No.

In the Supreme Court of the United States

COLIN MONTAGUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented, over which there is an open split between the Second and Third Circuits, is whether an indictment charging a violation of 21 U.S.C. § 848 is invalid if it fails to set forth facts and circumstances that establish the elements of at least three prior controlled-substance offenses.

RELATED PROCEEDINGS

United States District Court (W.D.N.Y.):

- *United States* v. *Montague*, No. 14-cr-6136-FPG (March 14, 2018) (denial of motion to dismiss)

United States Court of Appeals (2d Cir.):

- *United States* v. *Montague*, No. 18-2975 (May 9, 2023) (original opinion and judgment)
- *United States* v. *Montague*, No. 18-2975 (October 18, 2023) (order denying rehearing)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Constitution, statutes, and rule

Other authorities

INTRODUCTION

To establish a "continuing criminal enterprise" in violation of 21 U.S.C. § 848, the government must prove that the defendant engaged in a "continuing series" of three or more controlled-substance violations. 21 U.S.C. § 848(c)(2). The Court, in *Richardson* v. *United States*, 526 U.S. 813 (1999), held that each prior offense comprising the "continuing series" is a standalone element of a CCE charge. To convict, a jury must therefore agree unanimously on the identities of three or more specific prior drug offenses. *Id*. at 816.

This case concerns the sufficiency of an indictment charging a continuing criminal enterprise (CCE). It is black-letter law 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 keeping with *Richardson*, the Third Circuit has held that a CCE indictment "must include the facts and circumstances comprising at least three" prior offenses. *United States* v. *Bansal*, 663 F.3d 634, 647 (3d Cir. 2011).

Breaking from *Bansal*, a divided panel of the Second Circuit held that an indictment does *not* need to set forth the facts or circumstances of any of the predicate offenses underlying a CCE charge. According to the decision below, it suffices to provide an unelaborated citation to some controlled-substance statute, coupled with a bare assertion that the defendant "did violate" that statute—without any allegations of why, when, how, or with whom. App., *infra*, 8a-10a.

That holding "openly splits with the Third Circuit." App., *infra*, 48a (Jacobs, J., dissenting). Indeed, the majority acknowledged the "circuit split with the Third Circuit's decision in *Bansal*" and explained its rejection of the reasoning in that case. App., *infra*, 13a n.3.

The split will not resolve itself. The question posed here was presented to the full Second Circuit, which denied *en banc* rehearing over a five-judge dissent. See App., *infra*, 58a-64a. In addition to confirming the circuit split, the dissenters stressed the "exceptional importance" of the issue and expressly called for this Court's intervention. App., *infra*, 58a, 64a.

The Court should accept that invitation. Aside from the circuit split, the decision below is shockingly wrong. *Richardson* held that "[t]o *convict* on a CCE count, a petit jury must conclude beyond a reasonable doubt that the defendant committed each predicate offense." App., *infra*, 60a. It follows that "to *indict* on a CCE count, the grand jury must find probable cause that the defendant committed each predicate offense." *Ibid.* To that end, the indictment must identify "without any uncertainty or ambiguity * * * all the elements" of the predicate offenses and include "such a statement of the facts and circumstances as will inform the accused of the specific" violations constituting the continuing series. *Russell* v. *United States*, 369 U.S. 749, 765 (1962).

An indictment—like the one here—that simply cites to two criminal statutes and asserts without a word of explanation that the defendant "did violate" those statutes falls far short of that requirement. It denies the defendant meaningful notice of the charges against him and invites prosecutors to charge continuing criminal enterprises when the facts do not support it. The practical consequences are chilling. As Judge Jacobs put it, the Grand Jury Clause "is no fussy rule of pleading," but rather "a substantial safeguard against oppressive and arbitrary proceedings." App., *infra*, 42a. The Court should grant the petition and reverse.

