No. _____

In the Supreme Court of the United States

SAMUEL TANEL CRITTENDEN, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

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QUESTION PRESENTED FOR REVIEW

Should a conviction be reversed and remanded for a new trial where the district court erroneously fails to give a lesser-included-offense instruction, regardless of whether there was sufficient evidence to find guilt on the greater offense, so long as a jury could rationally convict on the lesser offense and acquit on the greater offense?

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Petitioner SAMUEL TANEL CRITTENDEN asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 24, 2024.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Crittenden*, No. 23-50007, 115 F.4th 668 (5th Cir. 2024). Judgment entered September 24, 2024. Order denying petition for rehearing en banc October 25, 2024.

- *United States v. Crittenden*, No. 3:17-cr-2039-DB (W.D. Tex. Dec. 15, 2022) (judgment).
- *United States v. Crittenden*, No. 18-50635, 46 F.4th 292 (5th Cir. 2022) (en banc). Judgment entered on August 18, 2022.
- *United States v. Crittenden*, 25 F.4th 347 (5th Cir. 2022), judgment vacated and reh'g en banc granted, 26 F.4th 1015 (5th Cir. 2022).
- *United States v. Crittenden*, 971 F.3d 499, 505 (5th Cir. 2020), withdrawn, 827 F. App'x 448 (5th Cir. 2020).

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DECISION BELOW

A copy of the opinion of the court of appeals, *United States v. Crittenden*, No. 23-50007, 115 F.4th 668 (5th Cir. 2024), is attached to this petition as Appendix A.

A copy of the order denying the petition for rehearing en banc, *United States v. Crittenden*, No. 23-50007 (5th Cir. Oct. 25, 2024), is attached to this petition as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 24, 2024. Pet. App. A. Petitioner filed a timely petition for rehearing en banc on October 8, 2024, which was denied on October 25, 2024. Pet. App. B. This petition is filed within 90 days after the denial of rehearing. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall be … deprived of life, liberty, or property, without due process of law …."

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to … trial, by an impartial jury …."

STATEMENT

Samuel Crittenden was charged with three drug offenses: two conspiracies with intent to distribute (Counts One and Three) and one count of possession with intent to distribute (Count Two). At trial, his attorney timely proffered a correct jury instruction for the lesser included offense (of Count Two) of simple possession. The district court denied the requested instruction based on the mistaken belief that simple possession was not a lesser included offense of possession with intent to distribute.

The district court indicated (in considering the motion for a judgment of acquittal) that it doubted whether there was evidence of an intent to distribute, stating, "Let me tell you what gives me more of a problem. Okay? And that's – that is with the intent to distribute. . . . Because I can see you arguing to the jury that even if he did have possession he wasn't going to distribute it." Although the district court denied the motion for judgment of acquittal, it showed some reluctance, stating that if the jury convicted, it would take up the issue later. Mr. Crittenden was convicted on all counts.

The district court later granted a new trial as to all three counts, based on its finding that the verdict was contrary to the great weight of the evidence. The government appealed the granting of the new trial. On appeal, the government challenged only

the granting of the new trial as to Count Two, the substantive possession with intent to distribute charge, and abandoned any argument as to the conspiracies charged in Counts One and Three.

The court of appeals initially affirmed the trial court's granting of the new trial. Pet. App. D1–11, E1–3, F1–19. However, the court sua sponte granted rehearing en banc, after which the court of appeals reversed the granting of a new trial, and remanded the case to the district court (with three justices dissenting). Pet. App. C1–14. After remand, Mr. Crittenden was sentenced on Count Two. The government dismissed Counts One and Three.

Mr. Crittenden then appealed his conviction, alleging, among other things, that the trial erred in not giving the jury the requested lesser-included-offense instruction. On appeal, the government agreed that simple possession was a lesser-included offense, and that the district court had misunderstood the law when it found otherwise. However, the Fifth Circuit affirmed Mr. Crittenden's conviction. The majority of the panel concluded that the district court did not err in failing to give the jury the lesser-included instruction of simple possession because it felt that a rational jury could not have acquitted Mr. Crittenden of possession with intent to distribute and convicted only of simple possession.

Pet. App. A15. The dissent pointed out that to reach this conclusion, the majority panel ignored evidence in the record that the district court noted serious concerns about the intent to distribute, and "flips the standard on its head by only searching for evidence to support the jury's conviction." Pet. App. A16–19 (citation omitted).

Mr. Crittenden filed his Petition for Rehearing En Banc, seeking to have the entire court correct the panel's employment of the incorrect standard. The Fifth Circuit denied the petition. Pet. App. B1–2.

REASONS FOR GRANTING THE WRIT

This case presents an ideal procedural and factual background to clarify the standard of review when a district court has failed to give the jury a lesser-included-offense instruction.

The record is clear that the district court could have given the lesser-included-offense instruction, and only failed to do so based on its misunderstanding of the law. There is no dispute that the trial court was mistaken in its understanding that simple possession was not a lesser-included-offense of possession with intent to distribute.

