No._____

IN THE SUPREME COURT OF THE UNITED STATES

MARIO IGLESIAS-VILLEGAS, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. The Court has held that the due process clause requires the government to prove each element of a criminal offense beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970). In *Jackson v. Virginia,* 443 U.S. 307 (1979), the Court ruled that a federal habeas court reviewing a challenge to the sufficiency of the evidence supporting a state conviction had to apply the reasonable-doubt standard to determine whether a reasonable factfinder could have found every element of the charged offense had been proved by the government. *Winship* and *Jackson* appear to set a clear constitutional minimum for obtaining and sustaining a conviction–the evidence must prove every element of the charged offense beyond a reasonable doubt.

Nonetheless, the Fifth Circuit applies a lesser standard when a defendant does not make or renew a motion for acquittal under Federal Rule of Appellate Procedure 29 at the close of all the evidence. Rather than look for proof of every element, the Fifth Circuit reviews only to see if the record is devoid of evidence of guilt.

The question presented is whether a federal court of appeals reviewing a defendant's direct-appeal challenge to the sufficiency of the evidence supporting his conviction must apply the every-element, reasonable-doubt standard articulated in *Jackson v. Virginia.*

2. Whether an accused has made a sufficient showing of the need for grand jury transcripts under Federal Rule of Criminal Procedure 6(e)(3)(E) when he demonstrates that the government had, at the time it obtained the indictment against him, confused him with another person and had apparently treated that other person's acts as the defendant's acts.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mario Iglesias-Villegas asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 22, 2023.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, Arturo Shows-Urquidi was a party to the proceeding in the court of appeals.

RELATED PROCEEDINGS

United States v. Guzman-Loera, U.S. District Court for the Western District of Texas, Number 3:12 CR 00849-FM-19, Judgment entered April 13, 2022.

United States v. Shows-Urquidi and Iglesias-Villegas, U.S. Court of Appeals for the Fifth Circuit, Number 22-50164, Judgment entered June 22, 2023.

OPINION BELOW

The opinion of the court of appeals is reported at 71 F.4th 357. A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on June 22, 2023. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent parts that "No person shall be held to answer for a capital, or otherwise infamous crime, except on a presentment or indictment of a grand jury . . . [nor] shall any person be . . . deprived of life, liberty, or property, without due process of law[.]"

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) provides that:

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

. . .

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

Federal Rule of Criminal Procedure 29(a) provides that a motion for judgement of acquittal may be made:

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

STATEMENT

The first question presented by this case asks whether a federal court of appeals reviewing on direct appeal a defendant's challenge to the sufficiency of the evidence supporting a conviction must apply the constitutional reasonable-doubt standard the Court set out in *Jackson v. Virginia,* 443 U.S. 307 (1979) and *In Re Winship,* 397 U.S. 358 (1970).

The Fifth Circuit answered no, following its precedent. That court follows a rule that, if a defendant does not make or renew a Rule 29 motion for judgment of acquittal at the close of all the evidence, he is deemed to have forfeited reasonable-doubt review of the sufficiency of the evidence. In such circumstances, the Fifth Circuit reviews for what it calls "plain error" under a lesser standard that looks only to whether the record is "devoid of evidence of guilt[.]" *See* Appendix A, 71 F.4th at 374; *see also United States v. Delgado,* 672 F.3d 320, 330-31 (5th Cir. 2012) (en banc);

United States v. Pierre, 958 F.3d 1304, 1310-11 (5th Cir. 1992) (en banc). This devoid-of-evidence standard conflicts with the Court's holdings. It also creates an insupportable situation: in the Fifth Circuit, the due process right to proof beyond a reasonable doubt applies at trial, *In re Winship,* 397 U.S. 358, *Sullivan v Louisiana,* 508 U.S. 275 (1993) and in federal habeas proceedings, *Jackson,* 443 U.S. at 316-24, but not on a federal direct appeal.

The second question presented by this case asks for clarification of the test set out in Federal Rule of Criminal Procedure 6(e)(3)(E). That rule allows an accused to obtain grand jury transcripts when he demonstrates that grounds may exist to dismiss the indictment against him. The Fifth Circuit's decision reads Rule 6 to require an accused to prove, before receiving grand jury materials, the very error that he seeks disclosure to aid him in proving.

Petitioner Mario Iglesias-Villegas was charged with twelve offenses, among them conspiring to commit murder, kidnapping, racketeering, and money-laundering as a member of the Sinaloa Cartel, a drug-trafficking organization based in Mexico. The indictment also alleged that Iglesias-Villegas had aided and abetted murder and kidnapping.