OPINIONS BELOW

The Second Circuit's opinion (App., *infra*, 1a-46a) is published at 67 F.4th 520. The five-judge opinion dissenting from denial of rehearing (App., *infra*, 55a-61a) is published at 84 F.4th 533. The opinion of the district court (App., infra, 47a-52a) is unreported but available in the Westlaw database at 2018 WL 1317347.

JURISDICTION

The Second Circuit entered its judgment on May 9, 2023, and denied a timely rehearing petition on October 18, 2023. On December 14, 2023, Justice Sotomayor extended the time to file a petition for certiorari to and including March 1, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in relevant part, that "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 * * *."

STATEMENT

A. Legal framework

1. "Federal crimes are made up of factual elements." *Richardson* v. *United States*, 526 U.S. 813, 817 (1999). For example, a bank robbery statute generally "makes it a crime (1) to take (2) from a person (3) through force or the threat of force (4) property (5) belonging to a bank." *Ibid.* Each of these five facts is an element of the crime. Designating a particular fact an "element" of the crime "carries certain legal consequences." *Ibid.* (citing *Almendarez-Torres* v. *United States*, 523 U.S. 224, 239 (1998)).

Among other things, "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Ibid.*

This case concerns not convictions by petit juries but indictments by grand juries. The Fifth Amendment requires a federal grand jury to find probable cause as to each of the essential factual elements of every offense charged in a federal indictment. *Beavers* v. *Henkel*, 194 U.S. 73, 84 (1904); accord *United States* v. *Debrow*, 346 U.S. 374, 376 (1953). In keeping with that requirement, Federal Rule of Criminal Procedure 7(c)(1) specifies that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

That rule serves three purposes. First, it gives the defendant notice of what is charged, allowing him to mount an informed defense. Second, it defines the scope of the prosecution for double jeopardy purposes. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Third, it is "a check on prosecutorial power" and "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973); accord *United States* v. *Cotton*, 535 U.S. 625, 634 (2002). If grand juries did not need to find probable cause as to each essential element of an offense, charges could be brought on incomplete facts—a rule that "might be applied to very oppressive purposes." *Beavers* v. *Henkel*, 194 U.S. 73, 84 (1904) (quoting 4 William Blackstone, *Commentaries* 303).

It is thus settled that an indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Russell* v. *United*

States, 369 U.S. 749, 765 (1962). An indictment also must include "such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Ibid.* (quoting *United States* v. *Hess*, 124 U.S. 483, 487 (1888)).

2. Section 848 specifies the elements of a continuing criminal enterprise: The defendant must be (1) engaged in a "continuing series" of three or more controlled-substance violations (2) committed "in concert with five or more other persons." 21 U.S.C. § 848(c)(2).

As to the "continuing series" requirement, *Richardson* held that it is not "one element" taken as a single amalgam, but instead "several elements, namely the several 'violations,'" which together comprise the series. 526 U.S. at 817-820. That is to say, each predicate violation establishing a "continuing series" under section 848(c)(2) "amounts to a separate element" that must be found unanimously by the petit jury. *Ibid.*

The penalties for engaging in a continuing criminal enterprise are significant. For a first-time offender who is a low-level participant in a CCE, conviction carries a mandatory minimum of 20 years' imprisonment. 21 U.S.C. § 848(a). Generally, a "principal administrator, organizer, or leader" of the continuing criminal enterprise "shall be imprisoned for life." 21 U.S.C. § 848(b).

B. Factual and procedural background

1. New York state authorities opened an investigation of Colin Montague for suspected drug trafficking. App., *infra*, 3a. Following a thorough investigation that included searches of Montague's home, car, and person, state prosecutors presented their case to a state grand jury. The grand jury declined to indict. *Ibid.* It concluded

"there was not reasonable cause to believe that the defendant committed [the charged drug crimes] or any other offense." Dist. Ct. Dkt. 45, at 3.

