No. 22-6037 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



SPENCER JEAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Spencer Jean
(Your Name)

Post Office Box 900
(Address)

Ray Brook, New York 12977
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

I. This Court should Grant certiorari review, Vacate the lower court's judgment, and Remand the case (GVR) based on the court of appeals error in affirming the district court's violation of Fed. R.Crim.P. 16's disclosure requirement especially considering the amendment to Rule 16(a)(1)(G)—Expert Witnesses Ordered April 11, 2022 establishing a clear violation of Petitioner's Due Process right to a Fair Trial.

II. This Court should grant this petition for Certiorari based on the well established principle inherent in the Due Process of Law that a conviction may not rest on the presentation of intentionally false evidence by the goverment.

III. Whether the jury verdict that Petitioner "discharged" but did not "branish" a firearm under 18 U.S.C. 924(c) was "metaphysically impossible" invalidated the jury finding that he violated the greater offense without violating the lesser offense in contravention of the Sixth Amendment.

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at U.S. App. Lexis 9923; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at U.S. Dist. Lexis 3898; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 13, 2022.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 3, 2022, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of U.S. Constitution

Sixth Amendment of U.S. Constitution

Title 18 U.S.C. Section 924(c)

## STATEMENT OF THE CASE

In March 2019, Petitioner was indicted on two (2) counts of violating 18 U.S.C. §1951(a)—Hobbs Act robbery and 18 U.S.C. §924(c)(1)—Use of a firearm during a crim of violence, by a federal grand jury sitting in the U.S. District Court of the Eastern District of New York.

Prior to the commencement of trial, a superseding indictment was filed in Petitioner's case, adding several counts for violating 21 U.S.C. §841(b)(1)(D)—Count 3; 18 U.S.C. §1512(k)—Count 4; and 18 U.S.C. §1512(c)(2)—Count 5, on which he proceeded to trial.[3]

At trial, the government presented two (2) key witnesses (John Ryan Goetz and Nastacia McPherson) that falsely cliamed that they were contacted the day prior to and day of the robbery incident by way of electronic devices i.e., cell phones. These claims of contact with Petitioner was allegedly made through cellphones but were found to be false because no cellphone records supported these two (2) witnesses' testimony at trial.

Moreover, the government placed before the jury evidence from two (2) other witnesses from state law enforcement (Conroy) and former federal law enforcement (Magnuson), who bolstered the false testimony of Goetz and McPherson. Detective Conroy testified to reviewing the alleged phone records which supported the planning of the alleged meeting between Petitioner and Goetz leading up to the robbery. Consequently, this testimony was false and not supported by any phone records as alleged by the government.

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[3] The superseding indictment included the additional charge of being a felon in possession of a firearm offense which resulted in an acquittal of the charge at Petitioner's jury trial.

Likewise, the government's expert witness, former FBI Agent Magnuson, testified to cell-site location data which allegedly placed Petitioner at the scene of the robbery. However, besides the government failing to properly disclosed a summary of its witnesses testimony pursuant to Federal Rules of Criminal Procedure 16(a)(1)(G), the geolocation data did not support his overall testimony. Furthermore, although the government secured a warrant for Snapchat evidence to support the testimony of Goetz, the information received from the warrant did not support the witness's account that he allegedly sent Petitioner a video of marijuana he wanted to sell to him.

Following the government's close of it's case-in-chief, Petitioner moved for a judgment or acquittal pursuant to Rule 29 which the district court denied. The case was then submitted to the jury for a verdict; however before reaching a verdict the jury sent a note out requesting a readback of Goetz's testimony concerning a specific point just before and during the alleged encounter. The jury thereafter convicted Petitioner of five (5) counts out of the sixt (6) charged.

