No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JASON GATLIN,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a jury has rendered a final verdict and jeopardy terminates under the Double Jeopardy Clause of the Fifth Amendment where the jury has indicated deliberations have concluded, the unanimous result is announced in open court, and no juror has registered dissent, thereby precluding the trial judge from ordering further deliberations.

2. Whether the Court should grant certiorari, vacate, and remand the Eleventh Circuit's affirmance of Petitioner's criminal conviction on a factual and legal theory the government did not present to the jury in light of *Ciminelli v. United States*, 598 U.S. 306 (2023).

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Gatlin submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

This petition arises from the decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Jason Gatlin*, No. 19-14969. The Eleventh Circuit's panel decision was filed January 5, 2024, and is reported at 90 F.4th 1050.

This petition is related to the following proceedings in the United States District Court for the Southern District of Florida, *United States v. Jason Gatlin*, No. 19-cr-20163-RS.

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Petitioner Jason Gatlin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion is reported at 90 F.4th 1040, reproduced in the Appendix to the Petition ("Pet. App.") at 1a-56a. The relevant proceedings in the district court are unpublished.

JURISDICTIONAL STATEMENT

The decision of the court of appeals was issued on January 5, 2024. Pet. App. 1a. On April 4, 2024, the court of appeals denied a timely petition for panel rehearing and rehearing en banc. App. 57a. On June 24, 2024, Justice Thomas granted an extension of time to file a petition for certiorari until August 2, 2024. *See* No. 23-A-1133. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the U.S. Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

"The jury is a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017). This foundation is built on the jury's responsibility to reach the requisite finding of guilt in a criminal trial. Because this is the jury's domain, judges have limited power to intrude. This case presents two important and interrelated questions about how a trial judge may diminish the jury's role in our federal criminal justice system.

For decades, courts of appeal have recognized that a jury, like Petitioner's, reaches a valid and final verdict when they have concluded deliberations, the result is announced in open court, and no dissent is registered by any juror. *See*, *e.g.*, *United States v. Taylor*, 507 F.2d 166, 168 (5th Cir. 1975). According to the Eleventh Circuit Court of Appeals, however, a judge must accept the jury's verdict before a verdict is final. Pet. App. 29a. But this Court has held for more than a century that the trial

judge's action, whether described as accepting or entering the verdict, does not affect the verdict's finality. *United States v. Ball*, 163 U.S. 662 (1896). In other words, when the jury unanimously acquits a defendant, that is the last word, and the judge cannot interfere with the jury's verdict and order the jury to continue to deliberate.

Relatedly, the Court has held that the jury acquits a defendant when the final verdict determines the government has not proven an element of the offense beyond a reasonable doubt. *United States v. Gaudin,* 515 U.S. 506, 509-510 (1995). Although general verdicts are the norm in federal criminal cases, courts will use special interrogatory verdicts in certain circumstances. Like in Petitioner's case, courts will often employ such verdicts to ensure that juries have reached a unanimous decision on an element that triggers a specific mandatory minimum sentence or an increased sentencing range. As federal sentencing schemes grow more complex, special interrogatories support the jury's responsibility to unanimously determine the elements that increase a minimum or maximum penalty.

When a jury, like Petitioner's, renders a final verdict that determines the government failed to prove an essential element of the offense, the defendant must be acquitted. Consequently, notwithstanding a simultaneous general finding of guilt, the trial judge has no power to reject the jury's final verdict that acquitted Petitioner and order the jury to resume deliberations because jeopardy had terminated.

The Double Jeopardy Clause's bright-line rule concerning acquittals exists to protect the jury's structural role in the criminal justice system. The jury stands between the accused and the power of the government, preventing judges or

prosecutors from wielding the criminal sanction unless a jury of the accused's peers agrees. But that power would be meaningless if judges, dissatisfied with the verdict, could circumvent the jury's final decision. The Double Jeopardy Clause guarantees that prosecutors and courts cannot retry defendants because those officials disagree with the jury's determinations. The Court should grant certiorari and reverse.

Judicial respect for the jury's work is also implicated on direct appeal. In Petitioner's case, the Eleventh Circuit affirmed his separate conviction on a legal and factual theory the government did not present to the jury. But the Court recently reiterated that the Constitution does not permit the government and the reviewing court to retry the case on appeal based on theories or facts not advanced in the trial court. *Ciminelli v. United States*, 598 U.S. 306 (2023). This rule protects the defendant's right to a fair opportunity to contest the theory or issue in the trial court. The Eleventh Circuit Court of Appeals disregarded this bedrock principle by affirming Petitioner's conviction on grounds that the jury had no opportunity to pass. The Court should grant certiorari, vacate, and remand in light of *Ciminelli.*

A. Factual Background

E.H. left home when she was sixteen years old. Pet. App. 3. Unable to get a job and using drugs, she became a sex worker. *Id.* When E.H. was nearly 18, her friend introduced her to Petitioner. *Id.* Petitioner and E.H. first talked on the phone and then had a one-time commercial sex relationship. *Id.* Thereafter, E.H. and Petitioner began a romantic relationship. *Id.*

During their brief relationship, Petitioner booked hotel rooms for E.H. to have a place to stay and engage in sex with customers. *Id.* at 4. He also often paid for E.H.'s food. *Id.* While they were together, E.H. and Petitioner took a trip and stayed in a house where he did renovation work. *Id.* at 3. On one occasion, Petitioner spontaneously took a photograph of them having sex with his iPhone. *Id.*

B. Procedural History

1. The government charged Petitioner with commercial sex trafficking. Pet. App. 5a-6a; *see* 18 U.S.C. § 1591(a). Section 1591(a) describes different penalties for different offenses: a fifteen-year mandatory minimum if the offense involved force, threats of force, fraud, or coercion, and a ten-year mandatory minimum if the offense involved a minor. 18 U.S.C. § 1591(a). The government charged Petitioner with both these offenses in a single count of the indictment. Pet. App. 6a, 11a. Petitioner proceeded to trial. Pet. App. 6a.