Before trial, Iglesias-Villegas moved to be provided with portions of transcripts of the proceeding of the grand jury that indicted him. He informed the district court that the documents provided to him through the discovery process indicated that the government had presented evidence that resulted in the grand jury indicting the wrong person on the counts relating to the incident referred to as the "wedding

murder" (Counts Nine, Ten, Thirteen, and Fourteen). He explained that, to file a motion to dismiss those counts in good faith, he needed the relevant grand jury transcript to confirm what the discovery documents suggested.

In support of his grand-jury transcript request, Iglesias-Villegas pointed to the fact that his indictment bore a name, Mario Alberto Iglesias-Villegas, which was not his. The name appeared to be a mashup of his name and that of his cousin, Mario Alberto Iglesias-Chavaria, who had been a Sinaloa Cartel member until his death. Iglesias-Villegas argued that the mashup name indicated that the government had failed to investigate sufficiently to determine who had done the acts alleged in Counts Nine, Ten, Thirteen, and Fourteen and that the grand jury transcript would show that failure. He cited discovery provided to him that showed the government had come across the name Mario Alberto Iglesias and had associated that name with both a person nicknamed Dos and a person nicknamed Ocho. He also cited a criminal complaint filed shortly before the indictment in this case that asserted that a Mario Alberto Iglesias-Villegas had driven a blue jeep during the wedding murders, something that other documents in the discovery refuted. Finally, he also pointed out that the government had conceded that confusion had existed between Iglesias-Villegas's identity and that of his cousin Mario Alberto Iglesias-Chavaria.

The facts known to him, Iglesias-Villegas asserted, strongly suggested that, before the grand jury, Iglesias-Chavaria's conduct had been presented as Iglesias-Villegas's conduct. His request for transcripts argued that the government had failed to determine the identity of the person responsible for the conduct before seeking an

indictment. The motion sought access only to the portions of the grand jury transcript concerning Iglesias-Villegas and Iglesias-Chavaria. It specifically disavowed "request[ing] the evidence specific to other co-defendants in the indictment." The district court denied the request.

The government's trial case rested on testimony by law enforcement agents and testimony by admitted criminals who were cooperating in the hope of obtaining lesser sentences and U.S. residency. Both the agents and the cooperating witnesses testified to the structure and operations of the Sinaloa cartel. Stipulations, agents, and cooperating witnesses provided evidence of drug deals done by Sinaloa and drug seizures made by law-enforcement agents. Some of the cooperating witnesses testified that Iglesias-Villegas was a member of the Sinaloa group, and some implicated him in some of the charged violent offenses.

Iglesias-Villegas's defense to the charges was two-fold: He had been misidentified by untruthful witnesses and the government had failed to prove the elements of the charges beyond a reasonable doubt. His counsel asked for a judgment of acquittal at the close of the government's case-in-chief. The district court denied that motion. The jury found Iglesias-Villegas guilty as charged.

Iglesias-Villegas appealed, contending, among other things, that the district court had misinterpreted the requirements of Rule 6 in denying him access to the grand jury transcripts. He also argued that the evidence was insufficient to sustain the convictions on Count IV (conspiracy to commit money laundering), Count VI

(conspiracy to murder Sergio Saucedo) and Count VII (aiding and abetting Saucedo's murder). He conceded that his trial attorney had not renewed a motion for judgement of acquittal at the close of all the evidence (something not required by the text of Rule 29), and argued that the constitution required the court of appeals to review the sufficiency of the evidence under the *Winship/Jackson* reasonable-doubt standard. Brief of Mario Iglesias-Villegas at 19-20 n.2, U.S. Court of Appeals for the Fifth Circuit, No. 22-50164

The Fifth Circuit affirmed the convictions. On the grand jury issue, it ruled that the district court had not erred. It did so because it believed Iglesias-Villegas had not "demonstrate[d] that any false information was *actually* presented to the grand jury. Iglesias-Villegas thus cannot show that a possible injustice could have been avoided[.]" Appendix A, 71 F.4th at 367 (emphasis added).

On the sufficiency challenges, the court of appeals failed to appeal the every-element, reasonable-doubt standard. It instead applied its devoid-of-evidence standard, explaining that because Iglesias-Villegas had failed to renew his motion for acquittal "we will only reverse the verdict if there is a " 'manifest miscarriage of justice,' which occurs only where 'the record *is devoid of evidence pointing to guilt*' or the evidence is so tenuous that a conviction is 'shocking.' " Appendix A, 71 F.4th at 374 (emphasis added) (quoting *United States v. Oti,* 872 F.3d 678, 686 (5th Cir. 2017) and *United States v. Delgado,* 672 F.3d 320, 331 (5th Cir. 2012) (en banc)).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT APPELLATE REVIEW OF THE SUFFICIENCY OF THE EVIDENCE SUPPORTING A CONVICTION MUST BE DONE UNDER THE CONSTITUTIONAL REASONABLE-DOUBT TEST.