A federal narcotics taskforce picked up where state investigators left off. The federal investigation uncovered one additional piece of evidence—Montague's personal ledger. On that basis, federal prosecutors presented their case to a federal grand jury, which returned a single-count indictment charging Montague with narcotics conspiracy. App., *infra*, 3a. Soon thereafter, the grand jury returned a second superseding indictment charging Montague with nine counts. App., *infra*, 3a-4a.

Count 1 of the operative indictment charged Montague with leading a continuing criminal enterprise, in violation of section 848(b). Count 2 charged a narcotics conspiracy in violation of section 846. The remaining seven charges alleged various money laundering crimes.

The indictment's allegations concerning the existence of a CCE are reproduced on page 66a of the appendix. They are, in sum total, as follows:

> From in or about 2008, the exact date being unknown to the Grand Jury, through and including on or about July 1, 2014, in the Western District of New York, and elsewhere, [Montague] did knowingly, willfully, intentionally and unlawfully engage 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 undertaken by the defendant * * *.

Count 2 states the facts and circumstances of a single alleged violation of section 846. But the indictment does not allege the facts or circumstances of any other

predicate offenses. Money laundering offenses are not predicates for purposes of section 848(c).

2. Montague moved to dismiss the CCE charge on the ground that the indictment did not contain a plain, concise, and definite written statement of the essential facts constituting the offense, as required by Federal Rule of Criminal Procedure 7(c)(1). See App., *infra*, 50a. He argued that the CCE count also was "constitutionally insufficient" under the Fifth Amendment in that it "fails to set forth at least three specific violations constituting a continuing series of violations in which [he] is alleged to have participated and which must be separately proved." App., *infra*, 52a (cleaned up).[1]

The district court denied the motion. App., *infra*, 50a-55a. In the district court's view, the indictment was sufficient under the Second Circuit's decision in *United States* v. *Flaharty*, 295 F.3d 182 (2d Cir. 2002).

Montague next moved for a bill of particulars and for leave to serve interrogatories, seeking information about the alleged violations constituting the continuing series. App., *infra*, 14a. Those requests were denied. *Ibid.* Montague thus had no notice of the prosecution's case with respect to the continuing series of offenses.

At the close of evidence, the judge instructed the jury:

> A continuing series of violations is three or more violations of the federal narcotics laws committed over a definitive period of time. These three or more violations do not have to be convictions

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[1] Montague conceded in the court of appeals and acknowledges here that the second count of the indictment, alleging a drug conspiracy in violation of section 846, sufficiently charged one predicate offense. App., *infra*, 8a. But the indictment was silent as to the facts or circumstances of any other predicate offense.

> or separate counts in the indictment. *They may even be acts not mentioned in the indictment at all.* As long as the defendant, Colin Montague, had the intent to violate the narcotics laws when he committed these acts, you must unanimously agree on which three acts constitute the continuing series of violations.

App., *infra*, 5a (ellipses omitted, emphasis added).

Montague was convicted on all counts and sentenced to life in prison pursuant to section 848(b).

3.a. A divided panel of the Second Circuit affirmed. App., *infra*, 1a-49a. As relevant here, the majority rejected Montague's contention that a CCE indictment must include "the facts and circumstances amounting to [the] violation[s]" asserted as predicates. App., *infra*, 10a. It generally suffices to allege that the defendant committed "felony violations of Sections 841(a)(1) and 846" without including even "the approximate time and place of [any such] offense." *Ibid.*

The majority did not dispute that its holding conflicts "with the Third Circuit's decision in *Bansal*," which had "adopted a facts-and-circumstances test." App., *infra*, 13a n.3. But it characterized the Third Circuit as having created the split when it broke from *Flaharty*, which previously had "declined to adopt" a facts-and-circumstances requirement for CCE indictments. *Ibid.*

Judge Bianco concurred separately with respect to issues not relevant here. App., *infra*, 31a-40a.