2. After closing arguments, the court provided the jury with a verdict form that contained two special interrogatories derived from the offense's elements that triggered different penalties: whether Petitioner (1) used force, threats, or coercion or (2) acted in reckless disregard of the fact that E.H. was under the age of 18 or had a reasonable opportunity to observe her. Pet. App. 6a-7a; 18 U.S.C. § 1591(a).

After deliberating for over a day, the jury informed the court at 3:39 p.m.—not the assigned trial judge but another judge—that they had reached a unanimous verdict. Dist. Ct. Dkt. No. 216 at 20. The court reviewed the verdict form and asked the foreperson whether the jury "arrived at verdicts concurred by all." *Id.* at 19-20.

The foreperson responded: "Yes, we have." *Id*. The court then told the clerk to publish the verdict. *Id*. at 20. When the clerk read the verdict, she announced the jury unanimously found Petitioner guilty of Count 1 but also unanimously found that he *did not* use means of force, threats, or coercion" and he *did not* act in reckless disregard of the fact that E.H. was under the age of 18 or have reasonable opportunity to observe her. *Id*. at 21.

Following publication of the verdict, the prosecutor asked the court to send the jury back to deliberate further. *Id*. Petitioner's lawyer objected and asked three times for the court to enter a verdict of not guilty based on the jury's answers to the special interrogatories. *Id*. After hearing from the parties for approximately three minutes—and without consulting the trial judge, asking the parties to conduct research, or conducting his own independent research—the judge ordered the jury to continue deliberating at 4:09 p.m. *Id*. at 24.

This judge instructed the jury as follows:

> It has been brought to my attention that Count 1 is inconsistent. If you come back guilty as to Count 1, you have to find either that (a) or (b) occurred, unanimously. If you find that (a) and (b) did not occur, then the verdict would be not guilty. So what I'm going to ask you to do is to continue deliberations, understanding to come back with a guilty verdict, you have to find unanimously either: (a) that [Petitioner] used means of force, threats of force, or coercion to commit the crime? Or (b) that [Petitioner] acted in reckless disregard of the fact that the minor victim was under the age of 18 years or had a reasonable opportunity to observe the minor victim. If your answers are still no to both of those, then the verdict is not guilty. You can't return a verdict of guilty unless you unanimously find and answer yes to either (a) or (b). And with that, I'll ask the clerk to give you back the verdict form and ask you to continue your deliberations.

Pet. App. 32a-33a. After the jury deliberated for an additional hour, the judge excused the jury for the weekend. Dist. Ct. Dkt. No. 216 at 20.

On Monday, the jury resumed deliberations at 9:00 a.m. Dist. Ct. Dkt. No. 217 at 1. After two hours of deliberations, the jury informed the judge that they had reached a new verdict. Dist. Ct. Dkt. No. 217 at 7, No. 104. When the jury returned, they announced that they had found Petitioner guilty of the sex trafficking charge, that he *had not* used force, fraud, or coercion, but *he had* known E.H. was under 18 or had a reasonable opportunity to view her. *Id.*

3. On appeal, Petitioner asserted that the jury initially rendered a valid and final verdict because they returned a unanimous verdict that resolved all the factual elements of the offense, the court published the verdict in open court, and no juror registered any dissent. Pet. App. 25a-26a. He further asserted that because the jury's original verdict determined that he had not committed an essential element of the offense, jeopardy terminated, and ordering the jury to continue to deliberate violated the Fifth Amendment's Double Jeopardy Clause. *Id.*

The Eleventh Circuit held that because the district court had not *accepted* the jury's verdict, the jury had not rendered a final verdict. *Id.* at 29a. Therefore, because the jury's verdict was never final, Petitioner's initial jeopardy never terminated, and he, therefore, was not subjected to double jeopardy. *Id.*

In a footnote, the Eleventh Circuit explained that because the district court had not accepted the verdict, they did not need to decide whether the jury acquitted Petitioner by specifically finding the government had not proved an

element of the offense beyond a reasonable doubt. *Id.* at 29a-30a, n.6. Judge Jordan concurred but addressed the issue more directly: "Had the district court accepted the jury's inconsistent verdict, I do not think [Petitioner's] conviction on Count 1 could stand." *Id.* at 46a-47a (Jordan, J., concurring and dissenting).

4. The government also charged Petitioner with producing child pornography. Pet. App. 15a; 18 U.S.C. § 2251(a). Under § 2251(a), the government must prove beyond a reasonable doubt that the defendant "employ[ed], use[d], persuade[d], induce[d], entice[d], or coerce[d] any minor to engage in any sexually explicit conduct, . . . for the purpose of producing any visual depiction of such conduct . . . ." 18 U.S.C. § 2251(a).

At trial, the prosecution presented evidence that Petitioner and E.H. occasionally stayed at a house where he worked. Pet. App. 3a. While they were there, on one occasion, Petitioner took a two-second iPhone "live photo" of them having sex. *Id.* at 16a.

Based on these facts, the prosecution argued to the jury because "at the point in time when the defendant is having sex with [E.H.], . . . and he picks up his camera to memorialize that moment, that was his purpose. His purpose was to produce child pornography, and so that element has been met as well." Dist. Ct. Dkt. No. 215 at 74.

