No. _____

IN THE
Supreme Court of the United States

ORLANDO CORTEZ-NIETO,
JESUS CERVANTES-AGUILAR
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Tenth Circuit

Joint Petition for a Writ of Certiorari

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QUESTION PRESENTED

After a jury convicted the petitioners of federal crimes, the district court granted their post-verdict motions for judgments of acquittal. But the district court then sua sponte convicted them of lesser-included offenses that were not submitted to the jury and that the government never advanced, either in its proposed jury instructions or in its response to the defendants' post-verdict motions. The Tenth Circuit affirmed, even while recognizing that other circuits require jury instructions on lesser-included offenses as a prerequisite for entering convictions on those offenses. The question presented is:

> May a court sua sponte enter post-trial convictions on lesser-included offenses that the jury had no authority to return?

RELATED PROCEEDINGS

United States v. Cortez-Nieto, D. Kan. Case No. 2:18-cr-20030-JAR-1 (amended judgment filed 11/15/2022).

United States v. Cervantes-Aguilar, D. Kan. Case No. 2:18-cr-20030-JAR-2 (amended judgment filed 11/15/2022).

United States v. Cortez-Nieto, 10th Cir. Appeal No. 20-3184 (opinion filed 08/05/2011; rehearing en banc denied 11/01/2022).

United States v. Cervantes-Aguilar, 10th Cir. Appeal No. 20-3189 (opinion filed 08/05/2011; rehearing en banc denied 11/01/2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Orlando Cortez-Nieto and Jesus Cervantes-Aguilar respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published panel opinion is available as *United States v. Cortez-Nieto*, 43 F.4th 1034 (10th Cir. 2022); it is included as Appendix A. The Tenth Circuit's unpublished order denying rehearing en banc is included as Appendix C. The district court order appealed from is included as Appendix B.

JURISDICTION

The United States District Court for the District of Kansas had jurisdiction under 18 U.S.C. § 3231, which provides the federal district courts with exclusive jurisdiction over offenses against the United States. The petitioners timely appealed the district court's judgments of convictions to the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1291. The Tenth Circuit affirmed in a published decision. On November 1, 2022, Tenth Circuit denied the petitioners' separate petitions for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 2. Interpretation

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

Rule 29. Motion for a Judgment of Acquittal

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

Rule 30. Jury Instructions

(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

Rule 31. Jury Verdict

(c) Lesser Offense or Attempt. A defendant may be found guilty of any of the following:

(1) an offense necessarily included in the offense charged[.]

STATEMENT OF THE CASE

"[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury *must*, as a theoretical matter, return a verdict of acquittal." *Keeble v. United States*, 412 U.S. 205, 212 (1973) (emphasis added). But what happens when the jury mistakenly fails to return that verdict of acquittal? Once the district court corrects the jury's error, may the court then do what the jury could not, and sua sponte enter a conviction on a lesser offense for which no instruction was offered? This action would be prohibited in some circuits, and is counseled against by both the Federal Rules of Criminal Procedure and the principle of party presentation. The Tenth Circuit nonetheless affirmed this action here.

Twenty-seven years ago, this Court declined to consider "the precise limits" on courts' "power to substitute a conviction on a lesser offense for an erroneous conviction of a greater offense." *Rutledge v. United States*, 517 U.S. 292, 306 (1996). The time has come for this Court to consider one such limit: whether a district court may sua sponte enter convictions on lesser-included offenses that the jury had no authority to return.

1. District Court Proceedings

A federal grand jury indicted Petitioners Orlando Cortez-Nieto and Jesus Cervantes-Aguilar with four drug-related crimes, all alleged to have occurred within 1,000 feet of a playground. Pet. App. 4a. The petitioners pleaded not guilty and proceeded to trial.

At trial, no party sought instructions or verdict forms on lesser-included offenses. R1.125-55; R1.164; R1.175. The district court accordingly instructed the jury only as to the crimes charged, with no option for convictions on lesser-included offenses. Pet. App. 3. Under these instructions, absent sufficient evidence of proximity—i.e., that the crimes occurred within 1,000 feet of a playground—the jury was required to acquit.

