NO._____

IN THE SUPREME COURT OF THE UNITED STATES

GENARO MEDINA-LUNA,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH M. MILLER
26944 Camino de Estrella, Suite B
Capistrano Beach, California 92624
Ken@KMMillerLaw.com
Telephone: (949) 388-3440

Counsel of Record for Petitioner Genaro Medina-Luna

QUESTION PRESENTED

Is Petitioner's appellate argument, that his waiver of Indictment was invalid, a claim of jurisdictional error that is not waived by an unconditional guilty plea to an information?

TABLE OF CONTENTS

Question Presented	ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	2
Jurisdiction	2
Constitutional Provisions and Guidelines	2
List of Proceedings	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	5
Appendix	
Ninth Circuit's Opinion	A-2
Order Denying Petition for Rehearing	A-12

TABLE OF AUTHORITIES

Cases – U.S. Supreme Court

Lamar v. United States, 240 U.S. 60 (1916) 2

United States v. Cotton, 535 U.S. 625 (1934) 3

United States v. Williams, 341 U.S. 58, 66 (1951) 4

Cases – U.S. Courts of Appeals

United States v. Daughenbaugh, 549 F.3d 1010 (5th Cir. 2008) 3

U.S. Constitution

Fifth Amendment 2, 3-4

Statutes

18 U.S.C. § 3231 3

18 U.S.C. § 3742 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 3

28 U.S.C. § 3742 3

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

GENARO MEDINA-LUNA,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Genaro Medina-Luna, respectfully asks that a writ of certiorari issue to review the judgment and decision of the Ninth Circuit Court of Appeals in Case No. 23-705.

OPINION BELOW

The published April 12, 2024, Opinion of the Ninth Circuit Court of Appeals is attached as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The matter seeks redress from the Ninth Circuit Court of Appeals' April 12, 2024, Opinion (Appendix A at 2). Petitioner's petition for rehearing and rehearing en banc was denied May 28, 2024 (Appendix A at 12).

CONSTITUTIONAL PROVISION INVOLVED

This case turns on the Fifth Amendment to the U.S. Constitution.

LIST OF PROCEEDINGS

Petitioner was charged by Information with violating Section 1326(a) and (b). Dkt. 9. According to the docket sheet, "Defendant waived Indictment in open court." Dkt. 12. Petitioner pled guilty to the Information. Dkt. 23. There was no plea agreement; it was an "open plea." Dkt. 23. Petitioner was sentenced to 41 months incarceration. Dkt. 35.

On appeal, Petitioner argued, *inter alia*, that his waiver of indictment was invalid. 9th Cir. No. 23-705, Dkt. 9.1. In a published Opinion, the Ninth Circuit dismissed that portion of the appeal finding that the claim was waived by Petitioner's unconditional guilty plea. Dkt. 33.1 at 3. The Petition for Rehearing was denied on May 28, 2024. Dkt. 35.1.

STATEMENT OF THE CASE[1]

Petitioner argued to the appellate court that the government could not establish his indictment waiver was knowing and voluntary because the record of waiver was materially incomplete. The Ninth Circuit dismissed that part of the appeal as waived by his unconditional guilty plea, pursuant to *United States v. Cotton,* 535 U.S. 625 (2002). *Cotton* held that a defective indictment is not jurisdictional error because it does not undermine "the courts' statutory or constitutional *power* to adjudicate a case." *Id.* at 630. But unlike a defective indictment, a missing indictment does impact the district court's power to adjudicate.

The Fifth Amendment provides that "no person shall be held to answer for . . . [an] infamous crime . . . unless on a presentment or indictment of a grand jury." U.S. Const. Am. V. That is a constitutional limit on a court's power to adjudicate. For example, were the government to charge a defendant with a felony by complaint against that defendant's will, and were a jury to convict on those felony charges, the district court would not have the authority to sentence the defendant to prison or make her pay a fine. The total lack of an indictment impacts the court's jurisdiction to hear a case, per the plain language of the Fifth Amendment.