5. On appeal, Petitioner asserted that the prosecution's theory converted the statute into a strict liability offense contrary to the statute's text. *See* Pet. App. 47a (Jordan, J., concurring and dissenting). The court affirmed Petitioner's conviction

but on a different factual and legal theory than presented by the government at trial. In particular, the court found:

> the 'live photo' makes evident that [Petitioner] and E.H. 'posed' for the photo by remaining still during sexual intercourse. In other words, for [Petitioner] to make the recording of the sexual act, he had to engage in a sexual act with E.H. and intentionally pause in the middle of that act to take the 'live photo.' A jury could reasonably infer from that pause that, for at least some fraction of time, [Petitioner] was engaged in sexual conduct with E.H. partly for the purpose of recording it.

Pet. App. 16a.

Judge Jordan dissented. He wrote:

> The conviction, as noted in the court's opinion, is based on a single "live" photo taken by [Petitioner] during intercourse with E.H. Having reviewed the single live photo, I don't think that the evidence is sufficient to convict [Petitioner] of production of child pornography. In my view, [Petitioner] correctly asserts that the evidence showed only that he took a photo during sexual intercourse with E.H., not that he had sexual intercourse with her for the purpose of producing child pornography.

Pet. App. 47a (Jordan, J., concurring and dissenting). Moreover, while Judge Jordan agreed "that there was enough evidence to establish that [Petitioner] took the photo," contrary to the majority opinion, the "photo does not show that [Petitioner] and E.H. 'posed' for the photo by 'remaining still during sexual intercourse.'" *Id*. at 48a (quoting Maj. Op. at Pet. App. 16a). "The government's theory at closing argument seems to have been that the mere taking of the photograph established [Petitioner]'s antecedent purpose to produce child pornography. That theory is, in my view, legally unsound." *Id*. at 50a.

6. The district court sentenced Petitioner to a term of life imprisonment. Pet. App. 8a.

REASONS FOR GRANTING THE PETITION

This case presents a clear circuit split on an important question concerning when a jury's verdict becomes final. Every circuit to consider this issue has held that a jury's verdict becomes final when three conditions occur: (1) deliberations are over, (2) the result is announced in open court, and (3) no dissent by a juror is registered. In Petitioner's case, however, the Eleventh Circuit created a new rule that imposed an additional condition—a jury's verdict only becomes final when accepted by the trial judge. The Eleventh Circuit's decision also diverges from this Court's longstanding pronouncements that the judge's acceptance or receipt of the jury's verdict is a ministerial act that does not affect finality.

Because the Eleventh Circuit's new rule conflicts with the Court's precedents and is on the wrong side of the consensus federal rule, there is no reason for the Court to wait to intervene. The Court's intervention is also necessary given modern federal criminal practice. Although historically disfavored, trial courts have been employing special verdicts or interrogatories with greater frequency. In particular, trial courts use special interrogatories, like in Petitioner's case, where an element of the offense would subject the defendant to a mandatory minimum or increased maximum sentence. In these circumstances, courts of appeal have confronted a jury's verdict that arrived at a general verdict of guilt while simultaneously determining that the government failed to prove an essential element of the offense through an answer to a special question. These cases turn on whether the jury rendered a final verdict. This

Court should resolve the circuit split on this important question by granting plenary review and reversing.

Additionally, the Court should grant certiorari, vacate, and remand the Eleventh Circuit's separate holding that affirmed Petitioner's pornography conviction on a factual and legal theory the government did not present at trial. In *Ciminelli v. United States*, 598 U.S. 306 (2023), this Court admonished the government for asking the Court to "cherry-pick" facts presented to a jury charged on one theory and apply them to the elements of a different theory in the first instance. The Court flatly rejected this request. In Petitioner's case, however, the government accomplished what the *Ciminelli* prosecutors did not. Accordingly, the Court should remand for the Eleventh Circuit to reconsider Petitioner's case in light of *Ciminelli*.

I. Question Presented 1

A. The Eleventh Circuit's decision created a conflict by holding that the trial judge must "accept" the jury's verdict for jeopardy to terminate under the Fifth Amendment

1. The Eleventh Circuit's new rule that a jury's verdict only becomes final when accepted by the trial judge created a substantial conflict with every other federal court of appeal to confront this issue. Every other court to consider the issue does not require judicial acceptance for finality to attach. Instead, these courts have held a jury's verdict becomes final when three conditions occur: (1) deliberations are over, (2) the result is announced in open court, and (3) no dissent by a juror is registered. *See, e.g., Gov't of the Virgin Islands v. Hercules*, 875 F.2d 414, 417 (3d Cir. 1989) (agreeing that a jury reaches a valid verdict when the result is announced in

open court and no dissent is registered by any juror); *United States v. Dakins*, 872 F.2d 1061, 1065 (D.C. Cir. 1989) ("A verdict becomes immutable by the jury once announced in open court, or when it has been confirmed by a poll, if ordered."); *United States v. Rastelli*, 870 F.2d 822, 834–35 (2d Cir. 1989) ("[I]t is well established that the jury's verdict is not final until the "deliberations are over, the result is announced in open court, and no dissent by a juror is registered."); *United States v. Nelson,* 692 F.2d 83, 84–85 (9th Cir. 1982) ("[A] jury has not reached a valid verdict until deliberations are over, the result is announced in open court, and no dissent by a juror is registered."); *United States v. Love*, 597 F.2d 81, 85 (6th Cir. 1979) (recognizing that the "generally accepted position" is that "a jury has not reached a valid verdict until deliberations are over, the result is announced in open court, and no dissent by a juror is registered."); *Taylor*, 507 F.2d at 168 ("We hold that a jury has not reached a valid verdict until deliberations are over, the result is announced in open court, and no dissent by a juror is registered."); *see also Commonwealth v. Roth,* 437 Mass. 777, 796 (Mass. 2002) (declining to give effect to "the verdict received from the lips of the foreman in open court" would "elevate form over substance"); 3 C. *Wright & A. Miller,* Federal Practice & Procedure: Criminal § 517 (5th ed. 2014)("A verdict is valid and final when the deliberations are over, the result is announced in open court, and no juror registers dissent.").

