No. ________

In the Supreme Court of the United States

COLIN MONTAGUE,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE SONYA SOTOMAYOR, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Colin Montague respectfully requests a 44-day extension of time, to and including March 1, 2024, within which to file a petition for a writ of certiorari to review the judgment of the Second Circuit in this case. A divided panel of the Second Circuit issued its opinion on May 9, 2023. The full court of appeals denied a timely-filed petition for rehearing *en banc* on October 18, 2023, from which five judges dissented. Without extension, the time to file a petition for a writ of certiorari will expire on January 16, 2024. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The Second Circuit's opinion, order denying rehearing *en banc* and accompanying dissent are attached.

1. Montague was charged with, among other things, operating a "continuing criminal enterprise," or a CCE, in violation of 21 U.S.C. § 848. Slip Op. 1. To obtain a CCE conviction under Section 848, the government must prove that the defendant engaged in a "continuing series of violations" of the federal narcotics laws. 21 U.S.C. § 848(c)(2). The

lower courts uniformly have interpreted the word "series" to require three or more predicate violations, each of which is an element of a CCE offense. *See, e.g.*, *Monsanto* v. *United States*, 348 F.3d 345, 348 (2d Cir. 2003). And it is settled that, "to convict a defendant of violating § 848, a jury must not only unanimously find that the defendant committed a continuing series of violations, but must also unanimously agree on which specific violations make up the series." *Monsanto* v. *United States*, 348 F.3d 345, 348 (2d Cir. 2003) (citing *Richardson* v. *United States*, 526 U.S. 813, 815 (1999)).

This Court has said that "[a]n indictment must set forth each element of the crime that it charges." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998). In this case, the indictment charged that Montague "engage[d] in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 841(a)(1) and 846, which violations were part of a continuing series of violations of said statutes." 1 C.A. App. 32. But the it did not identify any specific predicate violations that, taken together, would amount to a "series" of past offenses. It found only that Montague "did violate Title 21, United States Code, Sections 841(a)(1) and 846." *Ibid.*

Montague was convicted of violating Section 848. He challenged the sufficiency of the indictment on appeal, arguing that it had not adequately found three or more predicate violations needed to support a CCE charge.

The Second Circuit affirmed the conviction in a divided opinion. The court acknowledged that "the violations composing a continuing series are elements of the CCE offense and must appear in the indictment." Slip op. 11. But it concluded that, to meet that requirement, an indictment need only "track the language of the statute" and need not identify any specific offenses or even their "approximate time[s] and place[s]." Slip op. 12. It is not true, according to the Second Circuit majority, that "violations composing the continuing

series must be alleged in separate counts or that the facts and circumstances amounting to a violation must be mentioned elsewhere in the indictment." *Ibid*. Finding that the indictment here "clearly passes this test," the court affirmed. *Ibid*.

Judge Jacobs dissented. Montague in turn petitioned for rehearing *en banc*, which the court of appeals denied over the dissent of five judges.

2. The decision below is wrong, and the petition will show that it warrants the Court's attention. An indictment that does not find probable cause for each of the facts necessary for conviction is facially insufficient to satisfy the Fifth Amendment's grand-jury requirement. See Panel Dissent 10; Rehearing Dissent 4-5. And an error of this nature is certain to beget additional constitutional problems. Given the barebones nature of the indictment here, the district court was required to instruct the petit jury that the CCE predicate offenses could include "acts not mentioned in the indictment." 19 C.A. App. 5681. That instruction is unavoidable, because if the grand jury's indictment omits the facts of any of the defendants' predicate offenses and instead cites only vaguely to a criminal statute, then the petit jury necessarily will have to convict, if at all, based on conduct not alleged in the indictment. But of course, a conviction cannot be premised on accusations entirely absent from the indictment. See Panel Dissent 10-11; Rehearing Dissent 4-5.

The Second Circuit's contrary decision below "openly splits with the Third Circuit regarding how a CCE indictment must set forth each predicate violation." Panel Dissent 11. That circuit "has adopted a sensible rule" by which "an indictment must include the facts and circumstances comprising at least three offenses," albeit without "need[ing to] identify with exacting specificity which three will ultimately prove the CCE charge." Rehearing Dissent 7-8 (cleaned up) (quoting *United States* v. *Bansal*, 663 F.3d 634, 647 (3d Cir. 2011)). The majority below expressly "disagreed" with *Bansal*. *Id*. at 8. Moreover, the

decision is "in serious tension with cases from the First, Seventh, Eighth, and Tenth Circuits," which have "strongly disapproved" of a "CCE indictment that fails to specify predicate violations in the CCE count." Panel Dissent 11.

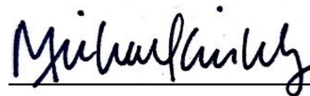
As the judges dissenting from rehearing *en banc* concluded, therefore, "this case involves a question of exceptional importance" warranting this Court's "[i]ntervention." Rehearing Dissent 1, 10.

3. Additional time is needed to fully research and brief a petition for the Court's consideration. Undersigned counsel was only recently retained in this case and has no prior familiarity with the facts or procedural history. The requested extension will ensure that counsel has adequate opportunity to review the record and conduct additional original research. The need for additional time is made more pressing by the intervening winter holidays, for which undersigned counsel has pre-arranged family travel plans. Finally, undersigned counsel is engaged in several other matters with proximate due dates, including a number of other matters before this Court, a matter before the Nebraska Supreme Court, and a matter before the D.C. Court of Appeals.

For the foregoing reasons, the application for a 44-day extension of time, to and including March 1, 2023, within which to file a petition for a writ of certiorari in this case should be granted.

December 14, 2023

Respectfully submitted.



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