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It is a well settled constitutional rule that the government must prove any criminal charges brought against a defendant beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 358-64 (1970); *Jackson v. Virginia,* 443 U.S. 307, 315 (1979); *Sullivan v. Louisiana,* 508 U.S. 275, 277-78 (1993). It is also settled that, when a federal court is assessing on habeas review whether the evidence was sufficient under the due process clause to sustain a conviction, it must determine if any reasonable finder of fact could have found each of the elements of the charged offense beyond a reasonable doubt. *Jackson,* 443 U.S. at 316-19. Though it is settled that due process requires the use of the reasonable-doubt standard at trial and on habeas review, the Court has never explicitly addressed the standard to be used on direct appeal.

Given that both the trial standard and the habeas-review standard require proof beyond a reasonable doubt of all elements of a charged offense, the logical conclusion would be that the reasonable-doubt standard must also apply to appellate review. *Jackson* stated that the question it was answering went "to the basic nature of the constitutional right recognized in the *Winship* opinion[.]" 443 U.S. at 313. *Jackson*'s ruling that reasonable-doubt standard was required on habeas review in light of *Winship* would seem ineluctably to require that reasonable-doubt review be used on direct review. As *Jackson* explained, the "fundamental" reasonable-doubt standard "give[s] 'concrete substance' to the presumption of innocence to ensure against unjust

convictions, and to reduce the risk of factual error in a criminal proceeding[.]" *Jackson*, 443 U.S. at 315 (quoting *Winship,* 397 U.S. at 363)).

If reasonable-doubt review does not apply on direct appeal, a curious constitutional lacuna opens: due process always makes stringent demands at trial and always makes stringent demands on habeas review, but skips over direct appeal. The Fifth Circuit has held persistently that this gap does exist. *See, e.g.,* Appendix A 71 F.4th at 374; *United States v. Delgado,* 672 F.3d 320, 330-31 (5th Cir. 2012) (en banc). The Fifth Circuit has for decades insisted that, when a defendant has not made or renewed a motion for judgment of acquittal, it need review sufficiency challenges only to determine whether the trial record is "devoid of evidence" Appendix A. 71 F.4th at 374; s*ee, e.g., Delgado,* 672 F.3d at 330-31; *United States v. Yusuf,* 57 F.4th 440 (5th Cir. 2023); *Oti,* 872 F.3d 678. 686 (5th Cir. 2017); *United States v. Pierre,* 958 F.2d 1304, 1310-11 (5th Cir. 1992) (en banc). The devoid-of-evidence standard the Fifth Circuit uses defies the Court's precedent. *Jackson* specifically rejected that standard as incompatible with the demand of due process. *Jackson,* 443 U.S. at 316 (holding inadequate the no-evidence standard articulated in *Thompson v. City of Louisville,* 362 U.S. 199 (1960)).

The Fifth Circuit has clung to devoid-of-evidence review because of its reading of Federal Rule of Criminal Procedure 29, concerning motions for judgment of acquittal, and of Federal Rule of Criminal 52(b), concerning plain-error review. To the Fifth Circuit, these rules demote the *Jackson*-articulated standard from a constitutional requirement to a mere standard of review. *See, e,g, Delgado,* 672 F.3d at 331-32. Since

reasonable doubt is only a standard of review, it may be discarded or lowered, the Fifth Circuit reasons, to penalize a criminal defendant for failing to do what the court of appeals believes Rule 29 requires. *See, e.g.,* Appendix A, 71 F.4th at 374; *Delgado,* 672 F.3d at 330-31; *United States v. Yusuf,* 57 F.4th 440, 444-45 (5th Cir. 2023).

The Fifth Circuit's devoid-of-evidence position is untenable. It ignores the Court's holdings in *Winship* and *Jackson.* It permits convictions to stand if there is merely some evidence unfavorable to the defendant, thus removing the "concrete substance" the reasonable-doubt standard ensures. It conflicts with the positions of other courts of appeals, which, while musing on the exact standard of review, acknowledge that the reasonable-doubt standard sets a constitutional floor. And, while these reasons alone are enough to conclude that the Fifth Circuit has misunderstood the required standard, further reason to reject the Fifth Circuit's interpretation is found in its interpretations of Rules 29, 51, and 52(b), which contain misunderstandings that bring it into further conflict with this Court's teachings, this time about Rule 51 and preservation of error. *See, e.g., Holguin-Hernandez v. United States,* 140 S. Ct. 762 (2020) (error preserved when defendant makes known to court ruling he seeks).