Examination of the reasoning underlying *Cotton's* holding supports the material difference between a defective indictment and a missing one. The *Cotton* Court relied on *Lamar v. United States,* 240 U.S. 60 (1916), in which Justice Holmes rejected the idea that the Court had no jurisdiction because an indictment failed to state an offense. A court "has jurisdiction of all crimes cognizable under

[1] The district court had jurisdiction under 18 U.S.C. § 3231, and the appellate court had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

the authority of the United States . . . [and] [t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Cotton,* 535 U.S. at 631 (quoting *Lamar*). Likewise, the *Cotton* Court quoted *United States v. Williams,* 341 U.S. 58, 66 (1951) for the proposition that the argument "that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment." *Cotton,* 535 U.S. at 631. Neither *Cotton* nor the cases it relied on dealt with the complete absence of an indictment.

The Ninth Circuit followed *United States v. Daughenbaugh,* 549 F.3d 1010, 1012 (5th Cir. 2008) in concluding that because a grand jury indictment can be waived, Fed. R. Crim. P. 7(b), the failure to secure a valid waiver does undermine the court's power to hear the case. Dkt. 33.1 at 10. Like the Ninth Circuit, the Fifth Circuit extended *Cotton* beyond its facts (i.e., a defective indictment), and its reading is inconsistent with the plain words of the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

Because indictments can be waived, a defective indictment does not impact a court's power to adjudicate a case. But the Fifth Amendment expressly prohibits proceeding without an indictment, unless that right is waived. Thus, a challenge to the validity of a waiver of indictment is a challenge to the court's power to hear the case; it is a jurisdictional challenge.

CONLUSION

For the foregoing reasons, Petitioner requests that this Court grant the petition for writ of certiorari.

Dated: August 2, 2024

Respectfully submitted,

s/Kenneth M. Miller
Kenneth M. Miller
Counsel for Petitioner

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. GENARO MEDINA-LUNA, *Defendant - Appellant*.	No. 23-705 D.C. No. 3:22-cr-02443-RSH-1 OPINION

Appeal from the United States District Court
for the Southern District of California
Robert Steven Huie, District Judge, Presiding

Submitted March 26, 2024[*]
Pasadena, California

Filed April 12, 2024

Before: Susan P. Graber and Danielle J. Forrest, Circuit Judges, and James V. Selna, District Judge.[**]

Opinion by Judge Graber

[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[**] The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.

SUMMARY[***]

Criminal Law

The panel dismissed in part Medina-Luna's appeal from the 41-month prison sentence imposed following his guilty plea to an information charging him with attempted reentry by a removed noncitizen in violation of 8 U.S.C. § 1326, and otherwise affirmed.

Medina-Luna challenged the validity of his waiver of a grand jury indictment. The panel held that Medina-Luna waived the right to appeal that issue by pleading guilty unconditionally. Relying on the Supreme Court's decision in United States v. Cotton, 535 U.S. 625 (2002) (holding that defects in an indictment do not deprive a court of jurisdiction), the panel held that an error in procuring a knowing and voluntary waiver of indictment is nonjurisdictional and is therefore waived by a defendant's subsequent guilty plea.

Citing Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc) (holding that a three-judge panel may recognize a decision as overruled if it is clearly irreconcilable with a later precedent from the Supreme Court), the panel overruled United States v. Travis, 735 F.2d 1129 (9th Cir. 1984), to the extent Travis characterized any defect in the waiver of indictment as jurisdictional. The panel took the opportunity to reaffirm that Miller remains good law in all respects.

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Seeing no abuse of discretion, the panel held that the sentence was substantively reasonable.

COUNSEL

Kenneth M. Miller, Law Office of Kenneth M. Miller, Capistrano Beach, California, for Defendant-Appellant.