2. The Eleventh Circuit's new rule that requires the trial judge to "accept" the jury's verdict for finality to attach has no basis in the Constitution, statute, rule of procedure or precedent. The Court explained over a century ago in *United States*

v. Ball, 163 U.S. 662 (1896), that "the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion[.] *** However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Id.* at 671. A few years later, the Court recognized, "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense." *Kepner v. United States*, 195 U.S. 100, 130 (1904). *Ball* and *Kepner* make clear that the judge's action—like "accepting" the jury's work—does not affect the finality of the verdict under the Double Jeopardy Clause. The Eleventh Circuit's new rule upsets this precious constitutional balance of the jury and judge's respective roles.

3. The courts of appeal also have described the judicial acceptance of a jury's verdict as "ministerial." *See*, *e.g.*, *PB Legacy, Inc v. Am. Mariculture, Inc.*, 104 F.4th 1258, 1263–64 (11th Cir. 2024) (holding that the "mere acceptance of a jury verdict . . . jury constitute no more than ministerial tasks that a magistrate judge may properly perform without the parties' consent.") (internal citation and quotation marks omitted*); United States v. Gomez-Lepe*, 207 F.3d 623, 627 (9th Cir. 2000) ("Acceptance and filing of a verdict constitute ministerial tasks which have no effect on the outcome of the case."); *United States v. Johnson*, 962 F.2d 1308, 1312

(8th Cir. 1992) ("the ministerial task of taking a verdict involves a magistrate simply being left to tend a deliberating jury, and to accept its verdict.…").

4. By exalting form over substance and breaking from every other court to consider the issue, the Eleventh Circuit's new rule arrogates power to the trial judge properly belonging to the jury. Last Term, the Court described the right to trial by jury as "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care." *Sec. & Exch. Comm'n v. Jarkesy*, --- U.S. ---, 144 S. Ct. 2117, 2128 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

This is not recently received wisdom. The Founders believed the right to a jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *See* Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti–Federalist 315, 320 (H. Storing ed.1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department").

Indeed, the historical foundation for the recognition of these principles pre-dates our Bill of Rights. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every*

accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added).

5. When the jury unanimously acquits a defendant, that decision is "inviolate." *McElrath v. Georgia*, 601 U.S. 87, 94 (2024). Echoing Justice Story and the Federal Farmer, the Court recently described "[t]his bright-line rule exists to preserve the jury's "'overriding responsibility ... to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction.'" *Id.* (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

6. Forty years ago, this Court reiterated, "Once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment." *United States v. Powell*, 469 U.S. 57, 66–67 (1984). *Powell* also emphasized that the jury is "the collective judgment of the community" and that "through this deference," the jury brings an element of needed finality to the criminal process. *Id*. (cleaned up). The Eleventh Circuit's new rule does not afford this deference to the jury and aggrandizes the judge's role in determining when a verdict is final, thereby curtailing a defendant's right to a jury trial and verdict. Accordingly, the Court's review is required to correct the Eleventh Circuit's decision which impinges on the jury's fundamental role upon which the very foundation of our criminal justice system is built.

B. The Eleventh Circuit's new rule authorizes judicial interference with a jury's finding that acquits a defendant by determining the government failed to prove an essential element of the charged offense beyond a reasonable doubt

1. Last Term, in *McElrath*, the Court asked, "What, then, is an acquittal?" 601 U.S. at 94. The Court unanimously answered: "[O]ur cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Id.* (citing *Evans v. Michigan*, 568 U. S. 313, 318 (2013)). Furthermore, "[L]abels do not control our analysis in this context; rather, the substance of [the ruling] does." *Id.* (quoting *Evans*, 568 U.S. at 322). In particular, courts "look to whether the ruling's substance 'relate[s] to the ultimate question of guilt or innocence.'" *Id.* (quoting *United States* v. *Scott*, 437 U. S. 82, 98 n. 11 (1978).

The Court unanimously held in *McElrath* that a jury's determination that a defendant is not guilty by reason of insanity is a conclusion that "criminal culpability had not been established," just as much as any other form of acquittal. *Id.* at 95. This petition presents another "form of acquittal"—a jury's special verdict finding that negates an essential element of the offense—that must be recognized.

2. Petitioner is on solid ground. In determining what constitutes an acquittal, the Court in *Martin Linen* instructed that the inquiry focuses on whether there has been a "resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 564. Therefore, the Court consistently has held that the Constitution requires criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond

a reasonable doubt. *See, e.g.*, *Gaudin,* 515 U.S. at 509-510 (1995); *Sullivan v. Louisiana,* 508 U.S. 275, 277–278 (1993).

This principle is significant not only for the trial's resolution but also for jeopardy purposes. It is a question of whether, once jeopardy has attached, whether there has been a determination regarding the defendant's guilt or innocence. *United States v. Scott*, 437 U.S. 82, 98 & n.11 (1978).

3. Where, like in Petitioner's case, a jury's special verdict finding negates an essential element of the offense, the defendant must be acquitted and cannot be retried on that offense. *United States v. Gonzales*, 841 F.3d 339, 348 (5th Cir. 2016); *see also* 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 24.10(a) (4th ed. 2015) ("A jury's special verdict finding may also negate an essential element of an offense of which the jury returned a general verdict. Unlike the situation where a verdict on one count is inconsistent with a verdict on another count, a special finding negating an element of a single count will be treated as an acquittal of that count, not as an inconsistent verdict.").

