No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October 2023

GILBERTO GONZALEZ-GONZALEZ
Petitioner
v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, after *Francis v. Franklin*, 471 U.S. 307 (1985) and *Carella v. California*, 491 U.S. 263 (1989), the burden-shifting jury instructions on joint possession, given at the petitioner's trial, violated due process.

INTERESTED PARTIES

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

RELATED PROCEEDINGS

United States v. Gilberto Gonzalez-Gonzalez, Case No. 22-10433-AA, 2023 WL 2301444 (11th Cir. Mar. 1, 2023).

United States v. Gilberto Gonzalez-Gonzalez, Case No. 22-10433-AA, (11th Cir. Jun. 5, 2023) (Order denying Petition for Rehearing and Rehearing *En Banc*).

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Mr. Gilberto Gonzalez-Gonzalez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit panel decision is available at 2023 WL 2301444 and is included as Appendix A. The Eleventh Circuit's unpublished order denying Mr. Gonzalez's petition for rehearing *en banc* is included as Appendix B. The relevant proceedings in the district court are unpublished.

JURISDICTIONAL STATEMENT

The Eleventh Circuit Court of Appeals had appellate jurisdiction under 28 U.S.C. § 1291, which gives federal courts of appeal jurisdiction over all final decisions of district courts. On March 1, 2023, the Eleventh Circuit affirmed Mr. Gonzalez's conviction. Pet. App. 1a. On June 5, 2023, the Eleventh Circuit denied Mr. Gonzalez's petition for rehearing and rehearing *en banc*. This petition for writ of certiorari is being filed within 90 days of that date, so it is timely under Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At the heart of this case is whether Mr. Gonzalez knowingly, jointly possessed cocaine with his codefendant. The cocaine was hidden within a locked, concealed compartment inside the codefendant's truck, which Mr. Gonzalez was driving when stopped by police. By acquitting Mr. Gonzalez of the conspiracy charge, the jury decided he did not make any agreement with anyone to possess, transport, or distribute the drugs. It is therefore illogical that the jury also concluded he did know about the drugs and intended to distribute them, but for the trial court's erroneous joint possession instruction. That instruction and the impromptu example given by the trial judge to help the jury understand joint possession created a mandatory presumption that joint possession of the codefendant's truck and all its contents occurred merely because Mr. Gonzalez and his codefendant shared possession of the truck. Such an instruction relieved the government of its burden of proving every essential element of the charged drug crimes beyond a reasonable doubt, which is contrary to both due process and this Court's well-established precedent.

A. Factual Background

Mr. Gilberto Gonzalez-Gonzalez is a 46-year-old husband and father of three children. Outside of the instant case, he has no other history of criminal conduct. For over 26 years, he supported his family as a commercial truck driver.

On January 24, 2021, Mr. Gonzalez's friend, a man named Neto, asked him to help Mr. Daniel Corona drive Mr. Corona's truck from Houston, Texas to Atlanta, Georgia on the following day. Pet. App. 6a, 10a. Neto gave Mr. Corona contact information for Mr. Gonzalez. Pet. App. 10a. Mr. Gonzalez knew very little about the trip, and he knew nothing about Mr. Corona or his truck, which was a Ford F-650 flatbed work truck with a sleeper compartment. Mr. Gonzalez was told that Mr. Corona was transporting broken transmissions to Atlanta, GA for repair. Indeed, a large wooden crate of broken transmissions was strapped to the flatbed trailer of Mr. Corona's truck. Mr. Gonzalez did not know the exact destination address for the transmissions. Pet. App. 2a-3a, 5a-6a.

On the afternoon of January 25, 2021, Mr. Gonzalez was driving the truck while Mr. Corona slept in the sleeper compartment. An Alabama state trooper executed a traffic stop on the truck. Pet. App. 2a-3a. During questioning, the trooper observed Mr. Gonzalez was nervous and "unsure of the exact destination" for the crate. Pet. App. 3a. Mr. Gonzalez denied having any knowledge of drugs being in the truck, and he notified the trooper that he did not own the truck. Pet. App. 5a.

