No._____

In the
Supreme Court of the United States

JESSE DAVENPORT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether a court violates a defendant's Fifth Amendment Grand Jury rights when it instructs a petit jury that it can convict him for a conspiracy consisting of any crime charged in a multi-count indictment rather than the specific conspiracy passed on and handed up by the grand jury?

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OPINION BELOW

The unpublished decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced as Appendix A.

JURISDICTION

The court of appeals entered judgment on September 6, 2022. App. A. It denied a petition for rehearing on November 30, 2022. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

STATEMENT OF THE CASE

A jury convicted Petitioner on all charges of an indictment, and he was sentenced to 50 years in prison.

Specifically, the government indicted Petitioner on four counts, charging him in Count One with conspiring to sexually exploit a child in violation of 18 U.S.C. §2251(a) and (e), alleging that he "knowingly and intentionally conspire[d] with [Angela Martin] to employ, persuade, entice, induce and use a minor . . . to engage in sexually explicit conduct . . . ." Count

Two alleged receipt of child pornography in violation of 18 U.S.C. §2252(a)(2) on August 27, 2013. Count Three alleged distribution of child pornography on August 28, 2013, and Count Four alleged receipt of child pornography on September 4, 2013.

Prior to trial, both Petitioner and the government proposed jury instructions. With respect to Count One, the conspiracy to exploit a child, Petitioner proposed in relevant part:

> The defendant is charged in Count One of the Superseding lndictment with conspiring to sexually exploit a child in violation of Section 2251(a) & (e) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, beginning on or about August 26, 2013, and ending on or about August 27, 2013, there was an agreement between the defendant and Ange1a Denise Martin, a.k.a. Ange1a Denise Hausmann commit the crime as charged in Count One of the Superseding lndictment; and
>
> Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it;
>
> Third, at the time, M.P.(2010) was under the age of eighteen years;
>
> Fourth, the defendant used had the M.P.(2010) assist any other person to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct; and

> Fifth, the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce.

The government, for its part, proposed the following instruction for Count One:

> The defendant is charged in Count One of the Superseding the [sic] indictment with conspiring to Sexually Exploit a Child in violation of Section 2251(a) and (e) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, beginning on or about August 26, 2013, and ending on or about August 27, 2013, *there was an agreement between two or more persons to commit at least one crime as charged in the superseding indictment*; and
>
> Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

[emphasis added].

The district court adopted the government's instruction, specifically the language pertaining to "an agreement between two or more persons to commit at least one crime as charged in the superseding indictment . . . ." The court intentionally chose this constitutionally flawed instruction over the one provided by Petitioner, a pro se litigant whose instruction tracked the language of the indictment rather than veering off into other theories and crimes that the grand jury never passed upon.

Petitioner's trial lasted five days. As the district court read the instructions to the jury, Petitioner, representing himself pro se, objected to this wording of the conspiracy instruction which even he could see clearly violated his grand jury presentment rights:

> [THE COURT]: First, beginning on or about August 26, 2013, and ending on or about August 27th, 2013, there was an agreement between two or more persons to commit at least one crime as charged in the superseding indictment; and
>
> Second –
>
> [PETITIONER]: Your Honor, if I may? It actually is not as charged in the superseding indictment. That would entail all four. Like this -- that would entail there was a -- there was a conspiracy that would -- sorry.
>
> That would imply that all four charges are conspiracy charges as opposed to the last three which are simply substantive charges.
>
> THE COURT: Your objection is overruled.

At the conclusion of arguments and jury instructions, the jury went into deliberations and returned a verdict of guilty on all counts on October 3, 2016.

On appeal, the Ninth Circuit affirmed Petitioner's conviction, rejecting his argument that the district court constructively amended the charge in Count One. Appx. A at 3. The court relied primarily on its decision in *United States v. Mickey*, 897 F.3d 1173, 1183 (9th Cir. 2018), a case that had nothing to do with constructively amending the elements of a charge and

instead only concerned multiple means of committing an offense. Petitioner sought rehearing en banc, which was denied. Appx. B. This petition follows.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's affirmance in this case warrants the Court's attention because the Ninth Circuit's reliance on its previous decision in *United States v. Mickey*, 897 F.3d 1173 (9th Cir. 2018), to reject Petitioner's constructive amendment argument, *see* Appx. at 2-3, conflicts with this Court's entire body of caselaw interpreting when such a fatal variance has occurred. Conflating *Mickey*'s analysis of means with the district court's amendment of the elements of a crime undermines the entire constructive amendment analysis. Because the Ninth Circuit has "decided an important question of federal law . . . that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c), the Court should grant review.

The Grand Jury Clause of the Fifth Amendment requires that where the government seeks to charge "the commission of any one offense in several ways . . . the crime *and the elements* of the offense that sustain the conviction [must be] fully and clearly set out in the indictment." *United States v. Miller,* 471 U.S. 130, 136 (1985) (emphasis added). The Grand Jury Clause "is designed to ensure that criminal defendants have fair notice of the charges

that they will face *and the theories that the government will present at trial*." *United States v. Hartz*, 458 F.3d 1011, 1022 (9th Cir. 2006) (emphasis added). If a court could simply change the charging part of the indictment to allege a theory of criminal liability that was distinct and had different elements from the ones charged,

> 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.

Russell v. United States, 369 U.S. 749, 770-71 (1962). For this reason, "[a]fter an indictment has been returned, its charges may not be broadened through amendment -- whether it be by physical alteration, jury instruction, or bill of particulars -- except by the grand jury." *United States v. Pazsint*, 703 F.2d 420, 423 (9th Cir. 1983); *see, e.g.*, *United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014) (same). In other words, the "Fifth Amendment's Grand Jury Clause endows defendants who are charged with felonies with a substantial right to be tried only on the charges set forth in an indictment by a grand jury." *United States v. Shipsey*, 190 F.3d 1081, 1086 (9th Cir. 1999).