Jordan Arakawa and James Miao, Assistant United States Attorneys; Daniel E. Zipp, Assistant United States Attorney, Chief, Appellate Section, Criminal Division; Badih Mouannes, Special Assistant United States Attorney; Tara K. McGrath, United States Attorney; United States Department of Justice, Office of the United States Attorney, San Diego, California; for Plaintiff-Appellee.

OPINION

GRABER, Circuit Judge:

Defendant Genaro Medina-Luna timely appeals his sentence of 41 months of imprisonment, following his guilty plea to an information charging him with attempted reentry by a removed noncitizen, in violation of 8 U.S.C. § 1326. He raises two issues: whether his waiver of the right to a grand jury indictment was valid, and whether the sentence imposed was substantively reasonable. We hold that Defendant waived the right to appeal the first issue by entering an unconditional guilty plea and that the sentence was substantively reasonable. We therefore dismiss the appeal in part and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant is a Mexican national and citizen. In September 2022, he attempted to enter the United States from Mexico through the Otay Mesa, California Port of Entry, concealed in the trunk of a car. Defendant had been ordered removed from the United States to Mexico on five previous occasions, spanning the period from 2006 to early 2022.

Defendant was charged with attempted reentry by a removed noncitizen, in violation of 8 U.S.C. § 1326. During a hearing, the magistrate judge informed Defendant of the charge against him. The judge noted that the charge was for a felony, and she advised Defendant, as well as several other defendants who were charged in unrelated cases, as follows:

> [Y]ou have the right to have the charges presented to the grand jury. That's a group of citizens from the community. They are brought together. They hear evidence presented by the prosecutor. And it's their job to decide if there's probable cause to charge you with this crime or not.
>
> . . . .
>
> . . . [I]f the grand jury finds probable cause, you can be charged using a document called an Indictment. But if the grand jury doesn't find probable cause, you can't be charged with a felony at all.
>
> I've been told that each of you is giving up your right to have the charges presented to the grand jury. You're agreeing that, instead,

> the United States can file these charges by typing up a different type of document, this Information, and simply filing it with the Court.
>
> So I want to make sure that's what you want to do, and I want to make sure that you are doing so intelligently and voluntarily.

The magistrate judge then asked Defendant's lawyer whether she had advised him of the "right to the grand jury and the significance of the waiver." Counsel responded, "Yes, your Honor." After that, the judge asked Defendant whether, in fact, he wished to waive his right to have the charge presented to the grand jury. Through an interpreter, Defendant replied, "Yes, your Honor." The judge asked, "Before you made this decision, did you have enough time to talk to your attorney about the grand jury and your waiver?" Defendant answered, "Yes, your Honor." He then stated that he had no questions about the waiver and that he had not been pressured by anyone in any way to give up his right to an indictment.

A few months after waiving indictment, Defendant pleaded guilty. He entered an open, unconditional plea with no plea agreement.

The government calculated the Guideline range as 63–78 months. Defendant requested a four-level downward departure under Sentencing Guideline Manual § 5K2.12 because of his motivation to enter the United States to provide emotional support to his daughter, who had suffered a severe trauma. He calculated a Guideline range of 41–51 months. Probation recommended 63 months in custody; the United States recommended a downward variance to 57

months in recognition of the circumstances motivating Defendant; and Defendant sought 41 months.

The district court calculated the Guideline range as 63–78 months. After considering the 18 U.S.C. § 3553(a) factors, the court varied downward and sentenced Defendant to 41 months. This timely appeal followed.

DISCUSSION

A. The Waiver of an Indictment Is Nonjurisdictional.

Defendant challenges the validity of his waiver of an indictment, but we must first decide whether he waived appeal of the issue. We determine de novo the question whether Defendant has waived appeal of an issue. United States v. Watson, 582 F.3d 974, 981 (9th Cir. 2009). Here, Defendant pleaded guilty unconditionally, without a plea agreement and without preserving identified issues for appeal in writing as permitted by Federal Rule of Criminal Procedure 11(a)(2). "[A]n unconditional guilty plea constitutes a waiver of the right to appeal all nonjurisdictional antecedent rulings and cures all antecedent constitutional defects." United States v. Chavez-Diaz, 949 F.3d 1202, 1206 (9th Cir. 2020) (citations and internal quotation marks omitted). The specific question presented here is whether the failure to secure a valid waiver of indictment is a nonjurisdictional defect.