4. Courts of Appeal have confronted a jury's verdict that arrived at a general verdict of guilt while simultaneously determining that the government failed to prove an essential element of the offense through an answer to a special question. These courts have recognized that this verdict constitutes an acquittal.

a. In *United States v. Randolph*, 794 F.3d 602, 607 (6th Cir. 2015), the jury found the defendant guilty of a conspiracy involving three controlled substances. The verdict form gave the jury a choice of quantities for each narcotic, including the choice

of "None." *See id*. The trial judge instructed the jury, "If you unanimously find that a particular controlled substance was not involved in the offense, mark none on the appropriate special verdict form." *Id*. The jury checked "None" for each narcotic. *See id*. The Sixth Circuit concluded that "[b]ecause the jury found that none of the charged drugs were 'involved in' the conspiracy, it follows that [the defendant] cannot be guilty of the charged conspiracy." *Id*. at 612. The Court reversed the conviction on the conspiracy count and ordered a judgment of acquittal.

The Sixth Circuit, in *Randolph,* acknowledged that the Court's inconsistent verdict cases like *Dunn v. United States,* 284 U.S. 390 (1932)(inconsistency between verdicts on separate counts), *United States v. Dotterweich,* 320 U.S. 277, 278–79 (1943)(inconsistency between verdicts on different defendants) and *United States v. Powell,* 469 U.S. 57 (1984) (inconsistency between predicate and compound offenses) did not address the issue of an inconsistent special verdict that "negates an essential element of the offense." *Randolph*, 794 F.3d at 612. Therefore, the Sixth Circuit in *Randolph* held that when the verdict demonstrates that the government did not prove an essential element of the offense, the defendant must be acquitted and cannot be retried on that offense. *Id*. This holding flowed from the Constitution's guarantee that a defendant has the right to "demand that a jury find him guilty of all of the elements of the crime with which he is charged." *Id*. (citing *United States v. Gaudin,* 515 U.S. 506, 511 (1995). The Sixth Circuit concluded that "[t]o allow a retrial when the government fails to prove an essential element of the charge beyond a reasonable doubt violates the Double Jeopardy Clause." *Id*.

b. The Second Circuit reached the same conclusion in *United States v. Pierce*, 940 F.3d 817 (2d Cir. 2019). There, the government charged the defendant with conspiring to possess with intent to distribute four types of controlled substances. *Id*. at 818. In addition to a general verdict question, the form contained a special interrogatory form concerning the weight of each of the substances. *Id*. at 818-819. While the jury had marked "Guilty" as to the general question, they also marked "Not Proven" to each of the interrogatories. *Id*. The district court ultimately vacated the convictions. On appeal, the Second Circuit affirmed, concluding that "[t]o enter a guilty verdict, the court would have needed to overlook the special verdict findings that [the defendant] did not conspire to distribute any of the drugs at issue in the case." *Id*. at 823.

c. In *United States v. Shippley*, 690 F.3d 1192 (10th Cir. 2012), the government charged the defendant with conspiracy relating to a scheme to traffic cocaine. *Id*. at 1193. For deliberations, the court issued the jury two documents to fill out: a general verdict form and a set of special interrogatories asking which drug kinds and quantities were involved. *Id*. After deliberations ended, "the jury returned with a guilty verdict on the general verdict form, [but] it answered 'no' to each of the special interrogatories, indicating that Mr. Shippley conspired to distribute none of the drugs at issue in the case." *Id.* The district court was "[p]erplexed," "sought advice from counsel," and then, after reinstructing the jury, asked them to "deliberate again." *Id.* "[F]urther deliberations quickly yielded an unambiguous guilty verdict." *Id*.

The defendant appealed, asserting that the district court's direction to the jury to keep deliberating violated *Powell*. *Id.* at1194. The Tenth Circuit ultimately rejected the defendant's *Powell* argument. Writing for the court, then-Judge Gorsuch distinguished *Powell* on its face, saying that "nothing in *Powell* ... speaks to the propriety of ordering further deliberations in the face of inconsistent verdicts against the same defendant on the same count"; rather, it "simply hold[s] the district court was *allowed* to enter a guilty verdict on one count despite a logically inconsistent verdict on another." *Id.* at 1194–95 (emphasis in original).

Shippley, however, expressly noted the defendant did not raise a Double Jeopardy claim and did not have to reach the acquittal issue. *Id*. at 1194. Conversely, Petitioner asked the court three times to enter a not guilty verdict and, on appeal, directly raised Double Jeopardy and Due Process arguments. Furthermore, unlike Petitioner's jury, the *Shippley* jury's verdict was not published in open court, and the jury never had an opportunity to register agreement or disagreement. Therefore, the *Shippley* jury, unlike Petitioner's jury, never rendered a final verdict under the consensus test.

5. Because of the jury's central role in our criminal justice system and democracy, the Court has recognized that, while an acquittal might reflect a jury's determination that the defendant is innocent of the crime charged, such a verdict might also be "the result of compromise, compassion, lenity, or misunderstanding of the governing law." *Bravo-Fernandez v. United States*, 580 U.S. 5, 10 (2016); *see also Powell*, 469 U.S. at 65 (1984). "Whatever the basis, the Double Jeopardy Clause

prohibits second-guessing the reason for a jury's acquittal. As a result, 'the jury holds an unreviewable power to return a verdict of not guilty even for impermissible reasons.'" *McElrath,* 601 U.S. at 94 (quoting *Smith v. United States*, 599 U.S. 236, 253 (2023). In Petitioner's case, the trial judge did second-guess the jury's unanimous decision that the government failed to prove an essential element beyond a reasonable doubt and failed to recognize that Petitioner's jeopardy had terminated.

C. The Eleventh Circuit's decision was wrong, and Petitioner's case presents an excellent vehicle for the Court to address the issue

1. As previously discussed, the Court has held for more than 100 years that judicial acceptance or receipt of a jury's verdict is purely a ministerial act that involves no judicial discretion and does not affect finality. *See*, *supra*, at pp. 18-20. Instead, the consensus test among federal courts is a verdict is final when three conditions occur: (1) deliberations are over, (2) the result is announced in open court, and (3) no dissent by a juror is registered. By imposing an additional requirement to this test—a purely ministerial task—the Eleventh Circuit strayed from this Court's decisions and those of the other courts of appeals.