The trooper asked Mr. Gonzalez for paperwork for the crate and the truck. At Mr. Corona's direction, Mr. Gonzalez located an insurance card, bill of lading, and cab card. The insurance card was expired. The bill of lading was expired, and it listed "Edwin Martinez" as the truck driver and a produce store as the destination. Pet. App. 3a. The cab card contained the name of a trucking company that did not match the name displayed on the truck. Pet. App. 3a-4a.

Subsequently, the trooper asked and received permission from Mr. Gonzalez to search the truck. Pet. App. 5a. The trooper wanted to enter a locked, passenger side storage compartment, but neither Mr. Gonzalez nor Mr. Corona had a key for it. Pet. App. 5a. The trooper pried the compartment open with a screwdriver and found a black duffle bag containing sixteen wrapped bricks of powder cocaine. Pet. App. 5a-6a. After arrest, Mr. Gonzalez voluntarily allowed his cell phone to be searched, and he spoke with law enforcement without the benefit of legal counsel. He stated, in part, that he suspected something was not right with the crate's bill of lading. Pet. App. 6a,8a.

B. District Court Proceedings

Mr. Gonzalez and Mr. Corona were charged in a two count federal indictment with conspiring with each other and "other persons, both known and unknown to the Grand Jury" to knowingly possess with intent to distribute approximately 16 kilograms of powder cocaine (Count 1) and knowingly possess with intent to distribute approximately 16 kilograms of powder cocaine (Count 2), in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(A) and 21 U.S.C. § 846. Pet. App. 6a. Mr. Corona pled guilty. Mr. Gonzalez elected to go to trial on the defense theory that he was an unwitting, blind mule. Pet. App. 7a, 13a.

Mr. Gonzalez filed pretrial motions challenging the government's introduction of text messages and memes found on his cell phone because they had no connection to the charged offenses. The district court denied his motion. Pet. App. 7a. The trial court allowed those communications into evidence on the grounds it was *res gestae* of

the case. Pet. App. 8a. Those communications showed, in part, that Mr. Gonzalez received memes about drugs from friends, and he received four incoming calls from Mr. Corona between the late evening of January 24, 2021, and the early morning of January 25, 2021. Pet. App. 8a. Those communications also included a text message exchange between Mr. Gonzalez and a person named Tuckan, who was neither charged nor named in the indictment. During the exchange, Tuckan talked about being owed money for drugs and the increased price of cocaine during the COVID-19 pandemic. Mr. Gonzalez "replied, 'I know dude they are at 37 38 [thousand dollars].'" Pet. App. 9a.

The government introduced communications and images from Mr. Corona's cell phone. Pet. App. 7a -8a. These communications showed Mr. Corona had numerous chats with "Edwin M" about "meet[ing] up" and "do[ing] the run," to the border, as well as numerous calls between himself, Neto, and Edwin M on the morning of the traffic stop. Mr. Corona's cell phone contained images of "currency, a black duffel bag, a panel on the side of a truck matching the truck stopped by [the state trooper], as well as a news article link discussing cocaine seized during a traffic stop." Pet. App. 10a.

At trial, a law enforcement officer with experience with drug trafficking organization testified as an expert government witness. He testified that he believed the seized cocaine was intended for distribution; Atlanta, GA was a "hub city" for drug trafficking; and traffickers store drugs in hidden compartments on "transportation-type vehicles" that contain "cover loads." Pet. App. 10a-11a. He also testified that

"drug couriers are typically people within the driving business" and they "know that drugs are in the vehicle. Pet. App. 12a. He opined that "drug traffickers typically do not use unknowing or unaffiliated people to transport drugs because that increases the likelihood of getting caught and/or losing the drugs." Pet. App. 12a. He testified that "he had never encountered drug traffickers using a truck driver as a blind mule during his thirty-plus years of experience" and that "the calls and messages in this case were consistent with the communications of a drug trafficking group." *Id.*