Judge Jacobs dissented. App., *infra*, 41a-49a. In his view, the "barebones" indictment in this case was not just "bad practice" but "unconstitutional." App., *infra*, 41a. It "failed to describe any offense comprising the continuing series." *Ibid.* He explained that because "[e]ach

predicate offense comprising the requisite 'continuing series' of drug offenses is a separate and essential element of the CCE offense" under *Richardson*, "[t]he grand jury cannot find probable cause as to a CCE unless it finds probable cause that the defendant committed each predicate." App., *infra*, 43a. It did not do so here, rendering the indictment defective.

"This is no fussy rule of pleading or bureaucratic speed bump," Judge Jacobs explained, because "[t]he grand jury is a substantial safeguard against oppressive and arbitrary proceedings." App., *infra*, 39a. "The requirement that each element be set out ensures that the indictment reflects the judgment of a grand jury rather than only that of the prosecutor," who, unchecked by the grand jury, may overreach. *Ibid.*

Worse yet, according to Judge Jacobs, "[o]ne error spawns another." App., *infra*, 48a. In particular, "[t]he deficiency of this indictment compelled the trial court to instruct the jury that the predicate violations 'may even be acts not mentioned in the indictment at all.'" *Ibid.* Indeed, "[i]f predicate violations are effectively omitted from the indictment, juries will *have* to rely on extra-indictment acts" to convict. *Ibid.*

"Finally," in Judge Jacobs's view, "the majority openly splits with the Third Circuit" and "is also in serious tension with cases from the First, Seventh, Eighth, and Tenth Circuits." App., *infra*, 48a.

b. The Second Circuit denied rehearing *en banc* over the dissent of five colleagues. App., *infra*, 56a-64a. Writing for the dissenters, Judge Pérez opined that the majority's decision that "a CCE indictment need only cite the statute a defendant violated" substantially impairs

"the rights guaranteed by the Fifth Amendment's Grand Jury Clause." App., *infra*, 59a-60a.

Moreover, "[t]he proper rule is easy to derive." App., *infra*, 60a. It is simply that "to indict on a CCE count, the grand jury must find probable cause that the defendant committed each predicate offense" (*ibid.*), requiring facts and circumstances establishing the elements of at least three such offenses (App., *infra*, 62a). The Third Circuit has adopted just this "sensible rule" and "[t]here can be no doubt of the circuit split here." App., *infra*, 62a-63a.

The dissenting judges concluded by observing that "[i]ntervention is needed." App., *infra*, 64a. Because the *en banc* court of appeals declined to correct the decision in this case "from within," correction now is needed "from above." *Ibid.*

REASONS FOR GRANTING THE PETITION

Every relevant consideration weighs in favor of granting the petition. To begin with, the decision below creates (or, in the majority's view, extends) an acknowledged conflict with the Third Circuit, creating substantial uncertainty on the sufficiency of indictments for charges that have predicate offenses as elements.

More, the Second Circuit's resolution of the question is deeply flawed—it departs from this Court's precedents in both *Richardson* and *Russell* and disregards the commonsense symmetry between the requirements for grand jury indictments and petit jury guilty verdicts. These errors cry out for this Court's correction.

Because CCE charges often expose defendants to life in prison, the decision below is also a matter of tremendous practical importance. And it gives strong incentive for prosecutors to bring factually unfounded charges to gain advantage in plea negotiations or at trial.

Beyond that, this case offers a fully developed vehicle that queues up the question presented free of any factual or procedural complications. The issue was preserved at every stage of the case and was Montague's lead argument before the Second Circuit. The lower courts addressed the question in depth, fully ventilating the issues (and the circuit conflict) in four separate opinions. Further review is warranted.

A. The decision below creates a hardened conflict with the Third Circuit

1. In appellate proceedings below, Montague argued "that the indictment here failed to describe three violations constituting a continuing series of violations" and thus "did not put him on notice of the conduct alleged to have constituted" the predicate offenses underlying his CCE charge. App., *infra*, 8a-9a.