A. The Fifth Circuit continues to apply the rejected devoid-of-evidence standard

The Fifth Circuit treats the reasonable-doubt standard not as a constitutional requirement, but as a discardable standard of review. *Delgado,* 672 F.3d at 331; *See, e.g.,* Appendix A , 71 F.4th at 274-78; *United States v. Cabello,* 33 F.4th 281, 288 (5th Cir. 2022); *Delgado,* 672 F.3d at 330-32. It has repeatedly held that, if a defendant did not make or renew a motion for judgment of acquittal to the trial court after the

close of all the evidence, reasonable-doubt review falls out of the case, replaced by a plain-error standard of review that is "super-deferential" and can lead to reversal only when "the record is *devoid of evidence* pointing to guilt or [that] the evidence is so tenuous that a conviction is shocking." *Cabello,* 33 F.4th at 288 (quoting *Delgado,* 672 F.3d at 331) (emphasis in *Cabello*); *see also* Appendix A, 71 F.4th at 374; *Yusuf,* 57 F.4th at 444-45; *United States v. Inocencio,* 40 F.3d 716, 724 (5th Cir. 1994); *Pierre,* 958 F.2d at 1310-11.

This practice is impossible to square with *Winship* and *Jackson. "Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson,* 443 U.S. at 316. *Jackson* made it clear that "the due process standard recognized in *Winship* constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *Id.* at 314.

Jackson held that the reasonable-doubt sufficiency standard was required on habeas review because "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury." *Id.* at 317. Driving home why the constitution required reasonable-doubt review, *Jackson* observed that

"[i]n a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction." *Id.* (citing *Glasser v. United States,* 315 U.S. 60, 80 (1942)).

That *Jackson* held the reasonable-doubt standard was required in habeas for the same reasons that reversal would be required on direct appeal of a federal conviction meant *Jackson* all but pronounced that the constitutional every-element, reasonable-doubt standard applies to direct review in the federal system. So too did the Court's statement that "[a]fter *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." 443 U.S. at 318.

The Fifth Circuit refuses that undertaking. Its resistance to the constitutional necessity of reasonable-doubt review of the sufficiency of the evidence cannot be reconciled with *Winship* and *Jackson.*

The Fifth Circuit justifies its resistance in large part by insisting that the "Constitution does not require *de novo* review of the sufficiency of the evidence in every case." *Delgado,* 672 F.2d at 331 (emphasis added). It thinks this reduces the *Winship/Jackson* test to a mere standard of review. *Id.* It does not. Whatever standard-of-review nomenclature is used, the *Winship/Jackson* standard requires that every element of an offense be proved beyond a reasonable doubt. *Winship,* 397 U.S. at 358-64; *Jackson,* 443 U.S. at 316-19. The Fifth Circuit does not apply that standard. Instead, it uses a different and much lower test when conducting its plain-

error review of sufficiency challenge. It reviews only to see if the record was devoid of evidence. Appendix A, 71 F.4th at 374; *Cabello,* 33 F.4th at 288; *Inocencio,* 40 F.3d at 724; *Pierre,* 958 F.2d at 1310-11.

Jackson held such a no-evidence test was "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt[.]" 443 U.S. at 320. This is so because "a mere modicum of evidence may satisfy a 'no evidence' standard" and "it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Id.* The no-evidence test failed to "supply a workable or even a predictable standard for determining whether the due process command of *Winship* ha[d] been honored" and thus failed to ensure "that the factfinder [had] rationally appl[ied] that standard to the facts in evidence." *Id.*

The Fifth Circuit's devoid-of-evidence test is simply the banished *Thompson* no-evidence test worded very slightly differently. As before, it is not a workable test. As before, it is not a test that satisfies the due process clause. No doubt exists that the Fifth Circuit uses a no-evidence test. No doubt exists that the use of that test lowers the bar for affirming a conviction. As the Fifth Circuit recently put it, "a sufficiency error satisfies the second prong of plain-error review only when `the record is *devoid of evidence* pointing to guilt.'" *Yusuf,* 547 F.4th at 445 (citing *Delgado,* 672 F.3d at 330-31 and *Cabello,* 33 F.4th at 288). This devoid-of-evidence test means "*[m]ere insufficiency doesn't cut it.* Rather, the *movant must prove that the evidence was so completely, obviously, and unbelievably inadequate* that allowing the verdict to stand

would be a `shocking" and `manifest miscarriage of justice.'" 57 F.4th at 445 (quoting *United States v. Smith,* 878 F.3d 498, 503 (5th Cir. 2017)) (emphasis added).