The Grand Jury Clause is violated when the jury instructions at trial broaden the charges in the indictment by allowing a defendant's conviction to

be based on "an element of an offense not alleged in the indictment." *Miller,* 471 U.S. at 139; *see, e.g.*, *Jones v. Smith*, 231 F.3d 1227, 1233 (9th Cir. 2000) ("Where a defendant is convicted of a crime and where a grand jury never charges the defendant with an essential element of that crime, a constructive amendment of the indictment has occurred, and reversal is warranted").

Here the jury instructions unequivocally permitted the jury to convict Petitioner under any of the three distinct theories of liability, specifically a conspiracy to sexually exploit a child, a conspiracy to receive child pornography and a conspiracy to distribute child pornography. The problem is that the government only alleged one of those theories of liability in the indictment returned by the grand jury. The government "offered proof of facts different from those set forth in the indictment," *United States v. Wilbur*, 674 F.3d 1160, 1178 (9th Cir. 2012), and the district court allowed the jury to convict Petitioner under those facts.

Petitioner, pro se at trial, even tried to point out this glaring error when he objected to the instruction by telling the court, "It actually is not as charged in the indictment. That would entail all four [charges]." ER-191. But the court overruled the objection, foregoing the opportunity to correct this error. Thus, the district court's conspiracy "to commit at least one crime as charged in the superseding in the superseding indictment" jury instruction on

Count One is a classic example of an impermissible constructive amendment which allowed proof of an essential element of the crime on an entirely alternative basis (actually two), but not charged in the indictment. *See, e.g.*, *Shipsey*, 190 F.3d at 1084-86; *Pazsint*, 703 F.2d at 421-23.

Because the district court's conspiracy instruction here constructively amended the charge identified in Count One of the superseding indictment, the Ninth Circuit should have reversed Petitioner's conviction on that count, vacated his sentence and remanded for a new trial.

It did no such thing here. Instead, despite the fact that the district court clearly instructed the jury that it could convict Petitioner of a conspiracy to sexually exploit a child if the government proved Petitioner instead only conspired to commit two other completely distinct offenses from sexual exploitation, the Ninth Circuit concluded that "[u]nder these circumstances, no constructive amendment of the indictment can be established." Appx. at 3. It came to this conclusion relying on this Court's decision in *Mickey*. Appx. at 3 (citing *Mickey*, 897 F.3d at 1183 for the proposition that "there was no constructive amendment when the language of the indictment included multiple means of committing an offense, giving defendant notice that he would have to defend against all of them").

Mickey, a case the government never even cited it in its briefing, makes no sense in this case because it had nothing to do with a court changing the *elements* of the charge that a grand jury had previously passed on. Instead, *Mickey* was a case that concerned the statutorily permitted *means* for committing a particular offense. 897 F.3d at 1183. Moreover, it was a case where the grand jury's indictment *included* all four statutory means for the charge against the defendant there. *Id.* And the indictment even pled the means in the conjunctive, which led the Court to conclude that Mickey was "given notice that he would have to defend against all four means." *Id.* Nothing of the sort happened here.

Petitioner was not charged with conspiring to receive or distribute child pornography. And he certainly was not put on notice that he could be convicted of a conspiracy to sexually exploit a child by merely conspiring to have committed those lesser offenses with much lower mandatory minimum and statutory maximum penalties. Yet, over his objection pro se below, the district court charged the petit jury that it could do just that: convict Petitioner of the very serious offense of conspiring to sexually exploit a minor if it found that the government merely proved that he conspired to commit lesser offenses with entirely different elements. This was a clear violation of Petitioner's grand jury rights.

If the Ninth Circuit's interpretation of *Mickey* is left to stand, it eviscerates this Court's longstanding and uninterrupted understanding of a defendant's Fifth Amendment right to only stand charges passed on by a grand jury. *See, e.g., Miller*, 471 U.S. at 139 (Grand Jury Clause violated when jury instructions at trial broaden a charge in the indictment by allowing conviction to be based on "an element of an offense not alleged in the indictment"). This is so because if a district court can amend a charge to permit convictions under different elements and different crimes than the charge handed up by the grand jury, then this Court's decisions in cases like *Russell*, *Miller* and their progeny have no purchase, at least not in the Ninth Circuit. The Court should grant review to remedy this gross departure from a bedrock Constitutional principle that no one should be tried except on charges handed up by a grand jury.

Moreover, to the extent that the Court agrees with Petitioner that *Mickey* doesn't stand for the proposition that the Ninth Circuit claimed in this case, it should not decline review simply because the disposition in Petitioner's case was unpublished. When a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," a compelling reason exists for granting review. *See* Sup.

Ct. R. 10(a). That is the case here.

Petitioner is serving a 50-year sentence that is driven largely by a conspiracy conviction on Count One of his indictment, a conviction with a steep mandatory-minimum sentence that was obtained after a lower court judge instructed the jury that it could convict Petitioner if the jury believed he committed any number of conspiracies beyond the one that the grand jury charged. The lower court's instruction departed far beyond the crystal-clear caselaw of this Court and even the Ninth Circuit. And this departure was further exacerbated by the lower court's failure to even pause and consider the merits Petitioner's accurate objection, an objection made by a pro se defendant. And when a United States court of appeals buries such a clear-cut claim into the dark recesses of an unpublished memorandum and miscites caselaw that neither party even cited because the case does not aid the government's argument, it is time for this Court to exercise its power, grant this petition and restore justice that comes from fidelity to the law and the United States Constitution.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Date: February 28, 2023

Respectfully submitted,

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