

Title 18, United States Code, Section 1349:

Any person who attempts or conspires to commit any offense under this chapter 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.

18 U.S.C.A. § 1349.

STATEMENT OF THE CASE

Thompson was convicted after a jury trial of a conspiracy that alleged mail fraud under 18 U.S.C. § 1343 as the underlying substantive offense. App. 51.¹ The district court imposed a prison term of 108 months for a conspiracy offense under 18 U.S.C. § 1349. App. 53. The Ninth Circuit affirmed Thompson's sentence. App. 7-10.

Count 1 of the Superseding Indictment charged a mail fraud conspiracy, including a citation to the fraud conspiracy statute set out in 18 U.S.C. § 1349. App. 39-40, 51. The issue before the Ninth Circuit was whether the grand jury actually charged a general conspiracy under 18 U.S.C. § 371, instead of a mail fraud conspiracy under chapter 63 of Title 18, § 1349. App. 5-10.

¹ Codefendant, Derrick Fincher's, appeal was consolidated with Thompson's appeal in the Ninth Circuit. This petition is made on behalf of Mr. Thompson. Both defendant's cases were remanded to the district court to amend their forfeiture judgments. App. at 25-26. The forfeiture issue is not included in this petition.

If the grand jury actually charged a general conspiracy under § 371, then the district court's 108 month prison sentence exceeds the five-year maximum penalty for § 371 conspiracy offenses.² Thompson maintains that his sentence violated his right to be punished for the offense actually returned by the grand jury in violation of Grand Jury Clause of the Fifth Amendment. App. 7-10.

Count 1 expressly charges the legally relevant operative language for a general conspiracy offense under § 371. It states:

[Thompson] ... did knowingly combine, conspire, confederate, and agree to *commit an offense against the United States, to wit: wire fraud, in violation of 18 U.S.C. § 1343...*

App. 39 (emphasis added).

Furthermore, Count 1 alleges “*Overt Acts.*” App. 40 (emphasis added). It incorporates by reference the very detailed allegations from paragraphs 1 through 42 and includes those allegations as overt acts of the conspiracy. App. 40. Overt acts are legally relevant, and a material element, for charging a § 371 conspiracy. *United States v. Shabani*, 513 U.S. 10, 14 (1994) (“18 U.S.C. § 371 [] contains an explicit requirement that a conspirator ‘do any act to effect the object of the conspiracy.’”).

The Ninth Circuit recognizes that “[t]he indictment does indeed read, in many respects, as

² Thompson did not object to his sentence at the time the district court imposed the 108 month term of incarceration. Therefore, this issue was presented to the Ninth Circuit under a plain error standard of review. Fed. R. Crim. P. 52(b). Under the rule, “[t]here must be an ‘error’ that is ‘plain’ and that ‘affect[s] substantial rights.[] [and], Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error “‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Olano*, 507 U.S. 725, 732 (1993) (citations omitted). The Ninth Circuit never reached plain error since it did not conclude the district court’s sentence violated the right to a grand jury.

though it was drafted to charge a Section 371 conspiracy[,] noting, “[i]t charges a conspiracy against the United States and alleges overt acts, which are necessary for a Section 371 conspiracy.” App. 7. The Ninth Circuit also noted that “[t]he indictment says in the caption that the appellants were charged with wire fraud and conspiracy to commit wire fraud under 18 U.S.C. §§ 1343 and 1349” and that “the indictment says that the alleged acts were ‘all in violation of 18 U.S.C. §§ 1343 and 1349.’” App. 8.

The Ninth Circuit stated,

The indictment never mentions 18 U.S.C. § 371. Appellants do not dispute that the indictments sets forth all elements of Section 1343 and 1349. They say only that it also sets forth all elements of Section 371. Perhaps they could have been charged with and convicted of the conspiracy against the United States under Section 371, but they were not. The language in the indictment that would have been necessary or appropriate for a Section 371 charge was surplusage with respect to what they actually were charged with and convicted of. There is no constructive amendment of the indictment here because the indictment alleged all elements of Sections 1343 and 1349. Appellants were tried and convicted of the crime charged, and there was no reason to include in the jury instructions the surplusage relating to the Section 371 crime that was not charged.

App. 8-9.

The Ninth Circuit then rested on the following passage from the Court’s decision in *Miller*:

As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime.... A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as “a useless averment” that “may be ignored.”

App. 9 (quoting *Miller*, 471 U.S. at 136) (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927)).

The Ninth Circuit decision allows for legally relevant elements of an offense actually returned by a grand jury to be ignored, and after conviction, permits imposition of a greater sentence for the more serious offense left standing after the legally relevant elements of the lesser crime are ignored. The Ninth Circuit effectively excludes from the Fifth Amendment right to a grand jury, a right to be punished for the offense actually returned by the grand jury.