The Fifth Circuit's standard is not the one articulated by the Court. Nor is it the standard used by other courts of appeals. While other circuits have held that a defendant's failure to renew a motion for judgment of acquittal at the close of all the evidence can be said to trigger plain-error review, s*ee, e.g., United States v. Geronimo,* 330 F.3d 67, 72 (1st Cir. 2003); *United States v. Flyer,* 633 F.3d 911, 917 (9th Cir. 2011); *United States v. Bowie,* 892 F.2d 1494, 1496-97 (10th Cir. 1990), those circuits recognize that, despite their use of the "plain error" terminology, the ultimate question is whether the government proved the elements of the charged offense beyond a reasonable doubt. *See Flyer,* 633 F.3d at 917 ("plain-error review of a sufficiency-of-the-evidence claim is only theoretically more stringent than the standard for a preserved claim.") (internal quotation omitted); *Bowie,* 892 F.2d at1496-97 (under plain-error review, "[w]hen considering the sufficiency of the evidence to support the verdict,. . . the standard actually applied is essentially the same as if there had been a timely motion for acquittal."); *Geronimo,* 330 F.3d at 74 (concluding from evidence government had sufficiently proved challenged offense element).

The Fifth Circuit is out of line with the Court's precedent, and with the other courts of appeals. The Fifth Circuit's failure to conform lowers the government's burden of proof and means that defendants in the Fifth Circuit alone lack the

guarantee that their convictions will not stand if the government failed to prove the elements of the charged offense beyond a reasonable doubt.

B. The Fifth Circuit's Rationale Misapprehends the Text and Purpose of Federal of Criminal Procedure 29 and 51.

It's the Fifth Circuit's reliance on the devoid-of-evidence test and its reduction of the reasonable-doubt guarantee to a mere standard of review that merits certiorari in this case. Still, it should be noted that two important underlying premises of the Fifth Circuit's reasoning are quite doubtful. The Fifth Circuit arrived at its justification for a modern-day no-evidence test (1) by positing that to be entitled to every-element, reasonable-doubt review, a defendant is required by Federal Rule of Criminal Procedure 29 to renew his motion for judgement of acquittal at the close of all the evidence and (2) by overlooking the direction of Rule 51 and insisting that Rule 52(b) plain-error review applies when no renewed Rule 29 motion is made. Appendix A, 71 F.4th at 444-45; *Delgado,* 672 F.3d at 330-32.

Neither premise supports the Fifth Circuit's embrace of the no-evidence test. Rule 29(a) sets out the power of the trial court to grant a motion for judgment of acquittal. Under the Rule, a defendant may make a motion for acquittal. Nowhere, however, does the Rule require a defendant to make a motion, let alone does it require him to renew the motion once made, to preserve his right to conviction only upon proof beyond a reasonable doubt. In fact, the Rule permits a trial court on its own to consider whether the evidence is sufficient. Fed. R. Crim P. 29(a). Obviously, that

sufficiency inquiry has to be true to the *Winship* every-element, reasonable-doubt test.

The Fifth Circuit makes Rule 29 the focus. It's not. The focus is the defendant's due process right to not be convicted when the government has not proved every element of the charged offense beyond a reasonable doubt. *Jackson,* 443 U.S. at 316-19. Rule 29 does not create that right. The failure of a defendant to renew a Rule 29 motion cannot therefore erase that right.

Rule 29 simply sets out some ways in which a sufficiency challenge may be voiced or granted at trial. A defendant appealing the sufficiency of the evidence is not, however, challenging the denial of a Rule 29 motion. He is challenging the guilty verdict delivered by the factfinder. He is doing so on the grounds that the government did not prove every element of the offense beyond a reasonable doubt and thus the verdict cannot constitutionally stand. *Winship,* 397 U.S. at 364-370; *Jackson,* 443 U.S. at 316-19. The Fifth Circuit's elevation of Rule 29 and its persistent focus on the failure of defense counsel to do an act not required of him by the text of Rule 29 is wrong. The non-textual requirement that the Fifth Circuit imposes on defense counsel cannot be reason to allow a conviction to stand under a standard less than the reasonable-doubt standard of *Winship* and *Jackson.*

The Fifth Circuit's reliance on Rule 52(b) and plain-error precedent is also misplaced. As the Court has explained, federal practice requires a defendant to make clear to the trial court what he is asking for. Fed. R. Crim. P. 51; *Holguin-Hernandez v. United States,* 140 S. Ct. 762, 766 (2020). A criminal defendant who goes to trial is

asking for an acquittal. The entire point of a trial is to determine whether the government has sufficient evidence to convict the defendant of the charges it has brought.