Petitioner's newly appointed counsel filed a motion under Rule 29 and 33 seeking vacatur of his convictions and a new trial. The district court denied the motions on January 7, 2020, and a notice of appeal was filed with the appellate court. On appeal Petitioner raised claims based on the district court abusing its discretion on admitting the testimony of the government's expert in violation of Rule 16, prosecutorial misconduct in knowingly using false testimony, ineffective assistance of counsel, insufficiency of the evidence to support hobbs act jurisdiction, inconsistent finding

by the jury on Petitioner's §924(c) offense as charged, and error in denying speedy trial motion based the an untimely filed indictment.

The appellate court affirmed Petitioner's convictions and sentences in a "Summary Order" and he submitted a petition for rehearing en banc which was denied. This Petition for a Writ of Certiorari is now being submitted to this Court.

## REASONS FOR GRANTING PETITION

This Court should Grant certiorari review, Vacate the lower courts' judgment, and Remand the case (GVR) based on the court of appeals error in affirming the district court's violation of Fed.R.Crim.P. 16's disclosure requirement especially considering the amendment to Rule 16(a)(1)(G)—Expert Witnesses Ordered April 11, 2022 establishing a clear violation of Petitioner's Due Process right to a Fair Trial.

The U.S. Constitution guarantees a criminal defendant a right to a fair trial; United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006)("The Constitution guarantees a fair trial through the Due Process Clause"), and in furthering the protection of this fundamental right rules have been put in place to assure the process which is due when a person faces a deprivation of his liberty. See e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)(recognizing "[a]t a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportuinty for a hearing appropriate to the nature of the case").

Clearly, protection of a criminal defendant's due process right to a fair trial has been memorialized in the Federal Rules of Criminal Procedure ("F.R.Cr.P."), Rule 16 when involving expert testimony. See F.R.Cr.P. 16(a)(1)(G)(2020)(setting out the parameters for the Government's duty to disclosure anticipated expert testimony to be offered at trial). Thus, Rule 16 is there to protect a criminal defendant's fair trial right, which is a necessary component of th Due Process of Law. See e.g., Mathews v. Eldridge, 424 U.S. 319 (1976)(acknowledging that due process is a flexible concept which calls for procedural protections a particular situation

demands, and involves both notice and the opportunity to be heard).

Given the Rule 16 violation in this case, and the intervening change in the rule which specifically concerns such violations, this Petitioner respectfully seeks this Court GVR the matter to the lower court to squarely addrress the clear contravention of his Fair Trial and Due Process rights.

This Court's GVR power has been long recognized to allow "[i]n the appropriate case...[to] conserve[ ] the scare resources of this Court that might otherwise...assist[ ] the court below by flagging a particular issue it does not appear to have fully considered... and alleviates the '[p]otential for unequal treatment' that is inherent in [this Court's] inability to grant pleanry review of all pending cases raising similar issues[.]" Lawrence v. Chater, 516 U.S. 163, 167 (citing United States v. Johnson, 457 U.S. 556 n. 16 (1982); and Griffith v. Kentucky, 479 U.S. 314, 323 (1987)("[W]e fulfill our judicial responsibility by instructing the lower courts to apply [a] new rule retroactively to cases not yet final")).

In this instance, based on the amendment to the Rule 16 which directly applies to the Petitioner's challenge to the violation of Rule 16(a)(1)(G), the direct subject of the rule's amendment. (See Appendix D)(Honorable Chief Judge Robert's Aprill 11, 2022 Order and Notice to Congress). Importantly, even though Petitioner had challenged the application of the Rule 16, which was denied at the district court level; see United States v. Jean, 2020 U.S. Dist. Lexis 3898 *12 (E.D.N.Y. January 7, 2020)(Appendix B)("Defendant argue[d] that the Government committed a Rule 16 violation and... denied [him] a fair trial because the Government failed to disclose their cell-site expert in

their cell-site expert in sufficient time...with sufficient information, with sufficient results, sufficient exhibits, bases for his conclusions, and caused a surprise at trial that no attorney could predict much less handle"), the implementation of the proposed amendments were estabilshed in a report by the judicial committee long before the filing of Petitioner's appellate brief.