During cross-examination of the government's expert witness, Mr. Gonzalez attempted to introduce a 2011 letter written by federal prosecutors in the Western District of Texas describing instances in which drug traffickers used blind mules. Mr. Gonzalez sought introduction of the exhibit to rebut the government's expert witness testimony that drug traffickers did not use unwitting, blind mules. Pet. App. 13a. The trial court did not permit Mr. Gonzalez to introduce the letter. The government's expert witness was allowed to review the letter, and on cross examination, he admitted "it was possible that drug traffickers could use individual drivers who were not commercial package carriers as blind mules." Pet. App. 13a. "The district court did not permit defense counsel to admit the letter into evidence or publish it to the jury, and the district court also prohibited references to the letter in closing arguments." Pet. App. 13a.

Before jury deliberations, the district court gave the following joint possession jury instruction: "Joint possession of a thing occurs if two or more people share possession of it. So, if my wife and I are driving in my car, we both are in joint

possession of the car." Pet. App. 15a-16a. "The second sentence was not a part of the written jury instructions agreed upon by the parties." Pet. App. 16a. Mr. Gonzalez did not object to the jury instructions. Pet. App. 16a.

The jury unanimously found Mr. Gonzalez not guilty of the conspiracy charge in Count 1, but guilty of possession with intent to distribute powder cocaine in Count 2. Pet. App. 16a. He was sentenced to over 10 years of imprisonment. Pet. App. 17a.

C. The Eleventh Circuit's Decisions

Mr. Gonzalez unsuccessfully challenged his conviction on several grounds, including that the district court's joint possession jury instruction misstated the law in the Eleventh Circuit by "improperly focus[ing] the jury's attention on possession of the truck, rather than the drugs." Pet. App. 30a. Following oral arguments, the Eleventh Circuit Court of Appeals affirmed Mr. Gonzalez's conviction and sentence. *United States v. Gonzalez-Gonzalez*, No. 22-10433, 2023 WL 2301444 (11th Cir. Mar. 1, 2023).

The Eleventh Circuit panel acknowledged that current circuit law disapproves of "a constructive possession jury instruction 'stat[ing] that control over the premises—rather than control over the contraband itself—is sufficient to convict.'" Pet. App. 30a (citing *United States v. Cochran*, 683 F.3d 1314, 1320 (11th Cir. 2012)). Reviewing the challenged jury instruction under the plain error standard, the Eleventh Circuit "consider[ed] the totality of the charge as a whole and determine[d] whether the potential harm caused by the jury charge ha[d] been neutralized by the other instructions given at the trial such that reasonable jurors would not have been

misled by the error." Pet. App. 30a-31a (citing *United States v. Iriele*, 977 F.3d 1155, 1178 & n.12 (11th Cir. 2020)).

Characterizing the challenged jury instruction as "imperfect and ill-advised," the Eleventh Circuit reasoned "it was clarified and neutralized" by other jury instructions that "provided the jurors with the requisite elements of the crime, including possession of cocaine and knowledge (or deliberate avoidance) of the fact that he possessed cocaine, which ensured that a finding that Gonzalez possessed the truck would not itself result in a conviction." Pet. App. 32a. The Eleventh Circuit held "the district court did not commit plain error when instructing the jury on the issue of joint possession." Pet. App. 32a.[1]

On April 19, 2023, Mr. Gonzalez filed a Petition for Rehearing By Panel or *En Banc*. On June 5, 2023, the Eleventh Circuit summarily denied the petition. Pet. App. 38a.

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[1] Mr. Gonzalez also argued on appeal that the district court erred when it blocked his introduction of a letter rebutting the government's expert witness testimony that drug traffickers did not use unwitting, blind mules. Mr. Gonzalez asserted the evidence was relevant and probative because it pertained to the knowledge and intent elements of charged offenses, as well as to his defense theory. He also argued that exclusion of the letter allowed the government's expert witness to spoon feed the government's theory to the jury that Mr. Gonzalez knew about the drugs hidden in his codefendant's truck based on generalities about drug trafficking, despite that the government's expert witness admitting that he knew nothing about Mr. Gonzalez's particular case. The Eleventh Circuit rejected these arguments on the grounds that the letter was not properly authenticated, could not be introduced because it addressed the use of blind mules to smuggle marijuana across the U.S.-Mexico border, had little probative value, and any error resulting from its exclusion was harmless because the trial court allowed defense counsel to use the letter to impeach the government's expert witness on cross-examination. Pet. App. 20a-23a. Mr. Gonzalez does not renew this issue here.