By seeking a judgment of acquittal at the close of the government's evidence, Iglesias-Villegas informed the trial court of the action he wished it to take. *Holguin-Hernandez,* 140 S. Ct. at 766. He further insisted on proof of each element beyond a reasonable doubt throughout the closing argument of the case. *Cf. id.* No one could mistake what Iglesias-Villegas sought: an acquittal. The insistence of the court of appeals that Iglesias-Villegas had somehow given up that goal because he did not renew his Rule 29 motion after presenting evidence, but before arguing for a verdict of not guilty, denies reality. The point of a trial is to put the government to its constitutional burden of proof. One who does so, has not waived his right to challenge the constitutional sufficiency of the evidence.

Other circuits recognize that reality. Even when they use the language of plain-error in discussing Rule 29 and the standard of review, they then apply the every-element, reasonable doubt test to the substantive issue, the sufficiency of the evidence. *Flyer,* 633 F.3d at 917; *Bowie,* 892 F.2d at 1496-97. Only the Fifth Circuit conditions the right to proof of an offense beyond a reasonable doubt on a motion; only the Fifth Circuit makes proof of an offense beyond a reasonable doubt something that can be ignored as long as the record is not devoid-of-evidence. The Fifth Circuit's premises about Rules 29, 51, and 52(b) are incorrect. Its use of those rules to justify an application of a devoid-of-evidence test and its refusal of the *Winship/Jackson*

reasonable-doubt test is profoundly wrong. Certiorari is warranted to correct that wrong.

C. This Case is a Good Vehicle for Addressing the Error of the Revived No-Evidence Test.

Iglesias-Villegas's case is the right vehicle for fixing the Fifth Circuit's incorrect approach. His case squarely presents the issue: Iglesias-Villegas challenged the sufficiency of the evidence on Counts Four, Six, and Seven, arguing that on each count the evidence failed to prove a required element of the charged offense. In response to those arguments, the Fifth Circuit reviewed the challenged convictions merely to determine if the record was devoid of evidence that might support the convictions. App A, 71 F.4th at 374-78

Count Six charged that Iglesias-Villegas had conspired to murder Sergio Saucedo with the intent to further or maintain a position in a racketeering enterprise, the Sinaloa cartel. *See* 18 U.S.C. § 1959(a)(5) (defining offense). For this traditional conspiracy offense, "the criminal agreement itself is the *actus reus*[.]" *United States v. Shabani,* 513 U.S. 10, 16 (1994) (citing *Regina v. Bass,* 11 Mod. 55, 88 Eng.Rep. 881, 882 (K.B.1705) ("the very assembling together was an overt act") and *Iannelli v. United States,* 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act")).

Iglesias-Villegas argued that the evidence did not show an agreement to kill Saucedo that he knew of and joined. The evidence showed only that Saucedo was kidnapped by men acting for Jose Marrufo, the head of the Sinaloa Cartel in Juarez,

Mexico. Iglesias-Villegas was not among those men. Saucedo was taken to a house maintained by Rafael Figueroa. Iglesias-Villegas drove Marrufo to Figueroa's house. Saucedo was then later moved for a time to a house maintained by Iglesias-Villegas, before being taken back to Figueroa's house.

Figueroa testified that, after Saucedo had been taken back to Figueroa's house, Marrufo decided that Saucedo should be killed. Figueroa did not testify that anyone besides himself and Marrufo were present at the house when that decision was made. No one else testified about the plan to kill Saucedo. No one testified that Iglesias-Villegas was around when the plan was made by Marrufo and joined by Figueroa. No one testified he joined by word or action later. In short, proof that Iglesias-Villegas joined an agreement to kill Saucedo was lacking.

Similarly, the evidence did not show that Iglesias-Villegas had aided and abetted Saucedo's murder in support of a racketeering enterprise. 18 U.S.C. § 1959(a)(1). To prove a defendant aided and abetted an offense, the government must show that he "(1) [took] an affirmative step in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Id.* (quoting *Rosemond v. United States,* 572 U.S. 65, 71 (2014)). Aiding and abetting is not shown by proof "that a defendant was merely associated with a criminal[.]" *United States v. Portillo,* 969 F.3d 144, 164 (5th Cir. 2020).

