23-5292

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Carlors Patino Restrepo — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carlors Patino Restrepo
(Your Name)

FCI FORT DIX, P.O. Box 2000
(Address)

JOINT BASE MDL, NJ 08640
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Where an indictment alleges a conspiracy involving a specific group, does a district court's conspiracy instructions which removes any mention of the group from the overall conspiratorial agreement constitute a constructive amendment?

LIST OF PARTIES

☒ 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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STATUTES AND RULES

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 _____; 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[X] is unpublished.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 _____; 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[X] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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

☒ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was April 26, 2023.

☒ No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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

The Fifth Amendment of the U.S. 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, 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."

STATEMENT OF CASE

A federal grand jury in the Eastern District of New York returned a superseding indictment charging Petitioner with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (Count One); conspiracy to import cocaine into the United States, in violation of 21 U.S.C. §§ 960(a) and 963 (Count Two); and conspiracy to distribute and import cocaine, in violation of 21 U.S.C. §§ 959(a) and 963 (Count Three).

The 'Introduction' to the superseding indictment was set forth in Paragraphs 1 through 4. Those paragraphs stated, in relevant part, that "the Norte Valle Cartel ('NVC') exported multi-ton loads of cocaine both from Columbia's Caribbean and Pacific Coasts [and that] [b]etween 1990 and the present ... the [NVC] was responsible for the exportation into the United States of more than 100,000 kilograms of cocaine ... [and that] the [NVC] employed the Autodefensas Unidas de Columbia ('AUC') to protect its routes and drug laboratories ... [and that] [Petitioner] was a cocaine trafficker who participated in the exportation of individual drug loads **with members of the [NVC]**." (emphasis added).

Paragraphs 5, 7, and 9 of the superseding indictment set forth the following language: "The allegations contained in paragraphs 1 through 4 are realleged and incorporated as if fully set forth in this paragraph." Count 1 of the Indictment was comprised of paragraphs 5 and 6; Count 2 was comprised of paragraphs 7 and 8; and Count 3 was comprised of paragraphs 9 and 10[1].

[1] As set forth in full infra, paragraphs 6, 8, and 10 reiterated the time frame of the conspiracy offenses charged in Counts 1 through 3 and added that Petitioner had participated in the charged conspiracies "together with others" within the span of time alleged.

Once the trial proceedings commenced, in contrast to the core conspiracy set forth in the Introduction and realleged and incorporated in Counts 1 through 3, the evidence elicited by the Government established the existence of a broader conspiratorial agreement between Petitioner and various other drug traffickers that entailed conspiratorial acts which were not within the scope of, nor committed in furtherance, of the principal conspiracy that the superseding indictment alleged existed between Petitioner and members of the NVC. Throughout the duration of the trial defense counsel repeatedly objected to the testimony of various witnesses as inadmissible on the grounds that the testimony involved conspiratorial acts that were not germane to the principal conspiracy set forth in the Introduction.

> Counsel: Your Honor, this goes to the heart of the motion that we had filed pretrial regarding the so-called conspiracy involving the [NVC].
>
> Obviously, the witness will be asked was he a member of the organization. Presumably the answer will be the [NVC].
>
> This witness has not stated one word about how my client did anything with the [NVC]. He mentioned the Patinos, who Are not related to my client.
>
> Tr. @ 399-400
>
> ....
>
> Counsel: ... There has been no connection throughout the entire testimony to the [NVC]. There is no indication with respect to the AUC. And we are told that the AUC commits horrific acts, which in fact they did. Again, **there is no connection to the charged conspiracy, which is the [NVC], and the association of [Petitioner] to that cartel.**
>
> The government is relying on the language in the indictment which says, and others.
>
> **And others means and <u>others in the charged conspiracy</u>, [NVC].**

It doesn't mean and others, <u>every other Narco trafficker in the area of Columbia</u>.

That is again our motion. It should be dismissed. It is highly prejudicial information **<u>with no connection</u>**.

Id. @ 596 (emphasis added).

....

Counsel: It might be a little early but basically it is the same basis as [other trial counsel's] objection to the so-called conspiracy. We're starting to get people of---names of traffickers while in my mind **there is nothing established to the <u>charged conspiracy here</u>.**

Id. @ 738[2] (emphasis added).

In making its closing argument, the government---over the objection of defense counsel, stated to the jury that,

> Each of the conspiracies charged that [Petitioner] committed these crimes together with others. There's no requirement that those others be named in the indictment. That "together with others" includes everyone with whom he conspired to bring cocaine to this country in the time frame of this indictment.
>
> *Id.* @ 1436.

....

