No. 24-5241

IN THE SUPREME COURT OF THE UNITED STATES

JASON GATLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to plain-error relief on his claim that the district court violated his Fifth Amendment double-jeopardy right by instructing a jury to keep deliberating after it returned a general verdict of guilt on a count of child trafficking along with answers to special interrogatories that were inconsistent with the verdict on that count.

2. Whether petitioner's assertion that the court of appeals found sufficient evidence to support a child-pornography count on a theory of liability not presented in the district court warrants a grant of certiorari, vacatur of the judgment below, and a remand in light of Ciminelli v. United States, 598 U.S. 306 (2023), where the decision below postdates Ciminelli and petitioner already presented his assertion to the court of appeals in a supplemental letter and petition for rehearing.

IN THE SUPREME COURT OF THE UNITED STATES

No. 24-5421

JASON GATLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A56) is reported at 90 F.4th 1050. The orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2024. A petition for rehearing was denied on April 4, 2024 (Pet. App. B2). On June 24, 2024, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 2, 2024, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of sex trafficking of a minor, in violation of 18 U.S.C. 1591; one count of producing a visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2251(a); and one count of witness tampering, in violation of 18 U.S.C. 1512(b)(3). Judgment 1. The district court sentenced petitioner to a term of life imprisonment and a life term of supervised release. Judgment 2-3. The court of appeals affirmed petitioner's child-trafficking and child-pornography convictions under Sections 1591 and 2251(a) but reversed his witness-tampering conviction. Pet. App. A1-A45.

1. In October 2018, petitioner met the 17-year-old E.H, who had run away from home and was trading sex for money and drugs. Pet. App. A3. E.H. told petitioner that she was 17 years old. Ibid. Petitioner nevertheless took her to a hotel and gave her around $40 and drugs in exchange for sex. Ibid. They stayed in contact afterward and together visited a house that petitioner was working on in Key West, Florida. Ibid. During that time, petitioner took at least one "live" photograph of E.H. and petitioner having sex, which showed them "'pos[ing]' for the photo by remaining still during sexual intercourse." Id. at A16; see

9/9/2019 Tr. 439 (explaining that a "live" iPhone photograph is "a still photo and a movie photo combined").

In addition, petitioner "became E.H.'s de facto pimp." Pet. App. A4. He "booked hotel rooms for E.H. so that she could engage in sex with customers"; "paid for E.H.'s food"; "supplied her with [drugs]"; "drove her to the Florida Keys where she would prostitute herself"; and "allowed her to stay in the house that he was working on there." Ibid. Petitioner also "coached E.H. to charge more money in the Florida Keys than in Miami given the high presence of tourists and taught her sexual 'tricks' so that she could continue to engage in prostitution." Ibid. "In return," petitioner "expected a cut of E.H.'s earnings." Ibid.

The relationship between petitioner and E.H., however, "soured quickly." Pet. App. A4. On November 30, 2018, "[w]hile the two were staying together in the Florida Keys, E.H. threatened to call the police on [petitioner]." Ibid. Petitioner and E.H. then had a physical altercation, during which "E.H. suffered injuries to her nose and mouth." Ibid. As petitioner and E.H. drove back to Miami, petitioner threatened E.H. Ibid. That threat prompted E.H. to lock herself in a bathroom at a roadside convenience store and call the police. Ibid. Petitioner "then left her there." Ibid. Police officers responded to E.H.'s call, interviewed her, and brought her to a hospital. Id. at A4-A5. Petitioner was arrested three days later. Id. at A5.

Before trial, petitioner "made two attempts to tamper with E.H.'s testimony." Pet. App. A5. "First, in the period after E.H. spoke with law enforcement but prior to [petitioner's] arrest, [petitioner] gave E.H. money and food and told her to recant her statements to the police." Ibid. "Second, after he was arrested, [petitioner] told his mother to convince E.H. to recant." Ibid. Because "E.H. did not have permanent housing," she "was living with [petitioner's] mother." Ibid. Petitioner's mother "drove E.H. to the public defender's office, where E.H. tried to recant her statements." Ibid. E.H. later explained that she did so "because she 'needed a place to stay.'" Ibid.