The evidence showed only that Marrufo announced to Figueroa the plan that Saucedo would be killed. No evidence showed who killed Saucedo. Figueroa, who

testified that Marrufo gave the kill order, did not say Iglesias-Villegas was present at the time of the order. He did not say Iglesias-Villegas killed Saucedo. He did not say Iglesias-Villegas was at the place where Saucedo was killed. No other evidence filled in that gap.[1] No evidence shows that Iglesias-Villegas took an affirmative act, while Saucedo was alive, with the requisite intent to facilitate a murder or do an act clearly dangerous to human life. No evidence shows that Iglesias-Villegas took a step with the intent to facilitate a murder or to facilitate an act clearly dangerous to human life.

The Fifth Circuit, using its devoid-of-evidence test, was unbothered that no evidence showed Iglesias-Villegas's agreement to or participation in a plan to kill Saucedo or an action aiding Saucedo's killing. Appendix A, 71 F.4th at 377-78. It found it enough that the record showed "his general knowledge regarding how the Cartel handled matters akin to the Horizon City Kidnapping [involving Saucedo]" and that "Iglesias-Villegas knew that it was likely that Saucedo would be murdered after such an interrogation." *Id.* at 378. In other words, the court of appeals could not point to evidence of a separate agreement to kill Saucedo that Iglesias-Villegas joined

[1] Figueroa testified that Marrufo tasked him with disposing of Saucedo's body. Appendix B. He did not say who he got to do the task. Appendix B. Agent Briano stated that Iglesias-Villegas had admitted to him that he helped dispose of the body. Appendix B. That testimony does not show aiding and abetting. The murder offense alleged required the government to show that Iglesias-Villegas had cause the death of Saucedo. 18 U.S.C. § 1959; Texas Penal Code 19.02(b)(1) (indictment alleged murder within meaning of 19.02). Moving a dead person's body cannot cause death of that person. That the evidence was that Iglesias-Villegas moved Saucedo's body did not therefore show that he aided and abetted a murder.

and it was unable to point to an affirmative step that Iglesias-Villegas took to further the murder of Saucedo, but, under its devoid-of-evidence review, it affirmed because the general evidence about the cartel put Iglesias-Villegas in a bad light. *Id.* at 377-78.

Similarly, while there was no showing that Iglesias-Villegas agreed to launder money, the court of appeals thought it enough that he was among persons who committed money-laundering and that he maintained an office for the gang. 71 F.4th at 376-77; see 18 U.S.C. § 1956(a)(2)(A), (h). Its devoid-of-evidence review required no showing of agreement to commit money laundering. No one testified that there was money stored, exchanged, or counted at the office Iglesias-Villegas ran, or even that that they thought that Iglesias-Villegas was involved with money transportation.[2]

The evidence did not show those elements beyond a reasonable doubt. Had the Fifth Circuit engaged in reasonable-doubt review of the evidence, the outcome of Iglesias-Villegas's appeal would have been different. The Fifth Circuit's clear statement of its devoid-of-evidence test and the likelihood that the result of the Iglesias-Villegas's sufficiency challenges would have been different under the every-

[2] The Fifth Circuit wrote that" one witness placed [Iglesias-Villegas] in a Cartel office being used for this purpose," but Iglesias-Villegas was there to drink with friends, not to work, and the evidence did not show a discussion of money-laundering while he was there. Appendix C.

element, reasonable-doubt standard makes this case the right on in which to resolve the tensions the Fifth Circuit's no-evidence test has raised.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE LEVEL OF SHOWING THAT AN ACCUSED MUST MAKE TO OBTAIN GRAND JURY TRANSCRIPTS TO USE IN A MOTION TO DISMISS.

Federal Rule of Criminal Procedure 6(e)(3)(E) permits a defendant to seek release of grand jury records "because of a matter that occurred before the grand jury[.]" FED. R. CRIM. P. 6(e)(3)(E)(ii). Upon a proper showing, a district court can release grand jury records "at a time, in a manner, and subject to any other conditions that it directs[.]" *Id.* The defendant must also show that "(1) the material he seeks is needed to avoid a possible injustice in another judicial proceeding, (2) the need for disclosure is greater than the need for continued secrecy, and (3) his request is structured to cover only material so needed." *Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 221-22 (1979)).