Ironically, the court of appeals issued its denial of Petitioner's Rule 16 violation challenge in a "Summary Order" dated April 13, 2022, which was just two days after the amendments to the rule were approved by the Chief Justice and forwarded to Congress. See United States v. Jean, 2022 U.S. App. Lexis 9923 (2nd Cir. April 13, 2022) (Appendix A). The paradoxical incongruity of the court of appeals decision "is clear when comparing the issue raised by Petitioner in the courts below in comparison with the reasons for amending Rule 16 which mirrors the argument highlighted by the judicial committee and its reasons for proposing such amendments. (See Judicial Committee May 20, 2022 Report on the Advisory Committee Notes on Criminal Rules)(stating that "[t]he proposed amendments addresses two shortcomings of the current provisions on expert witness exposure: the lack of an enforceable dealdine for disclosure; and (2) the lack of adequate specificity regarding what information must be disclosed") (Emphasis mine).[1]

[1] It should be further noted thaat the report acknowledged that attorneys representing criminal defendants report receiving "expert witness summaries a week or even the night before trial, which significantly impaired their abilty to prepare for trial [and] also said they do not receive disclosures in sufficient detail to prepare for cross-examination." Id., May 20, 2022 Report). Particularly when, it was the final day of trial when insufficient disclosures were made in Petitioner's case.

The record in Petitioner's case, demonstrate that his Rule 16 violation challenge was a perfect match for the reasons the committee sought clarificatoin of the scope of the "expert testimony" aspect of the rule, and implicates the fundamental fairness principles inherent in due process were frstrated in this case. United States v. Barrett, 703 F.2d. 1076, 1081 (9th Cir. 1983)("[f]airness requires that adequate notice be given the defense to check the findings and conclusions of the government's experts").

Clearly, the current rule sought to be amended has long been recognized as intended to minimize the results from unexpected testimony, in order to provide the oppoinent with a fair opportunity to test the merit of expert testimony through cross-examination. See F.R.Cr.P. Rule 16—Advisory Committee Notes, 1993 Amendment. The record in Petitioner's case demonstrates that during his trial, the spirit of Rule 16 was contravened as was his fair trial right. This is because the expert testimony failed to be supported by the required "summary" of the testimony of FBI Agent Magnuson, amounting to a Rule 16 violation and hence a violation of Petitioner's Due Process rights. See e.g., Jean, Lexis 9923 *18 (essentially viewing the Rule 16 violation as arguably nothing above a technical breach); see also, Jean, Lexis 3898 * (upholding the Rule 16 violation because of a failure to "demonstrate substantial prejudice from the allegedly untimely disclosure of Magnuson's testimony").

In fact, FBI Magnuson seems to make it a habit of contravening a defendant's fair trial right by misrepresenting his expertise of cell-site location evidence. See United States v. Machado-Erazo, 901 F.3d. 326, 337 (D.C. Cir. 201 )(finding that Magnuson's testimony about coverage range for cell phone towers, proximity of cell phones

at time of crime, and there distance from cell towers was error due to government's failing to provide proper disclosure under Rule 16(a)(1)(G)). This Court has made clear that the adversarial process's integrity must rest on the fair administration of justice through the presentation of reliable evidence, balancing potential prejudice and the function of determining the truth. See Taylor v. Illinois, 484 U.S. 400, 415 (1988).

Therefore, by circumventing Rule 16, the government created an unfair advantage in its use of expeert testimony and eroded the purpose of a trial in revealing relevant real world facts. See Tehan v. Shott, 382 U.S. 406, 416 (1966)("The basic purpose of a trial is the determination of truth..."). Certainly, in this case, the government's use of expert testimony concerning cell-site data from its witness had not properly been vetted according to the disclosure rules, giving the government an unfair advantage. Moreover, in the context of this case, where the expert witness's summary report was not provided timely according to rule (further clarified by the recent amendment) entitles Petitioner to a GVR Order.