2. A grand jury in the Southern District of Florida charged petitioner in a superseding indictment with one count of sex trafficking of a minor, in violation of 18 U.S.C. 1591; one count of producing a visual depiction of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. 2251(a); and one count of witness tampering, in violation of 18 U.S.C. 1512(b)(3). Pet. App. A5-A6. Petitioner proceeded to a jury trial. Id. at A6.

At the close of evidence, the district court instructed the jury on Count 1, sex trafficking of a minor. Pet. App. A6. The court explained that to find petitioner guilty on that count, the jury "had to find that [petitioner] either acted: (a) by means of force, threats of force, or coercion; or (b) in reckless disregard of the fact that E.H. was a minor." Ibid.; see 18 U.S.C. 1591(b)(1) and (2). The court and parties agreed to an interrogatory verdict

form, which "asked whether the jury found [petitioner] guilty and, if so, whether it was by use of force or by reckless disregard of the fact that the victim was a minor." Pet. App. A6.

The jury returned a verdict finding petitioner guilty on all counts. Pet. App. A7. But "on the interrogatory verdict form, the jury did not find either of the conditions necessary to trigger liability" for Count 1 -- that is, "use of force or reckless disregard of the fact that the victim was a minor." Ibid. Defense counsel asked the district court to direct a not guilty verdict on Count 1, but "did not specify the grounds" for that request. Ibid.

The district court rejected the request, "reasoning that the jury had returned an inconsistent verdict and 'the verdict [had not] been discharged.'" Pet. App. A7 (brackets in original). The court then "clarified the instructions for the jury and directed them to continue deliberating." Ibid. After further deliberations, the jury again returned a guilty verdict, specifying that it had "found [petitioner] guilty under the second condition, i.e., that [petitioner] acted in reckless disregard of the fact that E.H. was a minor." Ibid.

3. The court of appeals affirmed in part and reversed in part. Pet App. A1-A45. The court reversed petitioner's witness-tampering conviction on the ground that "no rational trier of fact could have found the federal nexus element of" that crime satisfied. Id. at A25; see id. at A17-A25. But the court rejected petitioner's claims (a) that the evidence was insufficient to

sustain his conviction for production of child pornography under Section 2251(a), id. at A15-A17, and (b) that the district court erred by directing the jury to continue deliberating after its ambiguous verdict on the child-trafficking count, id. at A25-A33.

a. The court of appeals "conclude[d] that there was sufficient evidence to sustain [petitioner's] conviction for production of child pornography," in violation of Section 2251(a). Pet. App. A17. The court observed that "a person is guilty of violating § 2251 if he 'employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct.'" Id. at A15 (quoting 18 U.S.C. 2251(a)). "Based on the evidence presented at trial," the court determined that "the intent element was met" because petitioner acted "'for the purpose of producing a[] visual depiction'" of sexually explicit conduct. Ibid. And the court rejected petitioner's argument that he had produced child pornography only "incidentally to a sexual encounter." Ibid.

The court of appeals explained that because "[s]pecific intent does not require that the defendant be 'single-minded in his purpose,'" the government "'was not required to prove that making explicit photographs was [petitioner's] sole or primary purpose' for engaging in sexual activity with E.H." Pet. App. A15 (citations omitted). And the court observed that here, petitioner

"(1) intentionally had sex with a minor and (2) intentionally made a recording of that act by using his camera phone." Id. at A16. The court noted that "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.'" Ibid. And the court found that "[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." Ibid.

b. The court of appeals also found that the district court did not "violate[] [petitioner's] rights by directing the jury to continue deliberating after they reached an inconsistent verdict." Pet. App. A25. The court of appeals explained that petitioner was raising two separate claims -- first, that "the district court violated the Supreme Court's holding with regard to inconsistent verdicts in United States v. Powell, 469 U.S. 57 (1984)"; and second, that the district court violated his Fifth Amendment right "against double jeopardy." Id. at A25-A26. The court of appeals rejected both claims.

The court of appeals first determined that the district court had not violated any principle set forth in Powell. Pet. App. A26. The court observed that "Powell stands generally for the proposition that inconsistency between verdicts on different counts does not form an independent basis for review" of those verdicts. Ibid. The court further observed that "the inconsistent

verdict referred to in Powell is distinct from the one at issue here" because whereas "Powell referred to a verdict that was inconsistent between counts," this case involves "a verdict that is inconsistent as to just one count." Id. at A27.