> The bottom line, ladies and gentlemen, do you believe this defendant Patermuro? Do you believe he conspired with at least one other person during the time frame of this conspiracy, which is December 17, 1997, to December 1, 2004? Do you believe he conspired with at least one other person during that time frame to move five kilograms to the United States?

---

[2] The Court allowed the testimony but admonished the government that it would have to begin to show the relationship between the testimony and the charged conspiracy:

> Court: I'll allow it, but eventually you will tie it into this conspiracy he is charged with ... Eventually you will have to.
>
> *Id.* @ 738-39

Id. @ 1440.

As noted, the defense counsel immediately objected to the prosecutor's closing. The defense counsel noted as follows in response:

> [The Prosecutor], in his closing misstated the law completely when he suggested the only thing you have to do is find this defendant guilty sometime between the year 1990 and 2004, which is the time frame of the conspiracy, you find that he conspired with anyone who---or someone who transported the drugs to the United States.
>
> ....
>
> There is a basis to the process. We must know what the form of the indictment is, what the form of the conspiracy is, who they are talking to or who they are talking about, and we didn't have that.
>
> The conspiracy in the indictment simply sets out that he's not even a member of the [NVC], but he shares loads with members of the [NVC]. If he proves that, he is guilty.
>
> *Id.* @ 1440-41.[3]

The district court instructed the jury as to Count One. Even though Count One encompassed both Paragraphs 5 and 6, the court only instructed the jury as to Paragraph 6:

> Count 1 of the indictment charged that [Petitioner] conspired with others to distribute a controlled substance.
>
> I will now read you Count 1. This is the indictment.
>
> On or about and between January 1, 1990, And December 1, 2004, both dates being approximate and inclusive, with the Eastern District of New York and elsewhere, [Petitioner], together with others, did knowingly and intentionally conspire to distribute and possess with intent to distribute a controlled substance.

[3] Defense counsel requested a mistrial in light of the government's misstatement law which the district court denied. *Id.* @ 1441.

Id. @ 1452-53.

In relation to Count Two of the superseding indictment---which included Paragraphs 7 and 8, the district court omitted Paragraph 7 and only instructed the jury as to Paragraph 8:

> Count 2 of the indictment charged that [Petitioner] conspired with others to distribute a controlled substance.
>
> I will now read Count 2 of the indictment.
>
> On or about January 1, 1990, and December 1, 2004, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, [Petitioner] ... together with others, did knowingly and intentionally conspire to import a controlled substance into the United States from a place outside thereof[.]

Id. @ 1456-57.

Finally, Count Three included both Paragraphs 9 and 10. However, in instructing the jury, the district court excluded Paragraph 9 and only read Paragraph 10:

> Count 3 of the indictment charges that [Petitioner] conspired with others to import into the United States and distribute a controlled substance.
>
> I will now read Count 3.
>
> On or about and between January 1, 1990, and December 1, 2004, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, [Petitioner] ... together with others, did knowingly and intentionally conspire to distribute such a controlled substance, intending and knowing that such substance would be imported into the United States from a place outside thereof[.]

Id. @ 1460.

Petitioner was ultimately convicted of each of the conspiracy offenses and sentenced to a term of 40 years. The judgment of conviction and sentence were affirmed by the Second Circuit in November 2013. *See United States v. Patino-Restrepo*, 547 Fed. App'x 34 (2d Cir. 2013).

A timely 28 U.S.C. § 2255 motion was filed ni March 2015. Among other issues, Petitioner argued that the representation of trial and appellate counsel violated the Sixth Amendment based on each counsel's failure to argue that the indictment was constructivelv amended by the district court's instructions to the jury.

On October 27, 2021, the magistrate issued a Report and Recommendation wherein it recommended that each of Appellant's grounds be denied. On June 28, 2022, the district court overruled Appellant's objections to the magistrate's Report and Recommendation and affirmed the denial of the § 2255 motion.

Thereafter, a timely request for a certificate of appealability was filed challenging, inter alia, the representation of trial and appellate counsel in relation to the constructive amendment argument. On April 26, 2023, the Second Circuit declined to issue a COA and affirmed the district court's denial of the § 2255 motion.

REASONS TO GRANT THE WRIT

The writ should be granted in this instance to address the conflict which exists between the Eleventh and the Second Circuits as to whether the removal of certain identifying information from a conspiracy offense violates the Grand Jury Clause of the Fifth Amendment by constructively amending the indictment. Presently, the Eleventh Circuit has adopted the approach that in those circumstances where an indictment has identified a certain group and incorporated the identity of that group into the conspiracy offense, the omission of such identifying language in a court's instruction may constitute a constructive amendment. Conversely, the Second Circuit has embraced the viewpoint that where an indictment identifies certain individuals and/or a group of participating in a specifically alleged conspiratorial agreement, a district court's removal of such identifying information in its instructions can never amount to the constructive amendment of an indictment because the identity of the conspirators does not represent an essential element of the offense.