2. The Eleventh Circuit framed Petitioner's issue as the same "dilemma" addressed in *Shippley*. But *Shippley* did not present the same issue as Petitioner's case.

The Eleventh Circuit found *Shippley*'s reasoning persuasive and held that "directing the jury to continue deliberations . . . was not error." Pet. App. 27a. But only because "the district court had not accepted the jury's verdict and, as a result,

the verdict was not final. *Id.* (citing *Harrison v. Gillespie*, 640 F.3d 888, 899 (9th Cir. 2011) for the proposition that "[t]he court may ... reject the jury's verdict if it is inconsistent or ambiguous."). A close reading of *Shippley* reveals, however, that the jury had not reached a valid and final verdict under the consensus test. While the jury's deliberations had concluded, the court did not publish the verdict in open court, and the jury did not have an opportunity to agree or disagree that they had reached a unanimous verdict. *Shippley*, 690 F.3d at 1193–94. Furthermore, the defendant in *Shippley* did not raise the Double Jeopardy argument Petitioner raised. *Id.* at 1194 (noting that "neither does [Shippley] suggest the court's course in ordering additional deliberations violated the Double Jeopardy Clause of the Fifth Amendment. With enough to do today to address the arguments he does press, we do not pass on those, like these, he does not."). Therefore, the Eleventh Circuit's reliance upon *Shippley* was misplaced.

3. The Court's inconsistent verdict cases are irrelevant to the verdict finality and Double Jeopardy issues presented by Petitioner.

a. In *Dunn v. United States,* 284 U.S. 390 (1932), the government indicted the defendant on three counts: (1) maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor; (2) unlawful possession of intoxicating liquor; and (3) unlawful sale of such liquor. *Id.* at 391. He was convicted of the first count but acquitted on counts two and three. *Id.* at 391–92. The defendant argued that the court should overturn his conviction of count one because it was inconsistent with being acquitted of counts two and three. *Id.* at 392. This Court rejected the

defendant's argument, explaining that "[c]onsistency in the verdict is not necessary." *Id.* at 393. This Court held that, where separate counts charge separate crimes in a single indictment, the separate counts are treated the same as separate indictments separately tried. *Id.* The Court recognized that a "verdict may have been the result of compromise, or of a mistake on the part of the jury," but that "verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 394.

b. The Court applied *Dunn* in *United States v. Dotterweich,* where the Court found a verdict permissible in a joint trial, which found the corporation's president guilty while simultaneously finding the corporation not guilty. 320 U.S. 277, 278–79 (1943). The Court, citing *Dunn,* explained: "Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries." *Id.*

c. Finally, the Court revisited *Dunn* in *United States v. Powell,* 469 U.S. 57 (1984). In *Powell,* the government indicted the defendant on 15 counts of violations of federal law related to her involvement in a drug distribution operation. *Id.* at 59. The jury convicted the defendant of using the telephone in "committing and in causing and facilitating" the "conspiracy to possess with intent to distribute and possession with the intent to distribute cocaine" but acquitted of conspiring with others to knowingly and intentionally possess with intent to distribute cocaine and possession of a specific quantity of cocaine with the intent to distribute. *Id.* at 59-60.

She argued that the court should reverse her telephone facilitation convictions because the verdicts were inconsistent. *Id*. at 60. Specifically, she averred that "proof that she had conspired to possess cocaine with intent to distribute, or had so possessed cocaine, was an element of each of the telephone facilitation counts; since she had been acquitted of these offenses ..., [she] argued that the telephone convictions were not consistent with those acquittals." *Id.* The Court rejected this argument, upholding the defendant's convictions.

Powell rejected the defendant's argument and explained that inconsistent verdicts do not necessarily mean a windfall for the government. *Id*. at 65. Indeed, "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* The Court continued: Inconsistent verdicts, therefore, present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." *Id*.

d. *Dunn, Dotterweich,* and *Powell* do not resolve the issue presented by Petitioner: a purportedly inconsistent verdict as to the same defendant on the same count of an indictment where the jury determines, through a special verdict, the government did not prove an essential element of the offense. But the Court has spoken clearly on this issue time and time again. *See, e.g., United States v. Gaudin,* 515 U.S. 506, 511 (1995) ("The Constitution gives a criminal defendant the

right to demand that a jury find him guilty of all of the elements of the crime with which he is charged.").

4. In adding a fourth requirement to the consensus test, the Eleventh Circuit misread both binding precedent and persuasive, instructive opinions from other courts of appeal. This new condition has no basis in the Constitution or any statute, rule of procedure, or precedent.

a. Before Petitioner's case, the Eleventh Circuit employed the consensus test. *See Taylor*, 507 F.2d at 168; *see also United States v. Love*, 597 F.2d 81, 85 (6th Cir. 1979)(recognizing that *Taylor*'s "holding reflects a generally accepted position with respect to finality of verdicts.").

Instead, for this new requirement, the Eleventh Circuit cited a footnote from *Taylor*, which does not support this proposition. Pet. App. 31a. Footnote two states the obvious: "Even . . . where the verdict is announced to the court and no dissent is voiced, the verdict may not be accepted by the court *if a poll taken before the verdict is recorded indicates a lack of unanimity*." *Taylor*, 507 F.2d at 168 & n.2 (emphasis added). Under these circumstances—which are not present here—a judge may discharge the jury or order further deliberations. *Taylor* does not hold—or even imply—the trial court must "accept" a verdict to trigger double jeopardy finality.

b. The Eleventh Circuit also cited *Harrison v. Gillespie*, 640 F.3d 888 (9th Cir. 2011), for the proposition that because the district court had not "accepted" the jury's verdict, the verdict was not final. Pet. App. 29a (quoting "[t]he court may . . .

reject the jury's verdict if it is inconsistent or ambiguous."). *Harrison* made that statement in a much different context.