REASONS FOR GRANTING THE WRIT

I. Jury instructions that impose mandatory presumptions on the fact finders violate due process.

The Due Process Clause of the Fourteenth Amendment prohibits the government from depriving a criminally accused person of his liberty unless the government proves every element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Francis v. Franklin*, 471 U.S. 307, 313 (1985). "This 'bedrock, 'axiomatic and elementary' [constitutional] principle' prohibits the [government] from using evidentiary presumptions in a jury charge that have the effect of relieving the [government] of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313, (1985) (internal citations omitted).

Determining whether a challenged jury instruction relieves the government of its burden of proof at trial requires a court to first "determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference." *Francis v. Franklin*, 471 U.S. at 314 (internal citations omitted). "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts but does not require the jury to draw that conclusion." *Francis v. Franklin*, 471 U.S. at 314.

Jury instructions that create a mandatory evidentiary presumption violate due process because they "subvert the presumption of innocence accorded to accused

persons and also invade the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989). Jury instructions that create a permissive inference, however, do not violate due process if they "require[ ] the [government] to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Francis v. Franklin*, 471 U.S. at 314. When reviewing a challenged jury instruction, this Court "explained in *Francis* and *Sandstrom* [*v. Montana*, 442 U.S. 510 (1979)] that courts should ask whether the presumption in question is mandatory, that is, whether the specific instruction, both alone and in the context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the [government] proves certain predicate facts." *Carella v. California*, 491 U.S. 263, 265 (1989).

II. The Eleventh Circuit's ruling is irreconcilable with this Court's prohibition against mandatory presumption jury instructions.

A. The *Francis v. Franklin* decision.

Raymond Franklin attempted to escape from custody after he received treatment at a dental office. When he left the office, he took a dental assistant hostage. She was not harmed. Franklin later demanded car keys from a local resident. When the resident said he did not own a vehicle, Franklin left the man unharmed. Thereafter, Franklin knocked on the door of a nearby house. When the resident responded to the knock, Franklin demanded his car keys. The resident slammed his front door. Franklin's pistol fired. The bullets pierced the door and killed the resident. Franklin's sole defense was that he lacked intent to kill because the gun

firing was accidental. He argued his treatment of every other person he met during the escape demonstrated his lack of intent to use force.

The jury returned a guilty verdict after requesting reinstruction on the element of intent and the definition of accident. Franklin was sentenced to death. He eventually sought postconviction relief in federal court. Relief was denied. On appeal, the Eleventh Circuit reversed, holding that the jury violated fundamental Fourteenth Amendment due process. Thereafter, this Court granted cert and evaluated the following instruction in affirming the Eleventh Circuit's ruling:

> "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted" and (2) "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted."

Francis v. Franklin, 471 U.S. 307, 309 (1985).

In this Court's view, the question presented was identical to that in *Sandstrom*[2]: "whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated." *Francis v. Franklin,* 471 U.S. at 313. Considering whether the challenged portion of the instruction created a mandatory presumption or a permissive inference, this Court reasoned that the focus of the analysis should begin with "the specific language challenged," but "[i]f a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of

[2] *Sandstrom v. Montana*, 442 U.S. 510 (1979).

persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole." *Id.* at 315.

Significantly, this Court stressed that "[t]his analysis 'requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.'" *Id.* Therefore, "[t]he question . . . is not what the [lower court] declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." *Francis*, 471 U.S. at 315–16 (*citing Sandstrom*, 442 U.S., at 516–517).