As it was, the jury convicted both petitioners as charged. Pet. App. 54a. After trial, the petitioners filed written motions for judgments of acquittal. Pet. App. 54a. They argued that the evidence was insufficient to sustain any of the counts, because the government failed to prove proximity beyond a reasonable doubt. Pet. App. 54a. They asked the district court to acquit them on all counts. Pet. App. 22a-23a.

The government filed a response in which it chose to argue only that the convictions should be sustained because the evidence proved proximity. R1.384-87. The government did not argue alternatively that the district court could or should enter convictions on lesser-included offenses. R1.384-87.

The district court ruled that the government failed to prove proximity, and acquitted the petitioners of the crimes submitted to the jury. Pet. App. 54a-55a, 59a, 65a. But the district court also sua sponte entered convictions on lesser-included offenses on each of the four counts (the offenses as-charged minus the proximity element). Pet. App. 59a-61a, 65a. Both petitioners appealed.

2. Tenth Circuit Proceedings

On appeal, both petitioners argued that the district court erred by sua sponte convicting them of lesser-included offenses after the government twice waived or forfeited that result. Cortez-Nieto Br.32-49, Reply Br.9. The Tenth Circuit affirmed based on its reading of its own prior cases, and on "fairness" grounds. Pet. App. 1a-53a. Petitioners jointly petitioned for rehearing en banc. After requesting and receiving a response from the government, the Tenth Circuit denied the petition. Pet. App. 66a-67a.

REASONS FOR GRANTING THE WRIT

1. The circuit courts have long disagreed about judicial authority regarding lesser-included offenses; this Court's intervention is necessary to bring order to this important area of law.

a. The petitioners argued on appeal that "it was inappropriate for the court to enter judgment on lesser-included offenses when the prosecution had not sought a jury instruction on lesser-included offenses." Pet. App. 26a. The Tenth Circuit rejected this argument, noting that "[s]ome circuits have agreed with that proposition," while "other circuits have said that a lesser-included-offense instruction is not a prerequisite to imposing a conviction on a lesser-included offense." *Id.* (citations omitted). Other circuits have likewise recognized this split of authority, which has been entrenched for decades. Only this Court can bring order to this area of law.

Courts that disallow any post-trial verdict on a lesser-included offense absent a jury instruction on that offense ground their approach in federal procedural law. The Ninth Circuit, for instance, has long held that three conditions are "necessary" before

a court may enter judgment on a lesser-included offense after finding that insufficient evidence supported the jury's verdict on the greater offense: (1) the offense must be a true lesser-included offense; (2) "the jury must have been explicitly instructed that it could find the defendant guilty of the lesser-included offense and must have been properly instructed on the elements of that offense"; and (3) the government must have requested entry of judgment on the lesser-included offense. *United States v. Vasquez-Chan*, 978 F.2d 546, 554 (9th Cir. 1992), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). The *Vasquez-Chan* court stated that, absent a jury instruction on the lesser-included offense, the judgment of acquittal on the greater offense "precludes a conviction on the lesser offense." 978 F.2d at 554 n.5. The Ninth Circuit has more recently explained that *Vasquez-Chan* was decided not on constitutional grounds, but "as a matter of federal procedural law." *Douglas v. Jacquez*, 626 F.3d 501, 507 (9th Cir. 2010).

The Second Circuit adheres to a similar rule as a matter of federal procedural law, holding that "the jury must be instructed on the lesser offense as a prerequisite to any modification in a defendant's conviction and sentence." *United States v. Dhinsa*, 243 F.3d 635, 675 (2d Cir. 2001). As the Second Circuit explained in *Dhinsa*, Federal Rule of Criminal Procedure 31 provides the only authority for entering a conviction on a lesser offense; but Rule 31 is titled 'Verdict,' which "reinforces the conclusion that it applies to the *jury's*—rather than a reviewing court's—finding of guilt on a lesser-included offense." *Id*. at 676 (emphasis added). By allowing parties to request a lesser-included-offense instruction at trial, Rule 31 "may work to either the

prosecutor's or the defendant's benefit." *Id*. at 674. Thus, deciding whether to request such an instruction is a "tactical" decision for trial counsel to make. *Id*. (citation omitted).[1]