This case is unique in that it asks the Court to resolve a question of whether legally relevant elements of an offense charged in an indictment returned by a grand jury may be ignored as useless averments which then results in the imposition of greater punishment for a different offense that remains, only after the legally relevant elements of the lesser offense are ignored. This Court has yet to pass on this particular circumstance relating the Grand Jury Clause of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

1. The question of whether it offends the Fifth Amendment right to a grand jury for a court to ignore legally relevant elements of an offense charged by the grand jury in an indictment, and after conviction, impose greater punishment for a more serious offense that remains in the indictment after the legally relevant elements of actual charged offense are ignored is an important question of federal constitutional law that has not been, but should be, settled by the Court. This petition has unique facts that offers the Court with an ideal opportunity to review the full scope of the Grand Jury Clause in the Fifth Amendment. Moreover, the Ninth Circuit has decided the case in a manner that conflicts with decisions of the Court.

To begin with, the Ninth Circuit concludes that “Thompson … could not have been misled by the language that would have been used in a Section 371 charge” since Count 1 “consistently” cited § 1343 [wire fraud] and § 1349 [wire fraud conspiracy] in the caption and in the body of the charge, and “never mention[ed] Section 371.” App. 9. The Ninth Circuit rests on the fact that Count 1 included the statutory citation to § 1349, without reference to § 371. App. 8-9.

Historically, the Court has clearly instructed that a determination of what offense a grand jury actually charged turns on the *facts* contained in an indictment. The determination does not rest on what statutory citations are set forth in the indictment.

Over a century ago, the Court stated:

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 later 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).³

³ Indeed, the Ninth Circuit and other circuits have 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)). The Ninth Circuit’s *Wuco* decision aptly states:

Count 1 did not allege in the body of the charge that Thompson “conspire[d] to commit [a fraud] offense in [] chapter [63]” of Title 18. App. 37-38. The grand jury specifically charged Thompson with conspiracy “*to commit an offense against the United States.*” App. 39 (emphasis added). This *is* the legally relevant operative charging language for a § 371 conspiracy offense. App. __.

Count 1 also alleges “*Overt Acts*” committed to “effect the object of the conspiracy.” App. 40. An overt act is legally relevant and a material element of a § 371 conspiracy. App. 38; *see*, 18 U.S.C. § 371. *See, United States v. Shabani*, 513 U.S. 10, 14 (1994) (“18 U.S.C. § 371 [] contains an explicit requirement that a conspirator ‘do any act to effect the object of the conspiracy.’”).

The substantive offense underlying the alleged § 371 conspiracy in Count 1 is wire fraud in violation of 18 U.S.C. § 1343. App. 39. Under the Court’s core principles set out in

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).

Furthermore, other circuit cases rely on *Williams* and *Hutcheson*. *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.”). The Ninth Circuit’s decision here not only conflicts with decisions of the Court, but also conflicts with intracircuit decisions and with decisions of other circuits.

Williams and *Hutcheson*, the fact that Count 1 includes a statutory citation to 18 U.S.C. § 1349 is immaterial in determining what offense was actually returned by the grand jury. *Hutcheson*, 312 U.S. at 229 (citing *Williams*, 168 U.S. at 389).

Hutcheson and *Williams* make clear that the facts set out in an indictment are what determines the offense actually charged by the grand jury. The Ninth Circuit's decision in this case conflicts with this longstanding principle.

The Court's decisions in *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) are material to resolving the question presented. These decisions offer support to the proposition that a court may not ignore legally relevant language or elements of an actual offense charged by a grand jury and sentence a criminal defendant harsher for a different more serious offense that remains only because the legally relevant elements of the lesser offense charged in the indictment were ignored.

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*, 361 U.S. at 216 (citing *Bain*, 121 U.S. at 13). Later, *Miller* analyzed both *Stirone* and *Bain*, in conjunction with other decisions by the Court. *Miller*, 471 U.S. at 138-45.

In *Miller*, the grand jury returned an indictment that alleged mail fraud against the defendant for attempting to defraud an insurance company after a burglary of the defendant's business. *Id.* The indictment included two separate theories on how the fraud occurred.

The indictment first alleged that the defendant consented to the burglary in order to obtain insurance proceeds. Next, 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 found the defendant guilty solely on proof at trial that the defendant inflated the amount of loss. *Id.* at 133-34.

The defendant appealed, claiming that the proof at trial “fatally varied from the scheme alleged in this indictment.” *Id.* The Ninth Circuit agreed with the defendant and reversed the conviction. The Court granted the Government’s petition for writ certiorari and 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. *Id.* at 135. The Court agreed with the Government that “[c]onvictions generally have been sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment.” *Id.* at 136.