The majority squarely rejected that argument. In its view, a constitutionally sufficient CCE indictment "need only track the language of [section 848(c)]" and allege that some "continuing series of felonies were violations" of qualifying controlled-substance statutes, as the indictment here did. App., *infra*, 10a. The majority puzzlingly suggested that an indictment "must state the approximate time and place of the [predicate] offense[s]," but "only if necessary." *Ibid.* Yet the majority did not believe such details were "necessary" in this case and held, in effect, that they never are: A CCE indictment, it concluded, need not ever allege "the facts and circumstances amounting to a [predicate] violation." *Ibid.*

That holding cannot be reconciled with the Third Circuit's decision in *Bansal*. There, the defendant argued that his CCE indictment was insufficient because it did not adequately recount facts constituting the predicate

offenses. In evaluating that claim, the Third Circuit noted that, because "[t]he *Richardson* Court held that a jury must find with specificity the predicate offenses to a CCE charge," it "necessarily follows * * * that * * * each predicate act must appear in the indictment." 663 F.3d at 647. The court held, in particular, that although "the CCE count itself need not identify with exacting specificity" which prior offenses shall serve as predicates, a CCE "indictment must include the facts and circumstances comprising at least three felonies," from which a petit jury could conclude that a continuing series had occurred. *Ibid.* Simply put, the "facts and circumstances" of at least three predicate offenses "must appear within the indictment." *Id.* at 647-648.

Applying that test, the court affirmed the conviction because counts 1 through 5 in the indictment in that case all qualified as predicates. *Bansal*, 663 F.3d at 648. Moreover, the first 42 paragraphs of the indictment recited extensive "overt acts" in furtherance of the conspiracy charges. *Id.* at 648-649. "[T]he acts comprising the CCE charge" thus "did indeed appear within" the indictment, putting the defendant on adequate notice of the allegations against him and fully enabling him to prepare a defense. *Id.* at 648.

That reasoning is at loggerheads with the decision below. The panel majority in this case expressly rejected the "facts-and-circumstances test in *Bansal*," finding it foreclosed by Second Circuit precedent. App., *infra*, 13a n.3. It concluded instead that an indictment suffices when it "alleges predicate violations by reference to the violated statutory provisions" alone, without need to "allege facts and circumstances that would amount to three violations." App., *infra*, 12a-13a.

The split is particularly stark given that the New York City metropolitan area is divided across the Second and Third Circuits. For prosecutors and criminal defendants in the New York City area, the standard under the Grand Jury Clause for a CCE indictment turns on which side of the Hudson River the case happens to be tried.

2. The split between the Second and Third Circuits will not resolve itself. Montague sought rehearing *en banc*, bringing the Third Circuit's reasoning to the attention of the full Second Circuit. The court denied rehearing over vigorous dissent. There is thus no reason to think the Second Circuit might alter its position.

Nor is there any reason to believe the Third Circuit will change course. As we demonstrate in detail below, the Third Circuit's rule is plainly correct. But beyond that, *Bansal* also involved a request for rehearing *en banc* on the question of the sufficiency of CCE indictments. See Rehearing Petition, *United States* v. *Bansal*, No. 07-1525, at *8-10 (3d Cir.) (Dec. 28, 2011). The Third Circuit denied rehearing *en banc* there, too. And in the years since, it has had opportunities to reconsider its decision. See, *e.g.*, *Robinson* v. *Warden Schuylkill FCI*, 687 Fed. App'x 125, 127-128 (3d Cir. 2017). It has not done so. This Court's review is thus necessary to restore uniformity to federal law on the question presented.

3. Intervention is further warranted because, in addition to the hardened conflict between the Second and Third Circuits, there is a broad lack of clarity among the remaining circuits on the question presented.