Other circuits, including the Tenth Circuit here, Pet. App. 26a, have explicitly considered and rejected any rule requiring instructions on lesser-included offenses before a court may enter post-verdict judgments on those offenses. *See, e.g., United States v. Petersen*, 622 F.3d 196, 205-06 (3d Cir. 2010) (recognizing that some courts of appeals "have declined or hesitated to reduce a conviction to a lesser included offense when the district court did not give a lesser included offense instruction," but concluding that no such instruction is necessary); *United States v. Hunt*, 129 F.3d 739, 745 n.5 (5th Cir. 1997) (noting and rejecting Ninth Circuit's approach).

b. In the petitioners' case, the Tenth Circuit affirmed the district court's sua sponte *convictions* on lesser-included offenses in large part because, in the Tenth

[1] Several state supreme courts have cited the tactical nature of this decision when holding that courts within their jurisdictions may not enter judgment on a lesser-included offense "when a jury verdict of guilty of the greater offense is reversed for insufficient evidence and the jury was not instructed on the lesser included offense." *State v. Myers*, 461 N.W.2d 777, 778 (Wis. 1990). In *Myers*, the Wisconsin Supreme Court observed that when the state seeks such convictions after the fact notwithstanding its failure to ask for instructions on lesser-included offenses at trial, "[t]he state is asking us to rescue it from a trial strategy that went awry." *Id*. at 782. The Court recognized that it would be unfair to allow the state to back out of that strategy once it fails: "We require accuseds to abide by the decisions they made at trial. We should not alter the rules under which the trial was conducted after the trial is completed or allow the state to modify its trial position on appeal." *Id*. at 783. *See also State v. Villa*, 93 P.3d 1017, 1021-22 (N.M. 2004) (appellate court may not order conviction on lesser-included offense where jury was not instructed on that offense at trial: "The State, having made the strategic decision not to request jury instructions on the [lesser-included crimes] may not complain on appeal that it was denied a fair opportunity to pursue those convictions"); *State v. Holley*, 604 A.2d 772 (R.I. 1992) (after reversal for insufficient evidence, conviction on lesser-included offense only appropriate where jury was instructed on that offense); *State v. Brown*, 602 S.E.2d 392, 597 (S.C. 2004) (same); *In re Heidari*, 274 P.3d 366, 369 (Wash. 2012) (same; the state can "easily avoid" this rule "by requesting a lesser included offense instruction at trial").

Circuit's view, it would have been "perfectly proper" for the district court to have sua sponte *instructed the jury* on those lesser-included offenses. Pet. App. 28a-29a. The Tenth Circuit cited an older circuit case for the proposition that "[t]he trial court instructs the jury in accordance with the evidence and the applicable law *whether requested or not*." Pet. App. 29a (citing *United States v. Begay*, 833 F.2d 900, 901 (10th Cir. 1987); emphasis added). But other circuits have questioned the propriety of sua sponte instructions on lesser-included offenses.

The D.C. Circuit has held, for instance, that "[i]n general the trial judge should withhold charging on lesser included offenses unless one of the parties requests it, since that charge is not inevitably required in our trials, but is an issue best resolved, in our adversary system, by permitting counsel to decide tactics." *Walker v. United States*, 418 F.2d 1116, 1119 (D.C. Cir. 1969); *accord United States v. Dingle*, 114 F.3d 307, 312-13 (D.C. Cir. 1997) (reaffirming *Walker*). Similarly, the Seventh Circuit has cautioned that any rule requiring judges to sua sponte instruct on lesser-included offenses "would compel the judge to present jury instructions at odds with the trial strategy of [defense] counsel" *Kubat v. Thieret*, 867 F.2d 351, 365-66 (7th Cir. 1989) (citation omitted); *United States v. Chandler*, 996 F.2d 1073, 1099 (11th Cir. 1993) (same); *United States v. Davis*, 1997 WL 215698, at *2 (4th Cir. 1997) (unpublished) (same).[2]