The court of appeals found this case "nearly identical to" a situation "addressed by then-Judge Gorsuch" in United States v. Shippley, 690 F.3d 1192 (10th Cir. 2012), cert. denied, 568 U.S. 1110 (2013), where the jury's "guilty verdict on the general verdict form" as to a drug-conspiracy charge was inconsistent with "each of the special interrogatories" on that charge, but "'[f]urther deliberations quickly yielded an unambiguous guilty verdict.'" Pet. App. A27. (citation omitted). The court here was "persuaded by then-Judge Gorsuch's reasoning in Shippley that directing the jury to continue deliberations under these circumstances was not error." Id. at A29.

The court of appeals observed that entering a directed verdict for petitioner "would have required the district court to overlook the jury's unanimous finding of guilt as to Count 1 on the general verdict form," while "the inverse -- simply accepting the general finding of guilt -- was equally untenable." Pet. App. A29. Because the court found it "'metaphysically impossible' to give effect to the jury's verdict," it determined "that the district court did not err by giving clarifying instructions to the jury and then directing them to continue deliberating." Ibid. (citation omitted).

The court of appeals made clear that it was "not faced with a situation where the district court accepted an internally inconsistent verdict, e.g., a jury's verdict that generally found a defendant guilty of a charge but also specifically found that the government had not proved an element (or elements) of the offense beyond a reasonable doubt." Pet. App. A29 n.6. Accordingly, the court observed that it "neither need[ed] to decide this issue nor consider whether to follow cases from [its] sister circuits holding that when such an internally inconsistent verdict is accepted (and jeopardy attaches) the defendant is entitled to a judgment of acquittal." Id. at A29-A30 n.6.

The court of appeals next rejected petitioner's double-jeopardy claim. Pet. App. A30. The court observed, as an initial matter, that because petitioner "did not raise any constitutional challenges below as to this issue," and "the district court did not have the opportunity to consider the issue," its review was "limited to 'plain error.'" Id. at A30-A31. And the court of appeals found "no plain error relating to double jeopardy because the verdict was not final." Id. at A32.

The court of appeals observed that while "[t]he state of jeopardy terminates" after "a final verdict in the accused's favor," a "final verdict is valid only if 'it is published in open court with no juror dissent,' and the verdict is accepted by the court." Pet. App. A31 (citations omitted). The court observed that here, "[t]he district court stated that it had not 'accepted

the verdict,'" and that "[d]efense counsel at trial acknowledged as much" by stating that "the 'verdict was not accepted by the Court due to the inconsistencies in Count 1.'" Id. at A32. And the court explained that "[s]ince the inconsistent verdict was never final, [petitioner's] initial jeopardy never terminated, and he therefore was not subjected to double jeopardy." Ibid.

c. Judge Jordan concurred in part and dissented in part. Pet. App. A46-A51. He concurred in the majority's rejection of petitioner's double-jeopardy claim, reasoning that because the district court had refused to "accept[] the jury's inconsistent verdict," this case does not involve "a situation where a final jury verdict contains answers to special interrogatories that preclude a general finding of guilt." Id. at A46. Separately, while acknowledging that the issue is "close," Judge Jordan dissented from the majority's finding of sufficient evidence to uphold petitioner's "conviction for production of child pornography" under Section 2251(a). Id. at A47.

d. Judge Luck dissented only from the majority's decision to vacate petitioner's witness-tampering conviction. Pet. App. A52.

ARGUMENT

Petitioner renews (Pet. 12-29) his claim that the district court violated his double-jeopardy right by instructing the jury to continue deliberating after it had returned an inconsistent verdict on the child-trafficking count. The court of appeals

correctly rejected that claim, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, the plain-error standard of review makes this case a poor vehicle for addressing the first question presented.

Petitioner also asks (Pet. 29-34) this Court to grant certiorari, vacate, and remand for the court of appeals to reconsider its affirmance of his child-pornography conviction in light of Ciminelli v. United States, 598 U.S. 306 (2023). But petitioner already presented his Ciminelli argument to the court of appeals, and that argument lacks merit in any event. The petition should be denied.