Several circuits have described the Third Circuit's rule as preferable, but without characterizing it as a constitutional requirement. In a case predating *Richardson*, for example, the Eight Circuit opined that "it would be far

preferable to list the felonies comprising the criminal enterprise in the CCE count of an indictment." *United States* v. *Becton*, 751 F.2d 250, 257 (8th Cir. 1984); accord *United States* v. *Butler*, 885 F.2d 195, 198 (4th Cir. 1989) (similar). Even after *Richardson*, the First Circuit has only described it as "preferable for predicate offenses to be alleged in the CCE count." *United States* v. *Soto-Beniquez*, 356 F.3d 1, 26 (1st Cir. 2003).

These equivocal statements leave criminal defendants, prosecutors, and lower courts to operate under an ambiguous rule on a matter of considerable legal and practical importance. The law in the Tenth Circuit is emblematic of the uncertainty. After dividing evenly *en banc* on the question presented, that court declined to reach a "conclusion about the sufficiency of an indictment that does no more than track the language of the CCE statute." *United States* v. *Staggs*, 881 F.2d 1527, 1531 (10th Cir. 1989) (*en banc*).

The entrenched split and persistent confusion on the question presented is not tolerable. As the Third Circuit observed in *Bansal*, this Court has not "elucidated the contours of precisely what must appear in a post-*Richardson* indictment." 663 F.3d at 647. The time for that elucidation is now.

B. An indictment charging a continuing criminal enterprise must include the facts and circumstances of the series of offenses

To satisfy the Grand Jury Clause and Criminal Rule 7(c), an indictment charging a continuing criminal enterprise must allege facts and circumstances sufficient to establish the elements of at least three predicate offenses. That follows inexorably from this Court's precedents and the history and purposes of that clause.

1. The Second Circuit's decision contravenes this Court's precedents. In *Richardson*, the Court held that each predicate offense underlying a continuing series is itself a separate, essential element of a CCE offense. 526 U.S. at 817-820. Thus, the petit jury must "unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" *Id.* at 815.

That holding followed not only from the statutory text, the Court explained, but also from the realities of complex criminal trials. Given the wide variety of drug crimes eligible as predicate violations and the breadth of possible evidence the government may present in a CCE case, identifying individual predicate violations as standalone elements "require[s] [jurors] to focus on specific factual detail" and reduces the risk that they will "simply conclud[e] * * * that where there is smoke there must be fire." *Richardson*, 526 U.S. at 819.

As *Richardson* recognized, moreover, to characterize a "particular fact" as an "element of" a crime "carries certain legal consequences." 526 U.S. at 817. While *Richardson* was focused on the consequences for the work of the petit jury, *Russell* spells out the consequences for the work of the grand jury.

It is fundamental that, to ensure the defendant "is tried on the matters considered by the grand jury, [an] indictment must state some fact specific enough to describe a particular criminal act, rather than [just] a type of crime." App., *infra*, 62a. Accordingly, mere recitation of the "generic terms" of a statutory provision "is not sufficient" to satisfy the Grand Jury Clause. *Russell*, 369 U.S. at 765. An indictment "must descend to partic-

ulars." *Ibid.* This is not to say that "the language of the statute may [not] be used in the general description of an offense," but only that if it is so used, "it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Ibid.* (quoting *United States* v. *Hess*, 124 U.S. 483, 487 (1888)).

There is no squaring the decision below with these "elementary principle[s] of criminal pleading." *Russell*, 369 U.S. at 765. Again, the Second Circuit expressly approved the indictment's bare citation to sections 841(a)(1) and 846 of Title 21 of the U.S. Code, unaccompanied by even so much as a recitation of the elements of the crimes that those statutes define. In turn, it rejected the need for the grand jury to find the facts and circumstances that would have informed Montague of the specific predicate offenses under sections 841(a)(1) and 846 with which he was charged.

This is not defensible. *Richardson* teaches that each prior offense comprising an alleged "continuing series" is an essential, standalone element of a CCE charge. *Russell* teaches that the indictment must therefore describe the facts and circumstances of each particular offense. The indictment in this case did not do so.