This Court found the challenged instruction directed "the jury to presume an essential element of the offense—intent to kill—upon proof of other elements of the offense—the act of slaying another." *Id.* at 316. "In this way the instructions 'undermine[d] the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.'" *Id.* (*citing Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979)). The challenged language, however, also "explicitly informed [the jury] that the presumptions 'may be rebutted.'" *Id.* at 316. But this Court reasoned that "[t]his distinction [did] not suffice . . . to cure the infirmity in the charge" because "[t]he very statement that the presumption 'may be rebutted' could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption." *Francis*, at 316, 318. Thus, "[s]tanding alone, the challenged

language undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent." *Id.* at 318.

"Because a reasonable juror could have understood the challenged portions of the jury instruction in [*Francis*] as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent, and because the charge read as a whole [did] not explain or cure the error," this Court held "that the jury charge [did] not comport with the requirements of the Due Process Clause." *Id.* at 325.

B. The *Carella v. California* decision.

Following a jury trial in a California municipal court, "Eugene Carella was convicted of grand theft for failure to return a rented car." *Carella v. California*, 491 U.S. 263, 263–64 (1989). Over his objection, the trial court charged the jury as follows:

> (1) "Presumption Respecting Theft by Fraud:
>
> "Intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented."
>
> (2) "Presumption Respecting Embezzlement of a Leased or Rented Vehicle:
>
> "Whenever any person who has leased or rented a vehicle willfully and intentionally fails to return the vehicle to its owner within five days after the lease or rental agreement has expired, that person shall be presumed to have embezzled the vehicle."

Carella, 491 U.S. at 264. After the superior court validated the trial court's use of that instruction, this Court reviewed the instruction and reversed because the

superior court's "disposition was so plainly at odds with prior decisions of this Court." *Id.* at 265. Following *Francis*, this Court held as follows:

> These mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses with which Carella was charged. The instructions also relieved the State of its burden of proof articulated in *Winship*, namely, proving by evidence every essential element of Carella's crime beyond a reasonable doubt. The two instructions violated the Fourteenth Amendment.

Carella, 491 U.S. at 266.

C. The Eleventh Circuit's disposition validates the use of mandatory presumption jury instructions.

Knowledge and intent were elements of the drug offenses charged in this case. Consideration of those elements could not be removed from the jury through reliance on a legal presumption that Mr. Gonzalez had knowledge of hidden drugs and an intent to distribute them merely because of his presence inside his co-defendant's truck where the drugs were hidden. Nevertheless, to affirm Mr. Gonzalez' conviction, the Eleventh Circuit upheld the lower trial court's use of a rogue, erroneous joint possession jury instruction and example that both misstated the law and created an impermissible mandatory presumption that proof of Mr. Gonzalez's knowledge and intent could be derived from facts showing "two or more people shar[ing] possession of" a vehicle. Pet. App. 15a-16a. Thus, "[t]he portion of the jury charge challenged in this case direct[ed] the jury to presume an essential element of the offense—intent. . . —upon proof of other elements of the offense." *Francis*, 471 U.S. at 316 (*citing Ulster County Court v. Allen,* 442 U.S. 140, 156 (1979)). "In this way the instructions

'undermine[d] the factfinder's responsibility at trial, based on evidence adduced by the [government], to find the ultimate facts beyond a reasonable doubt.'" *Id.*

Joint possession of hidden cocaine is at the heart of this case. Out of necessity, a reasonable jury would have paid special attention to the joint possession instructions, and in particular, the trial court's impromptu example intended to help them understand joint possession. During oral argument, a panel member noted that the offending jury instruction was a misstatement of the Eleventh Circuit's law and erroneous in the context of this case. Two people can share a vehicle without having joint possession of it. Two people may share possession of a vehicle without sharing constructive possession of all the vehicle contents. *U.S. v. Stanley,* 24 F.3d 1314 (11th Cir. 1994).

When two people jointly possess a vehicle and drugs are secreted in a hidden compartment, dominion and control over the vehicle is insufficient to prove joint possession of the drugs. *Stanley*, at 1319–21. Some "nexus" must exist between the accused and the contraband, as a defendant's "mere presence in the area of contraband or awareness of its location is not sufficient to establish possession." *Holmes v. Kucynda*, 321 F.3d 1069, 1080 (11th Cir. 2003); *United States v. Maspero*, 496 F.2d 1354, 1359 (5th Cir.1974); *United States v. Pedro*, 999 F.2d 497, 502 (11th Cir.1993).