1. *Miller v. Gammie* Provides the Applicable Test.

In United States v. Travis, 735 F.2d 1129 (9th Cir. 1984), we considered a challenge to a defendant's waiver of indictment following the defendant's guilty plea. We stated that the "claimed defect is jurisdictional." Id. at 1131. As a three-judge panel, we may recognize that decision as overruled if it is clearly irreconcilable with a later precedent

from the Supreme Court of the United States. Miller v. Gammie, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). As discussed below, it is.

We pause to observe that, unfortunately, confusion has arisen about whether Miller itself has been overruled in part. We briefly addressed this topic in Rieman v. Vazquez, No. 22-56054, 2024 WL 927667, at *4 n.1 (9th Cir. March 5, 2024), as amended (April 2, 2024). We take this opportunity to provide more context.

In a few cases, we have cited Miller and erroneously appended an unexplained notation that Miller has been "overruled on other grounds by Sanchez v. Mayorkas, 593 U.S. 409 (2021)." E.g., Punchbowl, Inc. v. AJ Press, LLC, 90 F.4th 1022, 1031 (9th Cir. 2024); United States v. Eckford, 77 F.4th 1228, 1233 (9th Cir. 2023), cert. denied, 144 S. Ct. 521 (2023). By contrast, in dozens of our recent cases, we have used the proper citation formatting for Miller, with no reference to Sanchez or to Miller's having been overruled. E.g., Coria v. Garland, No. 22-970, 2024 WL 1164863, at *2 (9th Cir. Mar. 19, 2024); McBurnie v. RAC Acceptance E., LLC, No. 22-16868, 2024 WL 1101845, at *4 (9th Cir. Mar. 14, 2024); Jamgotchian v. Ferraro, 93 F.4th 1150, 1160 (9th Cir. 2024).

The confusion arises from a red flag placed on Miller by Westlaw, due to Westlaw's misreading of our decision in Hernandez v. Garland, 47 F.4th 908 (9th Cir. 2022), as amended (Sept. 14, 2022). Hernandez was an immigration case in which we applied Miller's test and recognized that the Supreme Court's intervening decision in Sanchez had overruled a series of our older cases. Westlaw misread our decision as having held that Miller itself was overruled. Westlaw's shallow reading of Hernandez was perhaps

understandable at first glance because the opinion assumed that the reader understood Miller, and the citation to it does not follow immediately after the phrase "effectively overruled our precedent" in the opening paragraphs:

> [W]e hold that the Supreme Court's recent decision in Sanchez v. Mayorkas, 141 S. Ct. 1809 (2021), effectively overruled our precedent requiring that the benefits conferred by an alien's immigration status be analyzed to determine if the alien had been "admitted in any status," see Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc), and we conclude that under Sanchez and the plain language of the relevant immigration statutes, Hernandez's [temporary protected status] does not constitute an admission under 8 U.S.C. § 1229b(a)(2).

Hernandez, 47 F.4th at 910.

Westlaw's reading of this shorthand summary was clearly wrong. Miller was a § 1983 case that had nothing whatsoever to do with immigration statutes. As the remainder of Hernandez makes clear, Sanchez overruled only a series of our immigration decisions. Hernandez, 47 F.4th at 913–14; see also Rieman, 2024 WL 927667, at *4 n.1 ("The Supreme Court's decision in Sanchez did not overrule any aspect of our decision in Miller.") Nothing in Sanchez speaks to any aspect of Miller, and no sensible reading of Hernandez suggests that Miller has been overruled, in whole or in part or on other grounds. As we have repeatedly recognized in cases decided after Sanchez,

Miller remains good law in all respects.[1] We now proceed to apply Miller.