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)). This is the very principle the Ninth Circuit relied on to affirm Thompson’s sentence on a § 1349 mail fraud conspiracy. App. 9.

Miller analyzed *Ford v. United States*, 273 U.S. 593 (1927). *Miller*, 471 U.S. at 136-37. In *Ford*, the defendant was charged with violating liquor laws in various federal statutes and with violating a treaty. *Id.* (citing *Ford*, 273 U.S. at 602). The defendant was convicted only on violation of the various federal statutes because the treaty did not create a criminal offense. The defendant challenged the validity of his conviction. *Id.* at 137. The Court upheld the defendant’s

conviction “because ‘that part of the indictment [was] merely surplusage and may be rejected.’”

Id.

The Court in *Miller* reasoned that ignoring the treaty portion of the indictment in *Ford*, as “independent of and unnecessary to the offense,” was appropriate where the treaty allegations “had no legal relevance, if proved.” *Id.* It stands to reason that the Court decisions in *Miller* and *Ford* demand that before a court may ignore language or allegations in an indictment as “independent of and unnecessary to the offense on which the conviction ultimately rests,” the court must first determine if the allegations to be ignored have any legal relevance to the grand jury’s charge. *Id.*

In this case, the charging language, Thompson “conspired ... to commit the following offense against the United States,” has legal relevance to the offense charged by the grand jury. App. 39. The same is true about the allegations that alleged overt acts. App. 40. The overt act element is the element that separates § 371 from other federal offenses, including a conspiracy under § 1349. Contrary to the facts in *Ford*, the Ninth Circuit here ignored legally relevant allegations that were not independent of, and were necessary to, the § 371 conspiracy offense returned by the grand jury.

Miller next analyzed *Salinger v. United States*, 272 U.S. 542 (1926). In *Salinger*, the grand jury charged the defendant “with mail fraud in an indictment containing several counts, ‘[a]ll relat[ing] to the same scheme to defraud, but each charg[ing] a distinct use of the mail for the purpose of executing the scheme.’” *Miller*, 471 U.S. at 137 (quoting *Salinger*, 272 U.S. at 546). Just as in *Miller*, the indictment in *Salinger* included allegations that the ““scheme to defraud”” included ““several relatively distinct plans for fleecing intended victims.”” *Id.* (quoting

Salinger, 272 U.S. at 548). The trial court withdrew all plans alleged in the indictment, except the one plan supported by the evidence at trial. *Id.* The defendant in *Salinger* argued that submission of his case to the jury on just the one plan alleged in the indictment violated his right to a grand jury. *Id.*

The Court “unanimously rejected Salinger’s argument on the ground that the offense proved was fully contained with the indictment,” holding 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. While the Ninth Circuit did not add anything to Thompson’s indictment, two significant facts separate this case from *Salinger*.

As previously indicated, the grand jury included the legally relevant and operative language of a § 371 conspiracy to commit any offense against the United States, and included the overt act element, which is also legally relevant and material to a § 371 conspiracy charge. This is the significant difference between the indictments addressed by the Court in *Miller*, *Salinger* and *Ford*.

The indictments in *Miller* and *Salinger* included alternative factual allegations as different means to support the “scheme to defraud” element of the mail fraud counts. *Miller*, and *Salinger* involved “trial evidence that narrowed the indictment’s charges without adding any new offense.” *Miller*, 471 U.S. at 138.

Ford is different because the grand jury added an allegation of an offense that did not exist in law. The treaty allegation was “[a] part of the indictment unnecessary to and independent of the allegations of the offense proved....” Therefore, it was appropriate to treat that legally irrelevant allegation “as ‘a useless averment’ that ‘may be ignored,’” just like it was

appropriate to ignore alternative factual means to commit fraud included the indictments in *Miller* and *Salinger*. *Id.* at 137-38 (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927)).

Next, by “narrowing” the charge here, the Ninth Circuit added a new offense, not charged by the grand jury. The Ninth Circuit transformed the § 371 mail fraud conspiracy to a § 1349 mail fraud conspiracy in violation of Chapter 63 of Title 18. Even though the indictment here alleged several alternate overt acts, which under the Court’s authority could have been narrowed at trial and survived a constitutional challenge, the facts remains that indictment as drafted and returned here by the grand jury charges all elements of a general § 371 mail fraud conspiracy.

The Court’s prior decisions teach that a trial court may ignore a factual allegations as “useless averment[s]” if the allegations include facts that are unnecessary to the proof at trial to support an element of the offense charged by the grand jury. It is quite another matter for a court to ignore elements set out by the grand jury in an indictment that had “legal relevance” to the actual offense returned by the grand jury, just as the Ninth Circuit did here.⁴ *See, Miller*, 471 U.S. at 137.