In joint possession cases, a defendant must know of the substance's existence to exercise dominion and control over it. *Holmes v. Kucynda*, 321 F.3d at 1080. By injecting a familial relationship into the joint possession instruction, when there was

none between Mr. Gonzalez and his codefendant, the instruction suggested to the jury that occupants jointly sharing a vehicle inevitably, constructively share all its contents. Thus, the instruction is erroneous because it is both contrary to and an incomplete statement of the law.

Ultimately, the Eleventh Circuit validated the challenged jury instruction because its consideration of "the totality of the charge as a whole" led it to conclude that the erroneous jury charge "ha[d] been neutralized by the other instructions given at the trial such that reasonable jurors would not have been misled by the error." Pet. App. 30a-31a. In reaching that conclusion, the Eleventh Circuit noted that:

> . . . the district court also instructed the jury that the Government had to "prove[] beyond a reasonable doubt . . . that the defendant knowingly possessed cocaine"; that he "was a willful participant and not merely a knowing spectator"; and that he "actually knew about the controlled substance or had every reason to know but deliberately closed [his] eyes."

Pet. App. 31a.

This Court explained in *Francis* and *Sandstrom* that these types of "general instructions . . . are not 'rhetorically inconsistent with a conclusive or burden-shifting presumption,' because " '[t]he jury could have interpreted the . . . instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.'" *Francis*, at 319. Thus, "general instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate the error in the challenged portion of the instructions." *Id.*, at 320.

"The question . . . is not what the [lower court] declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as

meaning." *Francis*, 471 U.S. at 315–16 (*citing Sandstrom*, 442 U.S., at 516–517). Nothing in the jury instructions made it clear to Mr. Gonzalez's jury that the other instructions referenced by the Eleventh Circuit carried more weight than the challenged joint possession instruction. The jury may have ignored those other instructions since joint possession of drugs was at the heart of this case.

At no point did the court qualify or correct the misleading instruction. The jury was never told that when contraband is hidden inside a vehicle, more is required apart from joint possession of the vehicle. Therefore, Mr. Gonzalez's jury could have reasonably believed the government's burden of proof was satisfied by showing Mr. Gonzalez and his codefendant jointly possessed the truck. The jury could have reasonably believed that, under the circumstances described by the trial court, joint possession of the truck meant joint possession of all the truck's contents. *See Francis*, at 322. The "[l]anguage [in the other instructions] that merely contradict[ed] [the challenged instruction] and [did] not explain [the] constitutionally infirm[ed] instruction will not suffice to absolve the infirmity" because the Eleventh Circuit "ha[d] no way of knowing which of the . . . instructions the jurors applied in reaching their verdict." *Id.*

Mr. Gonzalez's only defense to the drug charges was that he had neither the requisite knowledge nor intent to possess and distribute drugs. In addition to challenging the erroneous jury instruction, he also argued below that the government's evidence was insufficient to prove knowledge and intent. The Eleventh Circuit rejected that argument. Pet. App. 32a-37a. Nevertheless, "[a]n erroneous

presumption on a disputed element of a crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence." *Carella*, 491 U.S. at 270 (Scalia, J., concurring, joined by Brennan, J., Marshall, J., and Blackmun, J.) (*citing Connecticut v. Johnson*, 460 U.S. 73, 85-86 (1983)).

"If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant." *Id.* (see also *Cnty. Ct. of Ulster Cnty., N. Y. v. Allen*, 442 U.S. 140, 159–60 (1979) ("To the extent that the trier of fact is forced to abide by the presumption and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases. It is for this reason that the Court has held it irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction.").

D. Even if the challenged jury instruction could be interpreted as creating a permissive inference, it still violated due process.

"The most common evidentiary device is the entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant." *Ulster County Court*, 442 U.S. at 157.