[2] Many state courts agree. *See, e.g., State v. Brower*, 971 A.2d 102, 110 (Del. 2009) ("A trial judge should not instruct the jury sua sponte on lesser-included offenses that neither party requests, because that would contravene the autonomy of the parties to choose their trial strategies."); *Hagans v. State*, 559 A.2d 792, 804 (Md. 1989) ("[T]he trial court ordinarily should not give a jury an instruction on an uncharged lesser included offense where neither side requests or affirmatively agrees to such instruction. It is a matter of prosecution and defense strategy which is best left to the parties."); *State v. Grier*, 246 P.3d 1260, 1274 (Wash. 2011) (en banc) (rejecting rule requiring trial courts to sua sponte

c. As the D.C. Circuit once noted, "[t]he doctrine of lesser included offenses is not without difficulty in any area of the criminal law." *Fuller v. United States*, 407 F.2d 1199, 1228 (D.C. 1967). The question of the district court's sua sponte authority to instruct on or (as here) enter post-trial convictions on lesser-included offenses cuts across nearly every area of criminal law. From white-collar crimes to violent crimes to the controlled-substance offenses in this case, a host of criminal statutes embrace lesser-included offenses.

This Court has previously granted certiorari to resolve other questions regarding lesser-included offenses. *See, e.g., Keeble v. United States*, 412 U.S. 205 (1973) (holding that Major Crimes Act does not preclude instructions on lesser-included offenses); *Schmuck v. United States*, 489 U.S. 705 (1989) (resolving circuit split over test to determine what constitutes a lesser-included offense for purposes of Fed. R. Crim. P. 31(c)); *Carter v. United States*, 530 U.S. 255 (2000) (resolving circuit split over application of Fed. R. Crim. P. 31(c) to bank-robbery statute). The conflicts described above are open, longstanding, and entrenched, and thus ripe for this Court's resolution. As the law currently stands in the Tenth Circuit, the government can overcharge, not seek instructions on lessers, and hedge its bets knowing that the district court will save it from total acquittals in the face of any misbegotten convictions.[3] But in other circuits, the government has to be more selective in deciding

instruct on lesser-included offenses: "Such a rule would be an unjustified intrusion into the defense prerogative to determine strategy").

[3] Overcharging may happen as a result of inexperience, overconfidence, a desire for a harsher sentence, political posturing, or an expectation that "[w]here one of the elements of the offense

what charges to bring and what instructions to proffer, as district courts in those circuits are required to hold the government to its strategic choices.

This Court's intervention is necessary to bring order to this important area of law. This Court should grant this petition.

2. This case is an ideal vehicle for the question presented.

This case presents no procedural impediments to reviewing the question presented. The petitioners timely sought appellate review of the district court's order sua sponte convicting them of lesser-included offenses. The question of the district court's authority was fully litigated in the appellate briefs and at oral argument in the Tenth Circuit. The Tenth Circuit directly addressed the issue in a published decision, recognizing that the outcome would be different in other circuits. If this Court were to hold that courts may not sua sponte enter convictions on lesser-included offenses that were never submitted to the jury, then the petitioners would be entitled to the full acquittals on every count, as they requested in the district court. Review is necessary, and this case is the right vehicle.

3. The district court's action here cannot be squared with either the Federal Rules of Criminal Procedure or the principle of party presentation; the Tenth Circuit erred in concluding otherwise.