Especially considering, the "substantial prejudice" the lower court found lacking, was surrepitiously circumvented through an obviously calculated untimely disclosure required by then Rule 16 (and more so its proposed amendment). See Jean, Lexis 3898 * (citing United States v. Walker, 974 F.3d. 193, 203-04 (2nd Cir. 2020)).[2]

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[2] The Rule 16 violation in this case, was exacerbated through the testimony of the government's witnesses, Goetz and McPherson, who were undoubtedly intricately intertwined with the very cell-site evidence the government presented through Magnuson that it improperly disclosed late. See Jean, Lexis 3898 * (acknowledging that "phone records do not reflect a call between Goetz and Jean" and a "phone call [between McPherson and Jean] does not appear in in Jean's phone records")(Emphasis mine).

Consequently, in light of the judicial committee's proposed amendment to Rule 16(a)(1)(G), which seeks to eliminate essentially "trial by ambush[;]" United States v. Kelly, 420 F.2d. 26 (2nd Cir. 1969), thus this Court shold issue a GVR order given the amendment to F.R.Cr.P. 16 cast substantial doubt on the correctness of the lower court's summary disposition. Lawrence, supra at p. 170.

Particularly, when considering the untimely disclosure of a summary report of the expert testimony which was not provided in sufficient detail allowing a defendant to prepare for an effective cross-examination of the government's expert witness. (See Judicial Committee May 20, 2022). Thus, even assuming that the proposed Rule changes is not effective until December 1, 2022, this amended rule can be viewed as a clarifying amendment that should be applied retroactively to Petitioner's case given his conviction is not final. See Griffith v. Kentucky, supra. Therefore, since the amendment to Rule 16 simply clarifies the unsettled and confusing practice and does not change the rule it should be applied after issuance of a GVR Order in this case. And, equally important, is the fact that Petitioner's Rule 16 violation challenge below fits squarely within the reasons the judicial committee recommended amending it as stated in its May 20, 2022 Report.

In sum, this Court should Grant, Vacate and Remand (GVR) the lower court's affirmance of the violation of Rule 16 concerning the violation of Petitioner's fair trial rights.

II. This Court should grant this petition for Certiorari based on the well established principle inherent in the Due Process of Law that a conviction may not rest on the presentation of intentionally false evidence by the government.

This Court has long held that under the principles of Due Process the government may not rely on knowingly false evidence to convict a criminal defendant. See Napue v. Illinois, 360 U.S. 264, 269 (1969), Mooney v. Holohan, 294 U.S. 103, 112 (1935).

In the instant case, the record demonstrates that the government had its two key witnesses (Goetz and McPherson) testify to speaking with Petitioner both before and after an alleged robbery of marijuana from one of them. See United States v. Jean, 2020 U.S. Dist. Lexis 3898 *2-4 (E.D.N.Y. January 7, 2020). Importantly, as the appellate court conceded, Petitioner's "phone records do not reflect a call between Goetz and [him] until the day of the shooting[.]" United States v. Jean, 2022 U.S. App. Lexis 9923 * (2nd Cir. April 13, 2022). Similarly, the appellate court found that McPherson's testimony stated "she spoke with [Petitioner] after the shooting ... [in a] phone call does not appear in [his] phone record" at all. Id., Lexis 9923 *

Although, both the district and appellate courts attempted to negate the fact that the testimony of the government's two key witnesses was not supported by any cell phone records but it dismissed this fact as inconsequential to the witnesses testimony. However, this Court has long recognized that creating a false impression to the jury violates due process. See Napue, supra. Consequently, the fact of the lack of corroborating phone records was significantly material because contrary to the lower courts' rulings, the Goetz

and McPherson testimony was apparently false.