Permissive jury instructions do not violate due process unless "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Id.* Under those circumstances, there is a risk that the jury's reliance on the permissive inference led to "an erroneous factual determination." *Id.*

As noted *supra*, whether Mr. Gonzalez possessed cocaine hidden inside his codefendant's truck is at the heart of this case. By acquitting him of the drug conspiracy charge, the jury decided he made no agreement with anyone to possess, transport, or distribute the drugs. It is therefore illogical and unreasonable for the jury to also believe he knew about the cocaine and intended to possess and distribute it, but for the erroneous jury instruction. A reasonable jury would of necessity paid special attention to that particular instruction, and the outcome of the verdict proves that was indeed the case.

The Eleventh Circuit has characterized the challenged jury instruction as being merely "imperfect and ill-advised," but not plain error. Pet. App. 32a. But even if the instruction "was not a conclusive presumption but rather misdescription of an element of the offense, the latter like the former deprives the jury of its factfinding role and must be analyzed similarly." *Carella*, 491 U.S. at 270 (Scalia, J., concurring, joined by Brennan, J., Marshall, J., and Blackmun, J.). Thus, "misdescription of an element of the offense has similarly been held not curable by overwhelming record evidence of guilt." *Id.* (*citing United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 408-409 (1947)).

III. This Court should grant review because the Eleventh Circuit's disposition is "so plainly at odds" with this Court's precedent.

This Court "has disapproved the use of mandatory conclusive presumptions not merely because it 'conflict[s] with the overriding presumption of innocence with which the law endows the accused,' but also because it 'invade[s] [the] fact-finding function' which in a criminal case the law assigns solely to the jury." *Carella*, 491 U.S. at 268 (Scalia, J., concurring, joined by Brennan, J., Marshall, J., and Blackmun, J.) (internal citations omitted). "The constitutional right to a jury trial embodies 'a profound judgment about the way in which law should be enforced and justice administered.'" *Id.* (internal citations omitted). "It is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power— a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.'" *Id.* (internal citations omitted).

This Court's precedent prohibiting mandatory presumption jury instructions is clear and well settled. The Eleventh Circuit's disposition below is "plainly at odds with [those] prior decisions of this Court." 491 U.S. at 265. Left unchecked, Mr. Gonzalez, and hundreds like him, will spend decades of their lives in prison solely because they were tried in the Eleventh Circuit. Because the Eleventh Circuit has departed from the accepted and well-established usual course of judicial proceedings set by this Court, review is both critical and necessary. *See Carella,* 491 U.S. at 265; *see also Foucha v. Louisiana*, 504 U.S. 71, 75 (1992) (granting review, in part, because

a case "was decided by the court below in a manner arguably at odds with prior decisions of this Court.").

IV. Alternatively, this Court could grant, vacate, and remand to the Eleventh Circuit in the event it rules in favor of the petitioner in *Delilah Diaz v. United States*, Case No. 23-14 (June 30, 2023).

In *Delilah Diaz v. United States*, Case No. 23-14 (June 30, 2023), a jury found Ms. Diaz guilty of knowingly importing methamphetamine where the facts showed she drove her boyfriend's car to the U.S.- Mexico border and law enforcement found over 27 kilograms of the drug hidden inside a door panel. Ms. Diaz asserted she did not know drugs were hidden in the vehicle. During her trial, a government expert witness testified that drug trafficking organizations do not entrust large quantities of drugs to unwitting couriers. On appeal, she unsuccessfully challenged this testimony on the grounds it violated Rule 704(b) of the Federal Rules of Evidence because the testimony was a prohibited opinion on her mental state. The Ninth Circuit Court of Appeals disagreed and affirmed her conviction.

On June 30, 2023, Ms. Diaz filed a petition for writ of certiorari offering the following question presented:

> Federal Rule of Evidence 704(b) provides: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b).
>
> The question is: In a prosecution for drug trafficking—where an element of the offense is that the defendant knew she was carrying illegal drugs—does Rule 704(b) permit a governmental expert witness to testify that most couriers know they are carrying drugs and that drug-

> trafficking organizations do not entrust large quantities of drugs to unknowing transporters?