In this case, the district court granted the petitioners' post-verdict motions for judgments of acquittal, but then sua sponte convicted them of lesser-included offenses that were never submitted to the jury and that the government never advanced, either in its proposed jury instructions or in its response to the defendants' post-

charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Beck v. Alabama*, 447 U.S. 625, 633-34 (1980).

verdict motions. The Tenth Circuit affirmed, explaining that "[c]ourts have always had authority to resolve raised issues as fairness requires." Pet. App. 30a. But the Tenth Circuit did not identify the source of this authority, discuss its parameters, or explain how the district court's action was consistent with other governing rules. The Tenth Circuit erred, for at least two reasons.

a. First, nothing in the Federal Rules of Criminal Procedure authorized the district court's action. Rule 29 governs motions for judgment of acquittal. It is the natural place to look for the extent of a district court's authority on such motions. And yet Rule 29 states only that "[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal," period. Fed. R. Crim. P. 29 (c)(2). This rule does not authorize the district court to enter convictions on lesser-included offenses after entering an acquittal notwithstanding a guilty verdict.

Rule 31 states that "[a] defendant may be found guilty of . . . an offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c)(1). But that rule governs *jury* verdicts at trial, not judicial rulings on post-trial motions for judgment of acquittal. Fed. R. Crim. P. 31 (titled "Jury Verdict" and addressing jury verdicts throughout); *see Dhinsa*, 243 F.3d at 676 (noting that Rule 31 is titled "Verdict," which "reinforces the conclusion that it applies to the *jury's*—rather than a reviewing court's—finding of guilt on a lesser-included offense") (emphasis added).

Rule 2 provides that the Federal Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the

elimination of unjustifiable expense and delay." But this rule is "not a principle of law superseding clear rules that do not achieve the stated objectives." *Carlisle v. United States*, 517 U.S. 416, 424 (1996). In other words, Rule 2 cannot authorize an action that the specific and clear provisions of Rules 29 and 31 do not themselves authorize. *Id*.

We have been unable to locate any other rule or statute authorizing the action that the district court took in this case.

b. This brings us to the second error in the Tenth Circuit's decision—it cannot be reconciled with the principle of party presentation. "In our adversary system, both in civil and criminal cases, in the first instance and on appeal," federal courts "follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). That is, courts must rely on the parties "to frame the issues for decision." *Id*. One way the parties in criminal cases frame the issues for decision is by requesting or foregoing jury instructions on lesser-included offenses. *See, e.g., Dhinsa*, 243 F.3d at 674 (deciding whether to request lesser-included instruction is a "tactical" decision for trial counsel to make); *Walker*, 418 F.2d at 119 (instructions on lesser-included offenses "is an issue best resolved, in our adversary system, by permitting counsel to decide tactics"); *United States v. Boone*, 951 F.2d 1526, 1542 (9th Cir. 1991) (counsel's failure to request instruction on lesser-included offense "must be considered a matter of trial strategy and not error" (citation omitted)).

In *Greenlaw*, this Court held that a circuit court may not sua sponte "alter a judgement to benefit a nonappealing party," even (especially) when that party is the

government. *Id*. at 244. This Court emphasized in *Greenlaw* the executive branch's "exclusive authority and absolute discretion to decide whether to prosecute a case." *Id*. at 246; *see also id.* at 248 (noting Congress's recognition that Department of Justice officers "are best equipped to determine where the Government's interest lies"); *accord United v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."). Moreover, "[t]o the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights"—that is, *not* on behalf of the government, which is fully capable of protecting itself. *Greenlaw*, 554 U.S. at 243-44.

The considerations that informed *Greenlaw*—the party-presentation rule, the government's exclusive authority to make its own decisions, and the absence of a need to protect the government—all support a rule prohibiting district courts from sua sponte entering convictions on lesser-included offenses unless the jury was instructed on those offenses. This Court has more recently warned that, "as a general rule, our system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020) (marks and citations omitted).

In the petitioners' case, the government staked its all on the greater offenses, and advanced no instructions on lesser-included offenses. Ultimately, the government failed in its strategy, and under the instructions given, the jury had but one option:

to acquit the petitioners. *Keeble*, 412 U.S. at 212. Under these circumstances, the district court had no authority to rescue the government by sua sponte entering convictions that the jury was itself not permitted to enter. The Tenth Circuit erred in holding otherwise. Review is necessary.

CONCLUSION

For all of the above reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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