In *Harrison*, the court addressed a polling issue: whether the trial judge violated the Double Jeopardy Clause because the judge—before discharging the jury—failed to ask whether the jury unanimously rejected the death penalty or instead deadlocked over a lesser sentence. *Harrison*, 640 F.3d at 893. Therefore, in *Harrison*, the court held the inconsistency and ambiguity the trial judge could correct flowed from uncertainty concerning the unanimity of the jury's verdict—that the trial judge could cure by polling. *Id.* at 899 & n.7. In reaching this holding, *Harrison* reiterated the Eleventh Circuit's pre-*Gatlin* test. *Id.* at 898–99. *Harrison* never considered what the trial judge did in Petitioner's case: ordering further deliberations where no juror had expressed any disagreement as to the unanimity of the verdict.

Harrison did later say, "[t]he court may . . . reject the jury's verdict if it is inconsistent or ambiguous" and cited *United States v. Freedson,* 608 F.2d 739 (9th Cir. 1979), for support. *Id.* at 899. But *Freedson* addressed the same issue in *Harrison*—a purportedly inconsistent or ambiguous verdict caused by a juror's equivocal response to polling. *Freedson,* 608 F.2d at 741.

c. In *Freedson*, the jury returned a verdict, and the judge ordered polling. *Id.* A juror responded, "I voted yes (*i.e.,* guilty) to man but no to God," and she "wish(ed) to say not guilty." *Id.* The judge halted the polling and ordered further deliberations, which resulted in a guilty verdict. *Id.* On appeal, the court held the

judge did not err because, under Federal Rule of Criminal Procedure 31(d), a judge may direct further deliberations if polling reveals a lack of unanimity. *Id*.

d. *Harrison* also cited *United States v. Nelson*, 692 F.2d 83 (9th Cir. 1982), for the finality issue. *Harrison*, 640 F.3d at 898–99. *Nelson*, like *Harrison* and *Freedson*, addressed whether the jury had reached a final verdict notwithstanding a juror's statement during polling that while she agreed to a guilty verdict during deliberations, she changed her mind and did not agree to the verdict as to certain counts of the indictment. *Nelson*, 692 F.2d at 84. In reversing, the court relied upon this *Taylor* rule and held "[a]lthough their jury room votes form the basis of the announced verdict, the jurors remain free to dissent from the announced verdict when polled." *Id*. at 84–85. And any dissent precludes a final verdict. *Id*.

e. Therefore, *Harrison, Freedson,* and *Nelson* involve a trial judge ordering further jury deliberations when there was evidence regarding lack of juror unanimity. Here, all parties agreed deliberations had concluded, the trial judge announced the unanimous result in open court, and no juror registered any dissent. Dist. Ct. Dkt. No. 216 at 19–21. The jury, therefore, acquitted Petitioner by rendering a final verdict that found the government failed to prove an essential element beyond a reasonable doubt. As a result, the Petitioner was wrongfully put in jeopardy twice. *Martin Linen*, 430 U.S. at 571.

5. The Eleventh Circuit's error caused grievous harm to Petitioner who is serving a term of life imprisonment. Pet. App. 8a. Petitioner's case presents an excellent vehicle to resolve the question presented. He requested, three times, that

the trial judge enter an acquittal and reject the government's request to have the jury further deliberate. And he raised a Double Jeopardy argument on direct appeal. Pet. App. 31a.

The Eleventh Circuit, in a footnote, explained that they did not consider whether the jury acquitted Petitioner because the judge had not accepted the verdict. Pet. App. 29a-30a n.6. The concurring judge addressed the issue more directly: "Had the district court accepted the jury's inconsistent verdict, I do not think [Petitioner's] conviction on Count 1 could stand." Pet. App. 46a-47a. (Jordan, J., concurring and dissenting).

For Petitioner, the Eleventh Circuit's new rule and the application of this new rule to his case is the difference between an acquittal and a sentence of life imprisonment. This Court should grant the petition for a writ of certiorari.

II. Question Presented 2

A. The Eleventh Circuit's affirmance of Petitioner's criminal conviction on a factual and legal theory not asserted at his trial is wrong

1. In *Ciminelli v. United States*, 598 U.S. 306 (2023), the Second Circuit affirmed the defendant's wire fraud convictions, relying on a "right-to-control theory" of wire fraud that allowed for conviction on "a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information." *Id*. at 316. This Court concluded, however, that the wire fraud statute, 18 U.S.C. § 1343, reaches only traditional property interests. *Id*. at 309. And the right

to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. *Id.* Accordingly, this Court held that the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.

Notwithstanding, the government insisted that this Court could affirm Ciminelli's convictions on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory. *Id.* at 316. This Court rejected the government's request "to cherry-pick facts presented to a jury charged on the right-to-control theory and apply them to the elements of a *different* wire fraud theory in the first instance. In other words, the Government asks us to assume not only the function of a court of first view, but also of a jury. That is not our role." *Id.* at 316-317. In Petitioner's case, the government accomplished what the *Ciminelli* prosecutors did not.

2. At Petitioner's trial, the prosecutor argued:

> You saw the image, and you saw the video which showed the victim, a 17-year-old, having sex with the defendant, a photograph that the defendant took and that was found on the defendant's phone.
>
> * * * *
>
> Again, a picture of them having sex meets the definition for sexually explicit conduct. [] Producing a visual depiction had to be a purpose for engaging in the sexually explicit purpose-- conduct rather, it did not have to be the only purpose. It did not have to be the dominant purpose. What it had to be was a purpose. So at the point in time when the defendant is having sex with the victim, at the point in time when the defendant is having sex with a 17-year-old and he picks up his camera to memorialize that moment, that was his purpose. His purpose was to produce child pornography, and so that element has been met as well.