One way of making a proper showing is to demonstrate that "a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6; *see also Douglas Oil Co.,* 441 U.S. at 221-22. The standard Rule 6 sets for this preliminary showing is not stringent. An accused must demonstrate only that a ground "may" exist to "dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). The Fifth Circuit, however, held in this case that the district court had not erred in denying Iglesias-Villegas's request for transcripts because he had not "demonstrate[d] that

any false information was actually presented to the grand jury." Appendix A, 71 F.4th at 367. In making that ruling, the Fifth Circuit changed the standard set by Rule 6. Rule 6 does not require that an accused demonstrate that false information was presented to the grand jury. Such a presentation would assuredly be grounds for a motion to dismiss. If the defendant knew that false information had "actually" been presented, Appendix A, 71 F.4th at 367, the defendant would not have to seek the grand jury materials, he could immediately proceed to filing a motion to dismiss the indictment.

But that is not the situation Rule 6(e)(3)(e)(ii) addresses. The situation the rule address, and that Iglesias-Villegas was in, is that of a defendant with reason to believe that there may be grounds to dismiss the indictment because wrong information had been presented to the grand jury, but who needs the grand jury materials to confirm that belief. Fed. R. Crim. P. 6(e)(3)(E)(ii). The standard that the rule sets is probabilistic: the defendant need only show facts that suggest that the grand jury materials sought could lead to grounds for dismissal of the indictment. Iglesias-Villegas met that standard. The Fifth Circuit's ruling changes the standard from that declared in the text of the rule. In so doing, the Fifth Circuit has made it more difficult to obtain grand jury materials than the plain words of the Rule contemplate.

The recitals Iglesias-Villegas made about what was shown in discovery, what was contained erroneously in the criminal complaint, and the government's admission in 2018 that it had been confused about the two Marios, Iglesias-Chavaria

and Iglesias-Villegas, sufficed to show that grounds for a motion to dismiss were likely to be found in the grand jury transcripts. The government's seeming, from the available information and discovery, inability to pin down which of the two men had done what may have resulted in it presenting to the grand jury evidence or testimony that led to an indictment of Iglesias-Villegas for conduct done by Iglesias-Chavaria. The likelihood that the admitted confusion about the cousins had affected the presentation to the grand jury fulfilled the showing that the grand jury materials "may" have lead to a motion to dismiss. That is what Rule 6(e)(3)(E) required. *Cf. United States v. Williams*, 2020 WL 4584201 (W.D. La. Aug. 10, 2020) (emphasizing the standard was that the requested information "may" provide reason for a motion to dismiss); *United States v. Naegele*, 474 F. Supp. 2d 9, 12 (D.D.C. 2007) (same).

By imposing a requirement that a defendant show an actual violation that would provide reason for a motion to dismiss, the Fifth Circuit cut off the relief that Rule 6 contemplates. The Rule does not require proof of an actual prejudicial error; it requires a showing of the possibility of an error before the grand jury.

The Fifth Circuit's failure to frame its ruling correctly and its failure to give meaning to the plain language of Rule 6 is further shown by its reliance on its opinion in *United States v. Cessa,* 861 F.3d 121, 141-42 (5th Cir. 2017). *Cessa* was inapposite. It did not involve a request for grand jury materials. Instead, it concerned a motion to dismiss an indictment. In analyzing that motion the *Cessa* court properly followed the Court's opinion *Bank of Nova Scotia v. United States,* 487 U.S. 250 (1988). *Bank of Nova Scotia* set the test for when dismissal of an indictment is proper. 487 U.S. at

255-57. *Cessa* applied the *Bank of Nova Scotia* analysis to a motion to dismiss filed by the defendants, defendants who had already been allowed to obtain grand jury materials. 861 F.3d at 141-142. The *Cessa* court found that, even with those grand jury materials, the defendants had not met the prejudice standard set in *Bank of Nova Scotia. Id.*

By considering the ultimate question without allowing Iglesias-Villegas to obtain grand jury records or even waiting on the filing of a motion to dismiss, the Fifth Circuit hobbled defendants' ability to avail themselves of Rule 6(e)(3)(E) in its jurisdiction. Defendants will never be able to obtain grand jury materials because a sufficient "may" showing under Rule 6 is no longer enough. The Fifth Circuit requires a showing of actual misconduct and prejudice before a grand jury materials may be obtained. Appendix A, 71 F.4th at 367-68. That is not what the Rule requires or contemplates. The Court should grant certiorari to clarify the meaning of Rule 6(e)(3)(E)(ii) and ensure that defendants have the opportunity to seek the dismissals that the Rule is predicated on and protects.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

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DATED: August 7, 2023.