I. Grand Jury Clause of the Fifth Amendment

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. That guarantee, this Court has long held, means that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960) (citing *Ex parte Bain*, 121 U.S. 1 (1887)). Consequently, "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Id.* at 215-16.

Interpreting the Fifth Amendment principles enunciated by this Court, a defendant claiming constructive amendment in the Second Circuit "must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003). The charge has been so altered "either where (1) an additional element, sufficient for conviction, is added, or (2) an element essential to the crime charged is altered." *United States v. Dove*, 884 F.3d 138, 146 (2d Cir. 2018). The Second Circuit noted that this inquiry is undertaken mindful that "courts have constantly permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *United States v. Ionia. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009). "The core of criminality of an offense involves the essence of a crime, in general terms; the particulars of how a defendant effected the crime falls outside that purview." *United States v. D'Amelio*, 683 F.3d 412, 418 (2d Cir. 2012).

a) The Second Circuit's Application of the Fifth Amendment Grand Jury Clause to Conspiracy Offenses

"To prove conspiracy, the government must show [(1)] that the defendant agreed with another to commit the offense; [(2)] that he knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy; and [(3)] that an overt act in furtherance of the conspiracy was committed." *United States v. Mahaffy*, 693 F.3d 113, 123 (2d Cir. 2012).

With a focus on the core of criminality and whether adequate notice was provided thereunder, in conspiracy offenses in which the government explicitly identifies the names of co-conspirators in the charging language of the indictment and the scope of the conspiratorial

agreement in which those individuals participated, the Second Circuit has allowed a district court's instructions to omit this language without any implication of the Fifth Amendment's Grand Jury Clause. *See Dove*, 884 F.3d @ 147 (finding that the district court's failure to include four of the five coconspirators' names in the jury charge "did not constructively amend the indictment because the government did not have to prove the identities of those named to secure a conviction"); *United States v. Millar*, 79 F.3d 338, 345 (2d Cir. 1996) (finding no constructive amendment where court instructed jury it could find defendant guilty of conspiring with "others unknown," even though indictment had named specific co-conspirators who had since been acquitted); *United States v. Redd*, 1997 U.S. App. LEXIS 15273, @ 3-4 (2d Cir. 1997) (finding no constructive amendment where district court's instructions to jury omitted the name of the person who is alleged to have conspired with the defendant, because the indictment also alleged that the defendant conspired "together with others"); *United States v. Lucas*, 395 F. Supp. 3d 241, 252 (W.D.N.Y. 2019) (concluding that no constructive amendment occurred notwithstanding the district court's omission from the identity of the co-conspirators listed in the indictment because "the identity of one's coconspirators is not an essential element of the offense charged.").

The rationalization of these cases that no Fifth Amendment violation would occur where identifying coconspirator language listed in an indictment is removed in the court's instructions to the jury was explained in *Dove*. There, the court expressed that,

> the names did not constitute a necessary element by setting the minimum size of the conspiracy. Both the jury instructions and the indictment specified that the named co-conspirators, Dove and Ingram, conspired "with others." After the names of the conspirators other than Dove and Ingram were removed from the jury instructions, therefore, the difference in the size of the conspiracy alleged was one with at least four two "others." This alteration did not affect the burden on the government, which was not required to demonstrate the precise details or size of the conspiracy, but only to create a permissible

> inference that Dove was aware of his role in a larger scheme. We thus fail to see how the elimination of the names of four co-conspirators altered an essential element of the allegations set forth in the indictment.

Id. @ 147-48. It is through the lens of this rationale that the Second Circuit addressed Petitioner's constructive amendment claim.

Petitioner does not dispute that based on the language of Counts One through Three, he was effective put on notice that the paragraphs that the "core of criminality to be proven at trial," *see D'Amelio, supra,* was that he conspired with the NVC, the AUC, 'and others' to distribute and import cocaine. However, the most flagrant operation of this rationale---one in which Petitioner asserts violates the Fifth Amendment, occurred when the court instructed the jury what the government was required to prove to sustain a conviction for the charged conspiracies. Particularly, when instructing the jury on the conspiracy counts the court excluded paragraphs 5, 7, and 9 which expressly "realleged and incorporated" paragraphs 1 through 4 of the Indictment into Counts 1 through 3. Once these identifying paragraphs were removed, the jury was allowed to convict Petitioner of these counts if the government proved that he conspired "with any other person" to distribute and import cocaine.