Especially considering, that the government was keenly aware not only that there was no corrobating phone records but also that Goetz never sent a Snapchat video of marijuana to Petitioner. According to the information obtained through a Snapchat warrant, no video was sent to Petitioner's phone via Snapchat.Yet, the appeals court relied on the uncorrobated testimony of Goetz that he sent "a video of marijuana to [Petitioner] via Snapchat." Jean, Lexis 9923 * . Clearly, if the government witness did send "that video to [Petitioner] the evening before the shooting[;]" then it would have corroborated Goetz's testimony reflected in the information obtained through the Snapchat warrant. However, the Snapchat warrant did not support Goetz testimony at trial, nor did the Snapchat records show that Goetz even shown anything to Petitioner on the date he testified he did so. In fact, what the Snapchat record did show was that Goetz had deleted his contact with Petitioner on the Snapchat platform on March 17, 2016, long before the alleged robbery incident.

Importantly, the same discrepancies with Goetz's testimony are further magnified throughout the testimony presented through the government's witness McPherson. According to McPherson's testimony, following the Goetz robbery, Petitioner allegedly contacted her by "Facetime" confessing that he had shot Goetz because the victim allegedly "rushed" Petitioner. However, it was learned that no Facetime (or phone call for that matter) took place just like the absent Snapchat records Thus, this seemingly damaging corroborating evidence in fact similarly did not exist. Yet again, in attempting to negate these facts the government argued they should be viewed

as "minor discrepancies" instead of in the proper context as the false evidence it obviously presented.

As a matter of law, a prosecutor's misleading the jury by false evidence, and failing to correct that evidence when he undoubtedly should have reasonably known it to be false is an egregious violation of Due Process. Giglio v. United States, 405 U.S. 150, 153 (1972); see also, Berger v. United States, 295 U.S. 78, 88 (1935). The record in this case is clear when determining whether the government violated the basic fundamental principles of Due Process. See United States v. Universita, 298 F.2d. 365, 367 (2nd Cir. 1962)("The prosecution has a special duty not to mislead; the government should of course, never make affirmative statements contrary to what it knows to be the truth").

None of the false evidence presented was corrected by the prosecution at Petitioner's trial, and in fact the government persisted throughout the presentation of the evidence and even during summation to the jury, that the false evidence concerning the Snapchat video, the phone calls and text messages which clearly did not corroborate witness testimony. Consequently, at oral arguments, the government walked back that position when questioned by the circuit judge, concerning whether "the government elicited that testimony from Mr Gets (sic) knowing that it was actually contradicted by the objective third party evidence[.]" Oral Argument, Calendar No. 2036 59, United States v. Jean: Speaker 2 (27:42). In response to the inquiry, the government downplayed the effect of this obviously false evidence by stating, "No Your Honor, not contradicted, just not corroborated." (Id., Speaker 4 (27:53)(Emphasis mine).

Given the clear admission by the government that the witnesses' testimony concerning the allegedly supportive evidence "just [did] not corroborate[;]" (Id.), essentially with its case-in-chief is demonstrative of its knowledge of presenting false evidence in violation of the Due Process. Following this Court, the second circuit has recognized that when a defendant establishes "the government knowingly permitted the introduction of false testimony, reversal is virtually automatic." Drake v. Portundo, 553 F.3d. 230, 241 (2nd Cir. 2009).

Unfortunately, in this case the lower courts did not adhere to the spirit of the law which arguably required a full and thorough acknowledgement of the record in order to correct the obvious i.e., a manipulation by the government to use a cellphone geolocation expert wintess in order to paint a false narrative which undoubtedly influenced the jury verdict. Especially since, the government's failure to correct the fact that the totality of the evidence from Goetz and McPherson viewed with that of the other witnesses (Conroy and Magnuson) could not reasonably be reconciled with creating a smorgasbord of lies served to the jury.

In sum, this Court should grant certiorari review to direct that lower court adhere to this Court longstanding principles that the government does not rely on false evidence to obtain convictions.