Diaz Pet., p. i.

Ms. Diaz noted a circuit split where the Eighth and Eleventh Circuits agree with the Ninth Circuit that an expert witness does not violate Rule 704(b) unless she states an "explicit opinion" about a defendant's state of mind or knowledge. *United States v. Gomez,* 725 F.3d 1121, 1128 (9th Cir. 2013);*United States v. Urbina,* 431 F.3d 305, 311-12 (8th Cir. 2005); *United States v. Alverez,* 837 F.2d 1024, 1031 (11th Cir. 1988). The Fifth Circuit, however, holds that expert testimony offering generalizations that most drivers know they are carrying drugs and drug organizations do not entrust large quantities of drugs to unwitting, blind mules does run afoul of the rule's prohibition on opinions about a defendant's mental state. *United States v. Gutierrez-Farias*, 294 F.3d 657 (5th Cir. 2002). *Diaz Pet.*, pp. 8-13.

Ms. Diaz argues, in part, that the Ninth Circuit's interpretation of Rule 704(b) is wrong because it "allows the Government to establish a rebuttable presumption of mens rea" that relieves the government of its duty to prove every element of a charged offense, in violation of due process and this Court's precedent in *Franklin* and *Sandstrom*. *Diaz Pet.,* p. 24.

> Second, the Ninth Circuit's rule allows the Government to establish a rebuttable presumption of mens rea, which raises serious constitutional concerns. The Due Process Clause forbids creating "rebuttable presumptions" regarding mens rea or another element of a criminal offense. *See Francis v. Franklin*, 471 U.S. 307, 317-18 (1985). The reason is simple: such a presumption—which posits that if certain predicate facts are present, the jury should presume a certain element is satisfied—"relieves the State of the affirmative burden of persuasion on the presumed element." *Id.* at 317; *see also Sandstrom v. Montana*,

> 442 U.S. 510, 521 (1979); *In re Winship*, 397 U.S. 358, 364 (1970) (prosecution must prove every element beyond a reasonable doubt).
>
> *Franklin* and *Sandstrom* involved jury instructions from a judge, whereas the presumption in this case is created by expert testimony. But at least where, as here, the expert is a government agent speaking with the imprimatur of someone who enforces the law, there is not much difference between the two. When members of law enforcement—testifying based on their "specialized knowledge," Fed. R. Evid. 702—tell the jury that a particular class of defendants generally has a particular state of mind when certain predicate facts are present, they, in all practical terms, "shift[] to the defendant the burden of persuasion on the crucial element of intent." *Francis*, 471 U.S. at 316; *see also* Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 Geo. Mason L. Rev. 363, 365 (2012) ("An officer, testifying as an expert, relieves the prosecution of its burden to prove that defendant possessed the charged crime's requisite mens rea beyond a reasonable doubt.").
>
> This is grossly unfair, and Rule 704(b) should not be construed to tolerate such a potential incursion on elementary notions of due process. The Government must prove that every individual it wishes to imprison committed an evil act. Burden- shifting generalizations will not do. Especially when mens rea is involved.

Diaz Pet., pp. 24, 24-25.

While Mr. Gonzalez's challenge is not identical to Ms. Diaz's challenge, a review of her petition may result in an opinion from this Court that may include legal principles that bolster Mr. Gonzalez's substantive legal arguments. Hence, Mr. Gonzalez requests that, if this Court issues a decision in *Diaz*, it will issue an order granting certiorari review in this case, vacating the lower court's decision below, and remanding for re-evaluation in light of *Diaz*. Thus, Mr. Gonzalez requests a GVR order.

CONCLUSION

For the foregoing reasons, this Court should grant this petition. Alternatively, this Court should grant Mr. Gonzalez's petition, vacate the Eleventh Circuit's judgment, and remand to the Eleventh Circuit for consideration in light of any forthcoming decision issued in *Delilah Diaz v. United States*, Case No. 23-14 (June 30, 2023).

Respectfully Submitted,

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