1. The court of appeals correctly found no plain error under the Double Jeopardy Clause in petitioner's conviction on the child-trafficking count, because there was no final verdict of acquittal on that count when the district court instructed the jury to continue its deliberations.

a. The Double Jeopardy Clause provides that "[n]o person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. "[I]t has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and . . . is a bar to a subsequent prosecution for the same offence." McElrath v. Georgia, 601 U.S. 87, 94 (2024) (citation omitted; brackets in original); see Blueford v. Arkansas, 566 U.S. 599, 608 (2012) ("finality" of the verdict is "necessary" for an "acquittal"). A

jury verdict does not "become final" until "'deliberations are over, the result is announced in open court,'" "'no dissent by a juror is registered,'" and the verdict is "accepted by the court." Harrison v. Gillespie, 640 F.3d 888, 899 (9th Cir. 2011) (en banc) (citation omitted), cert. denied, 566 U.S. 1042 (2012); see ibid. (collecting cases); see, e.g., United States v. James, 955 F.3d 336, 347 n.11 (3d Cir.) ("A verdict is not final until [it] is accepted by the Court."), cert. denied, 141 S. Ct. 329 (2020).

Accordingly, a district court "may * * * reject the jury's verdict if it is inconsistent or ambiguous." Harrison, 640 F.3d at 899; see United States v. Shippley, 690 F.3d 1192, 1195 (10th Cir. 2012) (Gorsuch, J.) (upholding a district court's instruction that the jury deliberate further in light of "an inconsistent verdict" "on the same count with the same defendant"), cert. denied, 568 U.S. 1110 (2013). And here, the district court expressly "stated that it had not 'accepted the verdict'" and instructed the jury to resume its deliberations. Pet. App. A32. Indeed, it would have been "'metaphysically impossible' to give effect to the jury's verdict" in these circumstances, because it would have "required the district court to" either "simply accept[]" or to "overlook" the "jury's unanimous finding of guilt as to Count 1." Id. at A29 (quoting Shippley, 690 F.3d at 1195). Rather than endorsing one of those "untenable" results, the district court instead gave "clarifying instructions to the jury and then direct[ed] them to continue deliberating." Ibid.

The court of appeals thus correctly found "no plain error relating to double jeopardy because the verdict was not final." Pet. App. A32. "Since the inconsistent verdict was never final, [petitioner's] initial jeopardy never terminated, and he therefore was not subjected to double jeopardy." Ibid. At the very least, any double-jeopardy violation was not "clear or obvious" for purposes of the plain-error standard of review, Puckett v. United States, 556 U.S. 129, 135 (2009), whose applicability petitioner does not dispute.

b. Petitioner's contrary arguments lack merit. Petitioner relies (Pet. 13-14) on this Court's statement "that the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion." United States v. Ball, 163 U.S. 662, 671 (1896). But in making that statement, the Court was not considering a verdict (like the one here) that was inconsistent as to a particular count. Instead, it was considering only the distinct question of whether, "when a case is committed to the jury on Saturday, their verdict may be received and the jury discharged on Sunday." Ibid. And the court of appeals decisions cited by petitioner all involved inapposite situations involving the constitutional or statutory authority of magistrate judges with respect to the acceptance of verdicts. See PB Legacy, Inc. v. American Mariculture, Inc., 104 F.4th 1258, 1263-1264 (11th Cir. 2024); United States v. Gomez-Lepe, 207 F.3d 623, 627 (9th

Cir. 2000); United States v. Johnson, 962 F.2d 1308, 1312 (8th Cir. 1992).

Petitioner's reliance (Pet. 17) on McElrath v. Georgia, supra, is likewise misplaced. There, the Court held that a verdict of not guilty by reason of insanity under Georgia law was a "valid verdict of acquittal" for double-jeopardy purposes. McElrath, 601 U.S. at 95. But the Court made clear that its opinion "d[id] not address" a situation comparable to the one here -- i.e., "the Double Jeopardy Clause's application to a trial judge's rejection of inconsistent or incomprehensible jury findings under state law." Id. at 96 n.4.