2. As Judge Jacobs rightly noted (App., *infra*, 48a), one constitutional error begets another. It is the whole point of the Grand Jury Clause that a defendant "shall not be held to answer" matters not put before a grand jury. The grand jury's role is to investigate suspected crimes and to determine whether "the evidence is sufficient to justify putting the party suspected on trial." *Frisbie* v. *United States*, 157 U.S. 160, 163 (1895). A trial may move

forward only on "those accusations which [the grand jury has] approved." *Ibid.*

The Second Circuit's rule flouts this basic precept of criminal procedure, as well. If a CCE indictment need not allege the facts or circumstances of any of the alleged crimes underlying the "continuing series," it follows necessarily that the defendant will be put to trial on—and the petit jury will have to decide—matters not considered by the grand jury. The district court embraced this fact, instructing the petit jury that they could find that Montague had engaged in a continuing series of drug violations based upon "acts not mentioned in the indictment at all." App., *infra*, 5a.

That is a virtual concession of the unconstitutionality of the indictment in this case. After all, "there can be no amendment of an indictment by the court." *Ex parte Bain*, 121 U.S. 1, 8 (1887) (quoting *Commonwealth* v. *Drew*, 57 Mass. 279, 282 (1849)), overruled on unrelated grounds by *United States* v. *Cotton*, 535 U.S. 625 (2002). Yet there could not have been a conviction in this case without effectively violating that rule.

3. The history and purpose of the Grand Jury Clause confirm the deficiencies of the indictment here. The grand jury's "historic role" is as "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973); see also *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962) (describing indictment by grand jury as "a primary security to the innocent against hasty, malicious and oppressive persecution"). The purpose of indictment by grand jury is to "limit [a defendant's] jeopardy to offenses charged by a group of his fellow citizens acting in-

dependently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U.S. 212, 218 (1960).

This purpose is rooted in English common law. In seventeenth-century England, grand juries prevented the Crown from using criminal process to target religious enemies. Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 Fla. St. U. L. Rev. 1, 8-9 (1996). In the Thirteen Colonies, grand juries similarly "stood guard against indiscriminate prosecution by royal officials." Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 26 (1963). During the Revolution, they served the important function of preventing political vendettas from entering the decision to prosecute. When agents of the monarchy attempted to prosecute political dissidents and leaders of revolutionary activity, grand juries protected the colonists from abuse of the criminal law. Kadish, 24 Fla. St. U. L. Rev. at 11.

"Undoubtedly the framers" of the Fifth Amendment "had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence." *Ex parte Bain*, 121 U.S. at 12. Thus, even today, grand juries "operate substantially like [their] English progenitor," the basic function of which remains "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Russell*, 369 U.S. at 761.

By approving Montague's barebones indictment, returned without an iota of evidence supporting two of three predicate offenses, the decision below spurns the grand jury's historical role as a check on overzealous pro-

secutors. And the opportunities for prosecutorial overreach in this context are not challenging to imagine. All that separates a controlled-substance conspiracy under section 846 and a continuing criminal enterprise under section 848 is the involvement of five individuals, a minimum amount in controversy, and proof of a continuing series of violations. Under the Second Circuit's rule in this case, what prosecutor wouldn't reflexively tack on an unadorned CCE charge to every conspiracy charge when the accomplice and amount thresholds are met, as very often they will be?

The potential for arbitrariness and abuse doesn't end there, as this case shows. Faced with an incomplete indictment on the "continuing series" issue, Montague filed motions for a bill of particulars and for leave to serve interrogatories, both of which were denied. He was thus left flying blind at trial, unable to prepare an adequate defense without notice of the particular acts he was alleged to have committed. Under the Second Circuit's rule in this case, what prosecutor wouldn't take advantage of the Second Circuit's rule to gain this kind of advantage at trial?

At bottom, the lower court's decision is contrary not only to established Fifth Amendment doctrine but also the history and purpose of the Grand Jury Clause as a check on prosecutorial power.