This is not a case where the omitted language of the Indictment was mere surplusage or "unnecessary to an offense that is clearly contained within it." *United States v. Miller*, 471 U.S. 130, 144 (1985). Rather, the court's instruction on the three conspiracy offenses had the effect of enlarging the bases on which Petitioner could be convicted---that is, the instructions permitted Petitioner's conviction of Counts One through Three if the jury found that he distributed and imported cocaine in a conspiracy that involved any other person without any showing that such conduct was committed within the scope of Appellant's agreement to distribute and import cocaine with members of the NVC and AUC as specified in paragraphs 1 through 4. This

approach, and the conclusion that it endorses, cannot be harmonized with the Eleventh Circuit's interpretation of the Fifth Amendment's Grand Jury Clause in similar situations.

b) The Eleventh Circuit's Fifth Amendment Grand Jury Clause Approach to Conspiracy

Similar to the Second Circuit, to establish a conspiracy violation under § 846, the government must prove that: "(1) there was an agreement between two or more people to commit a crime; and (2) the defendant knew about the agreement; and (3) the defendant voluntarily joined the agreement." *United States v. Azmat*, 805 F.3d 1018, 1035 (11th Cir. 2015).

Where the Eleventh and Second Circuits diverge is how the Fifth Amendment's Grand Jury Clause applies in conspiracy cases where the indictment includes express identifying language as to the conspirators. Unlike the Second Circuit's approach, in the Eleventh Circuit the district court's removal of paragraphs 1 through 4, and the core conspiratorial agreement described therein, in its instructions to the jury would have constituted an unconstitutional broadening of Counts One through Three. This logic is buttressed by the conclusion of the Eleventh Circuit in *United States v. Weissman*, 899 F.2d 1111 (11th Cir. 1990). There, the defendants were convicted of RICO conspiracy. *Id.* 899 F.2d @ 1112. One element of a RICO conspiracy is the existence of an "enterprise" engaged in or affecting commerce. *Id.*@ 1114 (quoting 18 U.S. C. § 1962(c)). The indictment charged that the defendants were "associated with.an enterprise, to wit, a group of individuals associated in fact known as the DeCavalcante Familv of La Cosa Nostra." *Id.* @ 1112, 1115. The trial court initially instructed the jury that it could find the defendants guilty of RICO conspiracy if (among other things) it found that the defendants were associated with "the enterprise." *Id.* @ 1113. The trial court then gave the legal definition of the term "enterprise" and explained that the indictment in this case "defines the

enterprise as a group of individuals associated in fact as the DeCavalcante Family of La Cosa Nostra." *Id.*

After retiring to deliberate, however, the jury asked the trial judge whether "enterprise" and "DeCavalcante Family" as used in the court's instructions were "synonymous." *Id.* The trial court called the jury back in to the court and instructed that "in order for the Government to get a conviction" it was "not necessary" for it to show "that the DeCavalcante Family was the enterprise." *Id.* Al the prosecution had to show, according to the trial court, was that "there was an enterprise as the enterprise term is defined in your instructions." *Id.*Even though the government "did alleged [the DeCavalcante Family] was the enterprise," the trial court explained, "it isn't necessary for [the government) to prove that the enterprise was the DeCavalcante Family if there was an enterprise proved that meets the definitions of the term." *Id.* Following the supplemental instruction, the jury convicted several of the defendants of RICO conspiracy. *Id.* But the Eleventh Circuit reversed their convictions, holding that the trial court's supplemental instruction constructively amended the indictment. *Id.* @ 1113-16. The proper response to the jury's query, the Eleventh Circuit explained, would have been to inform the jury "that the enterprise in this case, in conformity with the charges brought in this indictment, was synonymous with the DeCavalcante family." *Id.* @ 1115. By broadening the factual basis on which the jury could find the "enterprise" element satisfied from just the DeCavalcante family (as expressly alleged in the indictment) to any enterprise, the trial court "in effect altered an essential element of the crime charged," thereby constructively amending the indictment. *Id.*

The chasm between the two circuits as to how the Grand Jury Clause should be construed could not be greater. In the Second Circuit, the 'core of criminality' was employed as a means to

justify the district court's removal of the identifying language of Paragraphs 1 through 4 on the basis that this language did not constitute an essential element of the conspiracy offense. But the Eleventh Circuit's approach evinces that there is no distinction between the indictment's explicit identification of the DeCalvante Family enterprise for RICO conspiracy purposes in Weismann and the government's express inclusion of the NVC in Paragraphs 1 through 4 as the group which was at the core of Petitioner's conspiratorial agreement. Based on the overt inconsistencies of the approach endorsed by both circuits, guidance from this Court is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carlos Patiño

Date: July 17, 2023