c. Contrary to petitioner's contention (Pet. 12-13, 18-22), the circuits are not in conflict on the double-jeopardy issue in this case. Instead, they are in broad consensus that "[i]f not accepted by the trial court, a verdict is not final for purposes of double jeopardy." United States v. Hiland, 909 F.2d 1114, 1138 (8th Cir. 1990); see, e.g., James, 955 F.3d at 347 n.11; Harrison, 640 F.3d at 899; United States v. White, 972 F.2d 590, 595 (5th Cir. 1992) (allowing further deliberation "if the jury expresses uncertainty, contingency, or ambiguity in its announced verdict"), cert. denied, 507 U.S. 1007 (1993); United States v. Chinchic, 655 F.2d 547, 550 (4th Cir. 1981) (verdict not "accepted by the trial judge" is "not a valid verdict of acquittal"); see also 3 Charles Alan Wright et al., Federal Practice & Procedure: Criminal § 517 (5th ed.) ("If there is ambiguity in the verdict or doubt whether

it is in fact unanimous, the judge should seek clarification immediately rather than after the jury has been discharged.").

Petitioner errs (Pet. 12) in asserting that other courts "do[] not require judicial acceptance for finality to attach." To the contrary, most of the decisions that petitioner cites expressly support a district court's authority to order further deliberations in the case of an unclear or inconsistent verdict. See Government of the Virgin Islands v. Hercules, 875 F.2d 414, 419 (3d Cir. 1989) (explaining that "'a verdict is not final when announced'" and that "'[t]he test for validity of the verdict is whether it 'was certain, unqualified and unambiguous'") (citation omitted; brackets in original); United States v. Rastelli, 870 F.2d 822, 835 (2d Cir.) ("[A] district judge has authority to require redeliberation in cases in which there is uncertainty, contingency, or ambiguity regarding the jury's verdict."), cert. denied, 493 U.S. 982 (1989); United States v. Love, 597 F.2d 81, 85 (6th Cir. 1979) (acknowledging circumstances in which "the verdict may not be accepted" by the trial judge) (citation omitted); United States v. Taylor, 507 F.2d 166, 168 (5th Cir. 1975) (same).

Other decisions cited by petitioner simply recite the rule 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." United States v. Nelson, 692 F.2d 83, 84-85 (9th Cir. 1982); see United States v. Dakins, 872 F.2d 1061,

1065 (D.C. Cir. 1989), cert. denied, 493 U.S. 966 (1989); Commonwealth v. Roth, 776 N.E.2d 437, 450-451 (Mass. 2002). But those cases did not consider whether a judge is required to accept an internally inconsistent verdict on a particular count, without any possibility of asking the jury to think further and arrive at a clear and comprehensible determination.

Nor does the decision below conflict with United States v. Randolph, 794 F.3d 602 (6th Cir. 2015), or United States v. Pierce, 940 F.3d 817 (2d Cir. 2019). See Pet. 18-20. In those cases, the district court did accept a verdict that "ha[d] an internal inconsistency in the same count, as it relates to the same defendant." Randolph, 794 F.3d at 611; see Pierce, 940 F.3d at 820. Unlike here, the district court in those cases did not "allow[] the jury to deliberate further" and reach a coherent verdict. Randolph, 749 F.3d at 611; see Pierce, 940 F.3d at 823. In that distinct context, the Sixth and Second Circuits held that the defendant "is entitled to a judgment of acquittal" because the "verdict finding negate[d] an essential element of the offense." Randolph, 794 F.3d at 612; see Pierce, 940 F.3d at 824.

Here, in contrast, "the district court did not accept the jury verdict" but instead directed the jury "to continue deliberating." Pet. App. A29. The court of appeals thus recognized that it was "not faced with a situation where the district court accepted an internally inconsistent verdict," as in Randolph and Pierce -- both of which it expressly identified as

presenting a different scenario. Id. at A29 n.6. Thus, the court "neither need[ed] to decide th[e]" issue presented in those cases "nor consider[ed] whether to follow cases from [its] sister circuits holding that when such an internally inconsistent verdict is accepted (and jeopardy attaches) the defendant is entitled to a judgment of acquittal." Id. at A29-A30 n.6 (citing Randolph and Pierce).

d. At all events, this case would be a poor vehicle in which to resolve the first question presented because it arises in a plain-error posture. Petitioner "did not raise any constitutional challenges" to the child-trafficking count in the district court, so the court of appeals reviewed petitioner's double-jeopardy claim only for "'plain error.'" Pet. App. A30-A31 (citation omitted); see Pet. 28-29 (admitting that he raised a double-jeopardy argument only "on direct appeal"). The same standard of review would apply in this Court. See United States v. Olano, 507 U.S. 725, 737-738 (1993). Even if the first question presented might otherwise warrant this Court's review, the Court should await a case in which the defendant adequately raised the issue below and cleanly presented it for de novo consideration.