III. Whether the jury verdict that Petitioner "discharged" but did not "branish" a firearm under 18 U.S.C. §924(c) was "metaphysically impossible" invalidated the jury finding that he violated the greater offense without violating the lesser offense in contravention of the Sixth Amendment.

It has been long established that "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty opf all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511 (1995).

In this instance, Petitioner was convicted of violating 18 U.S.C. §924(c)(1)(A)(iii), for discharging a firearm during a Hobbs Act robbery. The jury was instructed that the verdict sheet provided spaces which allowed it to find whether the jury agreed that Petitioner branished or discharged the firearm or both. Consequently, the jury found Petitioner discharged the firearm but he did not branish it. However, contrary to the government's position on appeal, and the subsequent decision of the appellate court, this was error.

Specifically, the court of appeals found that it was "incorrect" to view a defendant's discharge of a firearm but not finding that he branished it as repugnant. Jean, Lexis 9923 *8. In order to support its position, the appellate courtreasoned that "[b]ranishing requires the intent to 'intimidate,' while discharging does not include an intent requirement." Id. *8 (citing §924(c)(4); Dean v. United States, 556 U.S. 568, 572-73 (2009)). This reasoning and the appellate court's reliance on Dean is misplaced and amounts to an error for at least two (2) reasons.

First, this Court's rulig in dean was premised on whether the structure of the §924(c) statute at a time when it constituted a sentencing enhancement. See Harris v. United States, 536 U.S. 545, 567-70 (2002)(§924(c)(1)(A) calls for different levels of mandatory minimums for use of a firearm during an offense; therefore the factual findings of the court were not unconstitutional because each level did not have to be part of the indictment and proven beyond a reasonable to the jury since each was a sentencing factor, and not an element of the offense).

Consequently, this Court overruled Harris and held that whether a defendant violated §924(c), a jury required to determine if he would be subject to a strict mandatory minimum of five (5) years possession or use; seven (7) years for branishing; or ten (10) years for discharging a firearm during or in relation to a crime of violence or drug trafficking offense. See Alleyne v. United States, 570 U.S. 99 (2013).

Clearly, the Sixth Amendment has historically required that only a properly instructed jury may find a defendant violated a criminal statute beyond a reasonable doubt. In re Winship, 397 U.S. 58 (1970). Therefore, teh appellate court's reasoning that the jury in Petitioner's case could have found that he "shot Goetz immediately after producing the firearm without using it to intimidate [him] before firing" it based on Dean was strictly in the province of the jury. Jean, Lexis 9923 *9. Given that whether Petitioner first intimidated Goetz before allegedly shooting him is a mixed question of law and fact, such finding are typicaly required to be resolved by the jury. Thus, because the power of the jury to

even produce inconsistent verdict is within its province, a judicial body may not speculate on the jury's finding even if presumably based on impermissible reasons. Harris v. Rivera, 454 U.S. 339, 346 (1981)(recognizing that a jury verdict grants the power of a jury to return a verdict of not guilty for impermissble reasons). Hence, it was error for the appellate court to essentially invalidate (or for the matter make valid) the jury's "metaphysically impossible" verdict in this case.

Secondly, this Court has consistently acknowledged that under the elements test, a lesser offense is necessarily indicated in the greater offense when the elements of the lesser is a subset of the elements of the greater. Schmuck v. United States, 489 U.S. 705, 716 (1989). This principle requires special attention in the context of case because as Petitioner argued in his opening appellate brief, when the actions of a defendant are found to be elements of the offense; (citing United States v. Clemente, 22 F.3d. 477 (2nd Cir. 1994), "one cannot happen without the other [and] [t]here is no view of the case that can resolve that inconsistency." (Appellate Brief, p. 66).

In sum, this Court should grant certiorari given the clear violation of Petitioner's right to a consistent jury verdict under the Sixth Amendment right to a trial by jury.

## CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Mr. Spencer Jean
Pro se Petitioner

Dated: 10/27, 2022