2. *United States v. Travis* Is No Longer Good Law.

In United States v. Cotton, 535 U.S. 625 (2002), the Court held that defects in an indictment do not deprive a court of jurisdiction, that is, the statutory or constitutional power to adjudicate a case. Id. at 630–31. The Court overruled a Fourth Circuit decision holding that the district court had been "without jurisdiction" to impose a sentence for an offense not charged in the indictment. Id. at 628–29. The Supreme Court reasoned that—unlike true defects in subject-matter jurisdiction—the grand jury right can be waived pursuant to Federal Rule of Criminal Procedure 7(b). Id. at 630–31.

Accordingly, we overrule Travis to the extent that it characterizes any defect in the waiver of indictment as jurisdictional. Miller, 335 F.3d at 899–900. In doing so, we

[1] An overly formalistic reading of our circuit rules could suggest that our cases are internally inconsistent as to the status of Miller: some cases cite Miller with a notation that it has been overruled in part, and other cases cite Miller without that notation. And, if we were faced with a true intracircuit split, we ordinarily would have to call for rehearing en banc. Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1479 (9th Cir. 1987) (en banc). We decline to read our circuit rules in such a draconian fashion here, where the only "conflict" concerns the formatting of a citation, akin to a typographical error. If an opinion erroneously cited a precedent as having been decided in 1998, and other opinions correctly cited the date of the precedent as 1989, we would not invoke our en banc authority to resolve the "conflict." Similarly, here, the clear error in citation formatting in a few opinions does not present a true conflict that requires us to call for rehearing en banc. Cf. Blanton v. Anzalone, 813 F.2d 1574, 1577 nn.1–2 (9th Cir. 1987) (describing clerical mistakes by trial courts that may be corrected pursuant to Federal Rule of Civil Procedure 60(a) as "blunders in execution").

join the Fifth Circuit in relying on Cotton to hold that an error in procuring a knowing and voluntary waiver of indictment is "nonjurisdictional and [is] therefore waived by [the defendant's] subsequent guilty plea." United States v. Daughenbaugh, 549 F.3d 1010, 1012–13 (5th Cir. 2008). "[B]ecause criminal defendants may waive the right to grand jury indictment, see Fed. R. Crim. P. 7(b), a failure to actually secure such a waiver does not affect a district court's power to hear a case." Id. at 1012. Defendant's unconditional guilty plea, therefore, waived his right to appeal any defect in the antecedent waiver of indictment.

B. The Sentence Was Substantively Reasonable.

We review for abuse of discretion the substantive reasonableness of a sentence. United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). On appeal, Defendant does not challenge the accuracy of the district court's Guidelines calculation, which yielded a range of 63–78 months of imprisonment. Rather, he challenges only the substantive reasonableness of the 41-month sentence in view of his family circumstances.

The district court expressly acknowledged and listed the statutory factors under 18 U.S.C. § 3553(a). The court took into account that Defendant's stated family reason for coming back to the United States was sincere and also observed that Defendant had overcome an addiction to methamphetamine. Those factors persuaded the court that a downward variance was warranted. And the court imposed the sentence that Defendant himself had requested. We see no abuse of discretion.

APPEAL DISMISSED IN PART and AFFIRMED IN PART.

FILED

MAY 28 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. GENARO MEDINA-LUNA, Defendant - Appellant.	No. 23-705 D.C. No. 3:22-cr-02443-RSH-1 Southern District of California, San Diego ORDER

Before: GRABER and FORREST, Circuit Judges, and SELNA, District Judge.*

The panel judges have voted to deny Appellant's petition for panel rehearing. Judge Forrest has voted to deny Appellant's petition for rehearing en banc, and Judges Graber and Selna have so recommended.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc, Docket No. 34, is DENIED.

* The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.