2. Petitioner separately challenges the court of appeals' affirmance of his child-pornography conviction, requesting (Pet. 33-34) that this Court grant certiorari, vacate, and remand (GVR) in light of Ciminelli v. United States, 598 U.S. 306 (2023). There is no sound basis for doing so.

In Ciminelli, the Court rejected a theory of fraud based on "[t]he right to control valuable economic information needed to make discretionary economic decisions," holding that "the wire fraud statute reaches only traditional property interests." 598 U.S. at 316. In this Court, the government "concede[d] that the" right-to-control theory "as articulated" by the lower court was "erroneous" but argued that the Court could nonetheless affirm "on the alternative ground that the evidence was sufficient to establish wire fraud under a traditional property-fraud theory." Ibid. The Court "decline[d] the Government's request to affirm [the] convictions on alternative grounds." Id. at 317. In so doing, the Court cited longstanding precedent holding that "[a]ppellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." Ibid. (quoting McCormick v. United States, 500 U.S. 257, 270-271 n.8 (1991)); see ibid. (citing Chiarella v. United States, 445 U.S. 222, 236 (1980)).

Ciminelli does not supply a ground for a GVR in this case. This Court has stated that "a GVR order" is "potentially appropriate" where "intervening developments, or recent developments that [this Court] ha[s] reason to believe the court below did not fully consider, 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, and where it appears that such a redetermination may determine the

ultimate outcome of the litigation." Lords Landing Vill. Condo. Council of Unit Owners v. Continental Ins. Co., 520 U.S. 893, 896 (1997) (per curiam) (citation omitted). No such "reasonable probability," ibid. (citation omitted), exists here.

Petitioner has already presented his Ciminelli argument to the court of appeals. This Court decided Ciminelli on May 11, 2023, approximately one month after the court of appeals held oral argument. See C.A. Doc. 103 (Apr. 7, 2022). Five days after Ciminelli was decided, petitioner filed a letter alerting the court of appeals of that decision. See C.A. Doc. 107 (May 16, 2023). The court then issued its decision on January 5, 2024 -- over seven months after Ciminelli was decided and petitioner filed his letter. Moreover, petitioner again raised his Ciminelli argument in a petition for rehearing, see Pet. for Reh'g & Reh'g En Banc 18-20, which the court denied, see Pet. App. B2.

Nor, in any event, is Ciminelli a "development[]" in the law, Lords Landing, 520 U.S. at 896, that would aid petitioner here. As noted above, this Court in Ciminelli viewed itself as simply applying established precedent. See 598 U.S. at 317 (citing Chiarella, 445 U.S. at 236). Nothing in Ciminelli establishes a new legal principle applicable to petitioner's case. Furthermore, even the principle cited in Ciminelli is inapplicable here, as the theory of the case has been the same throughout.

The government's superseding indictment charged petitioner with inducing "a minor to engage in sexually explicit conduct for

the purpose of producing a[] visual depiction of such conduct." D. Ct. Doc. 29, at 2 (May 22, 2019). At trial, the government argued that "[p]roducing a visual depiction had to be a purpose" of petitioner's conduct, but "it did not have to be the only purpose." 9/12/2019 Tr. 1157. The district court instructed the jury that "[w]hile the government must prove that a purpose of the sexually explicit conduct was to produce a visual depiction, it need not be [the] defendant's only or dominant purpose." Id. at 1141. And the court of appeals upheld petitioner's conviction on the ground that a jury could reasonably infer that petitioner "was engaged in sexual conduct with E.H. partly for the purpose of recording it." Pet. App. A16.

Thus, the government's partial-purpose theory remained consistent throughout the case and was then embraced by the court of appeals. Contrary to petitioner's assertion (Pet. 31), the government never "argued that the jury could convict Petitioner on a strict liability theory." Instead, the government expressly acknowledged that petitioner must have acted "for the purpose of producing a visual production"; the government simply emphasized that such a purpose need not be "the only" one. 9/12/2019 Tr. 1157.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2024