C. The question is exceptionally important and cleanly presented

1. The question presented is a matter of "exceptional importance" to the administration of criminal justice. App., *infra*, 58a. If the decision below is allowed to stand, it risks reshaping the way that federal prosecutors ap-

proach many controlled-substance prosecutions throughout one of the Nation's most populous circuits.

CCE cases are serious matters. These charges are typically brought against alleged "drug kingpins" and carry a mandatory life sentence. See 21 U.S.C. § 848; *Garrett* v. *United States*, 71 U.S. 773, 781 (1985) (explaining that section 848 "is designed to reach the 'top brass' in the drug rings"). As we have just shown, the invitation to prosecutorial abuse and other mischief is very real.

There is more. Even before trial, the introduction of a CCE charge and the prospect of a mandatory life sentence fundamentally tip the plea-bargaining balance in favor of the government. Under the Second Circuit's rule, prosecutors have a strong incentive to introduce CCE charges—even when they lack evidence of the necessary three predicate offences—to improve their leverage in plea negotiations. Equally problematic, it is "impossible for defendants to [negotiate rational plea bargains] if they don't know what evidence the prosecutor has." Carissa Byrne Hessick, *Punishment Without Trial: Why Plea Bargaining Is a Bad Deal* 57 (2021). That is to say, "a defendant cannot 'intelligently'" compromise a case by agreement "if he does not know the elements of the crime to which he is pleading and therefore does not know what the State has to prove." *Henderson* v. *Morgan*, 426 U.S. 637, 648 n.1 (1976) (White, J., concurring). Overreaching prosecutors thus gain a double advantage in plea negotiations under the Second Circuit's rule.

And for those rare cases that proceed through a contested trial, prosecutors enjoy the additional luxury of completing their investigations and building their cases long after the grand jury returns its indictment, inviting the evils that *Richardson* was supposed to prevent.

The Second Circuit's decision here will impact many cases. CCE charges are common. There has been an average of around 40 CCE prosecutions annually for the past two decades. In 2023, there were 48 such prosecutions nationwide—precisely half of which arose within the Second Circuit. See *Prosecutions for 2023*, Transactional Records Access Clearinghouse Reports (TRAC), Syracuse University, perma.cc/U2UW-F6LP. A search of the Westlaw database confirms that there have been more than 200 written decisions in cases involving CCE convictions in the past decade. In each such case, the defendant is certain to face the risk of a lengthy minimum term of imprisonment, often life.

Aside from the lengthy prison sentences at stake, the question presented is a weighty matter of constitutional law. As Justice Story explained, "the grand jury perform most important public functions; and are a great security to the citizens against vindictive prosecutions, either by the government, or by political partisans, or by private enemies." 3 Joseph Story, *Commentaries on the Constitution* ch. 38, § 1779 (1833). Judge Jacobs thus was on solid ground to observe that the dispute here is not over some "fussy rule of pleading," but rather "a substantial safeguard against oppressive and arbitrary proceedings." App., *infra*, 42a. That is why it is critical that an indictment "charge the * * * circumstances, of the offence, with clearness and certainty." 3 Story § 1779. It is essential to public respect for and confidence in the criminal justice system that the Court grant review to reaffirm this important point of constitutional law.

2. Finally, this case is an attractive vehicle for resolving the question presented. It arises from a final judg-

ment following a full jury trial during which the issue was preserved repeatedly at each level of review.

Other CCE cases routinely involve ancillary matters, complicating consideration of the question presented with alternative holdings or procedural barriers. No such complications are present here. Montague's principal argument before the Second Circuit was the insufficiency of the CCE charge, which was the focus of three appellate opinions signed by eight circuit judges.

From the start, Montague has maintained that the grand jury was required to find probable cause with respect to the facts and circumstances of at least three specific predicate drug crimes. The Second Circuit erred in rejecting that argument. The Court should grant review and reverse.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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