Dist. Ct. Dkt. No. 197 at 71-72.

Therefore, the prosecutor did not argue that Petitioner and E.H. posed for the purpose of taking a picture. *Id*. Instead, she argued that the jury could convict Petitioner on a strict liability theory—that he was guilty of using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct because he intended to "memorialize" his sexual conduct with E.H.—which conflicts with the text of the statute and the decisions of other courts of appeal. *Id*.; *see, e.g., United States v. McCauley*, 983 F.3d 690, 696 (4th Cir. 2020) ("§ 2251(a) does not criminalize a spontaneous decision to create a visual depiction in the middle of sexual activity without some sufficient pause or other evidence to demonstrate that the production of child pornography was at least a significant purpose. Adducing "a purpose" arising only at the moment the depiction is created erroneously allows the fact of taking an explicit video of a minor to stand in for the motivation that animated the decision to do so."); *United States v. Crandon*, 173 F.3d 122, 129 (3d Cir. 2023)(rejecting the government's argument that "*any* person who takes [a sexually explicit] picture *a fortiori* has the purpose of producing a visual depiction of sexually explicit conduct, regardless of what the defendant may have to say about his or her state of mind.").

3. In affirming Petitioner's conviction, however, the Eleventh Circuit found reasoned:

> [t]he jury first could reasonably infer that [Petitioner], during sexual intercourse with E.H., reached for his camera phone, unlocked the phone, and accessed the phone's camera. Additionally, the jury could reasonably infer, based on the angle of the 'live photo' in question, that [Petitioner] had to hold his camera phone in front of him using at least one of his hands while he was having sexual intercourse with E.H.

> Moreover, the short video contained in the 'live photo' makes evident that [Petitioner] and E.H. 'posed' for the photo by remaining still during sexual intercourse. In other words, for [Petitioner] to make the recording of the sexual act, he had to engage in a sexual act with E.H. and intentionally pause in the middle of that act to take the 'live photo.' A jury could reasonably infer from that pause that, for at least some fraction of time, [Petitioner] was engaged in sexual conduct with E.H. partly for the purpose of recording it.

App. Pet. 16a.

4. Judge Jordan dissented and correctly recognized that the court's basis for upholding Petitioner's conviction differed from the government's theory at trial: "The government's theory at closing argument seems to have been that the mere taking of the photograph established [Petitioner] antecedent purpose to produce child pornography. That theory is, in my view, legally unsound. Pet. App. at 50a (Jordan, J., concurring and dissenting).

5. Moreover, Judge Jordan, having reviewed the photo himself, disagreed with the majority's view regarding the reasonable inferences the jury could appropriately infer from the single photo. Pet. App. at 47a-48a (Jordan, J., concurring and dissenting) (concluding the "photo does not show [Petitioner] 'posed' for the photo by 'remaining still during sexual intercourse.'")(quoting Majority Opinion at Pet. App. at 16a).

6. The Eleventh Circuit disregarded *Ciminelli* by affirming Petitioner's conviction on a legal and factual theory not presented to the jury.

B. The Court should grant certiorari, vacate, and remand the Eleventh Circuit's decision in light of *Ciminelli*

1. This Court routinely grants certiorari, vacates the decision below, and remands (GVRs) a case when "intervening developments reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *see Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam). The Court need not be certain that the Eleventh Circuit will reach a different result on remand. Rather, "[i]t is precisely because of uncertainty" regarding the effect of a legal development "that [this Court] GVR[s]." *Lawrence*, 516 U.S. at 172.

The Court also frequently enters GVR orders in the wake of decisions that could be viewed as simply restating and clarifying pre-existing law. *See, e.g., Knowles v. Mirzayance*, 549 U.S. 1199 (2007) (GVR'd in light of *Carey v. Musladin*, 549 U.S. 70 (2006), which addressed the standards for determining whether a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" for purposes of 28 U.S.C. 2254(d)(1)); *Barnette v. United States*, 546 U.S. 803 (2005) (GVR'd in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005), which involved the proper application of *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Synder v. Louisiana*, 545 U.S. 1137 (2005) (same); *Kandies v. Polk*, 545 U.S. 1137 (2005) (same); *Hightower v. Schofield*, 545 U.S. 1124 (2005) (same); *Walker v. True*, 540 U.S. 1013 (2003) (GVR'd in light of *Wiggins v. Smith*, 539 U.S. 510 (2003), which

applied the test for ineffective assistance of counsel first stated in *Strickland v. Washington*, 466 U.S. 668 (1984)); *Grant v. Oklahoma*, 540 U.S. 801 (2003) (same).

2. There is at least a reasonable probability that the Eleventh Circuit would reach a different result if it were to reconsider this case in light of *Ciminelli*. The "equities of the case" also support vacatur and remand. *Lawrence*, 516 U.S. at 168. "[A] GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration." *Id.* at 167. A GVR would also "alleviate[] the potential for unequal treatment" and "assist[] this Court by procuring the benefit of the lower court's insight before [it] rule[s] on the merits." *Id.* Furthermore, Petitioner has not engaged in an "unfair or manipulative litigation strategy," and no unwarranted "delay" is threatened by a GVR. *Id.* at 168. "Finally, it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Id.* at 196.

3. This is especially true where the panel judges disagreed regarding the reasonable inferences the jury could have drawn had they been presented with the new theory on which the affirmance is based. *Compare* Pet. App. 16a *with* Pet App. 46a-47a (Jordan, J., concurring and dissenting). This Court should grant the petition for a writ of certiorari, vacate, and remand for further consideration in light of *Ciminelli.*

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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