Miller distinguishes the decision in *Stirone v. United States*, 361 U.S. 212 (1960), where the Court reversed the defendant’s conviction for violation of the right to a grand jury. *Miller*, 471 U.S. at 138-39. 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

⁴ It is important again to note that the Ninth Circuit recognized that Thompson’s indictment “does indeed read, in many respects, as though it was drafted to charge a Section 371 conspiracy....” by charging “a conspiracy against the United States and alleg[ing] overt acts, which are necessary for a Section 371 conspiracy.” App. 7.

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, a unanimous Court held that the indictment had been unconstitutionally ‘broadened.’” *Miller*, 471 at 139.

The Court concluded 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.* at 138 (quotations in original) (emphasis in original). The Ninth Circuit’s decision results in a similar problem identified in *Stirone*.

By ignoring the elements of the § 371 conspiracy charged in Thompson’s indictment, the Ninth Circuit broadened “the possible bases for conviction from that which appeared on the indictment.” *Id.* Under the Ninth Circuit’s holding, Thompson could have been charged with, tried for, convicted of and sentence for either a § 371 conspiracy or a § 1349 conspiracy without violating the grand jury’s constitutional charging function, App. 8-9, even though the two conspiracy statutes are different offenses with different elements. The Court’s decisions do not permit such an application of the Fifth Amendment’s right to a grand jury.

Finally, *Miller* addressed *Ex parte Bain*, 121 U.S. 1 (1987). *Miller* recognized that *Bain* included “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, *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 offense to stand independently, even if that remaining offense clearly was included in the text of the original." *Id.*

As *Miller* recognized, *Bains'* second proposition did not long survive in subsequent decisions of the Court. *Id.* at 144. It is *Bains'* first proposition, however, that controls here.

Miller reaffirmed the first general and historical proposition from *Bain* and *Stirone*. The Court stated,

In *Stirone*, the Court's unanimous opinion extensively relied on *Bain* for the proposition that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him," 361 U.S., at 217, 80 S.Ct., at 273, and therefore that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Id.*, at 215–216, 80 S.Ct., at 272–273. See also *Russell v. United States*, 369 U.S., at 770, 82 S.Ct., at 1050 (citing *Bain* for the "settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form").

As previously indicated, it is the statutory citations in this case that are to be ignored, as the statutory citations are immaterial to the determination of what offense is charged by grand jury. *See, Williams*, 168 U.S. at 389; and *Hutcheson*, 312 U.S. at 229. Once the statutory citations to § 1349 are ignored in Count 1, the remaining language clearly charges a § 371 general conspiracy, and does not charge a § 1349 conspiracy.

Finally, *Bain* instructs:

"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).

If the language in Count 1, "conspired ... to commit the following offense against the United States" and the overt act allegations Count 1 are ignored, a new and wholly different conspiracy offense results. The abundance of authority from the Court does not support the Ninth Circuit's conclusion that the grand jury actually charged a § 1349 conspiracy. App. 8.

A. **This case presents an important federal question and offers the Court an excellent vehicle to answer the question presented.**

This case provides the Court an ideal vehicle to resolve the important constitutional question presented relating to the Fifth Amendment right to a grand jury. The same constitutional principles underlying the right to a grand jury as announced in decisions of the Court should apply regardless of whether a defendant is seeking to overturn a conviction, or the defendant is challenging the increased punishment imposed after conviction. Both circumstances involve important questions relating to the scope and application of the constitutional protections that flow from the Fifth Amendment's right to a grand jury.

This case presents the Court with the very circumstance described in *Miller*, and should lead to a different outcome. The indictment contains factual allegations having legal relevance that the Ninth Circuit determined could be ignored when it sustained Thompson's sentence to the more serious fraud chapter conspiracy under § 1349. *Miller*, however, reaffirmed the notion

from *Ford* that useless and unnecessary facts in an indictment may be ignored without offending the right to a grand jury, so long as those facts have no legal relevance to the proof at trial, and the remaining allegations in the indictment clearly charge the offense charged by the grand jury. *Miller*, 471 U.S. at 137-39. *Miller* does not support the proposition that specific offense language in an indictment, having legal relevance, and which are dependent and necessary to charge the offense, may be ignored in such a way that it permits the prosecution and the subsequent greater punishment for a more serious offense, different from the offense actually charged by the grand jury.

This case presents a unique set of facts. It offers the Court with the opportunity to further define the full scope and 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 25th day of October, 2021.

Respectfully submitted,



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

Appendix