There is also an unusual amount of support in the record for the proposition that a rational jury could have found Mr. Crittenden guilty only of the lesser offense and acquitted him of the greater. This support in the record includes the trial judge's explicit statement that he had doubts about the intent to distribute, its later finding that the verdict was against the great weight of the evidence, and the Fifth Circuit's initial affirmance of this decision.

The trial court's finding (when it initially granted a new trial) that the jury **should** have acquitted Mr. Crittenden is actually much stronger than the statement that it **could** have acquitted, which is all that is required to support a lesser-included-offense instruction. Nevertheless, the majority panel chose to review the

evidence not as the district court did, nor how the jury may have viewed it, but rather in the light most favorable to the verdict.

The court of appeal's majority panel opinion relies heavily on testimony from Mr. Crittenden's wife, who was his codefendant. Pet. App. A13–14. This would support a sufficiency of the evidence challenge under *Jackson v. Virginia*, 443 U.S. 307 (1979), because the jury could have chosen to believe her testimony. But it does not support the denial of the lesser-included instruction because while the jury could have chosen to believe his wife's self-serving testimony (which seems unlikely, since they convicted her), the jury was equally entitled to discard her testimony as unbelievable.

"In determining whether to instruct on the lesser offense, the court must take into account the possibility that the jury might reasonably believe defendant only in part or might make findings different from the version set forth in anyone's testimony." 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL §498, at 799 (2d ed. 1982); *see United States v. Estrada-Fernandez*, 150 F.3d 491, 496 n.3 (5th Cir. 1998) ("[T]he jury was entitled to believe none, all, or any part of [the witness's] testimony.").

The court of appeals did not follow its own precedent. In *United States v. Lucien*, 61 F.3d 366 (5th Cir. 1995), the Fifth Circuit explained that the test is not whether the evidence is sufficient to convict a defendant of possession with intent to distribute, but whether the jury could have found the defendant guilty of only the lesser included offense of simple possession. *Id.* at 376. The court of appeals emphasized that while evidence could support an inference of an intent to distribute, "the jury was free also not to draw such an inference." *Id.* at 376 (citing *United States v. Burns*, 624 F.2d 95, 104 (10th Cir. 1980)).

Yet, based on its use of the incorrect standard, the court of appeals's majority panel opinion describes the evidence as "overwhelming." Pet. App. A14 n.29. Chief Judge Elrod, writing for the majority in the court of appeals's original, later-withdrawn opinion affirming the granting of the new trial, viewed the evidence quite differently. Pet. App. F8–9. These different perspectives in reviewing the same record highlight the critical role of the jury.

Other circuits have applied the standard correctly, recognizing that the test is what a jury could have concluded. *See United States v. Smith*, 21 F.4th 122, 136 (4th Cir. 2021); *see also United States v. Gibbs*, 904 F.2d 52, 59 (D.C. Cir. 1990) ("We have no doubt that the evidence was *sufficient* to convict the appellants of possession

with intent to distribute; but, when the issue is the propriety of a lesser-included offense instruction, the test is whether a reasonable jury could nonetheless find the appellants guilty only of simple possession.")

This Court should grant certiorari to correct the Fifth Circuit's use of the incorrect standard of review, and to clarify the appropriate standard to review evidence in light of a request for a lesser-included-offense instruction.

The jury's role would be unconstitutionally restricted if a trial court is allowed to deny a lesser-included-offense instruction simply because there is sufficient evidence to convict on the greater offense.

The importance of the right to have the jury consider the evidence and the applicable law cannot be overstated—it is the right to trial by jury, which is guaranteed by the Sixth Amendment. In the prior en banc decision in Mr. Crittenden's case, the court of appeals aptly emphasized the importance of the jury's role in criminal cases:

> The jury requirement for criminal cases is one of only two topics addressed in both the original Constitution and the Bill of Rights (the other is the more obscure topic of venue in criminal trials). U.S. Const. art. III, § 2, cl. 3; id. amend. VI; see also The Federalist No. 83, at 521 (Alexander Hamilton) (observing that if the Founders agreed on "nothing else," they concurred "at

> least in the value they set upon the trial by jury"). . . . This original jury requirement ensures that unelected judges are not the only actors in our judiciary. . . . **The jury's constitutional role in deciding criminal trials leaves little room for judicial second-guessing.**

United States v. Crittenden, 46 F.4th 292, 296 (5th Cir. 2022) (en banc) (emphasis supplied). The dissent in the most recent appellate opinion similarly recognized the importance of the jury's role, noting that appellate judges "should decline to 'play junior-varsity jury.'" Pet. App. A19 (citation omitted).

The availability of the lesser included jury instruction predates our Constitution. As this Court has noted, at common law the jury was permitted to find a defendant guilty of any lesser offense necessarily included in the charged offense. *Beck v. Alabama*, 447 U.S. 625, 633 (1980)(citations omitted). Justice Stevens addressed the importance of the lesser included instruction, explaining that it gives the jury a "third option" that "ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." *Beck*, 447 U.S. at 634, citing *Keeble v. United States*, 412 U.S. 205, 208 (1973). Thus, the Fifth Amendment's guarantee of due process also demands that a jury be properly instructed.

If the standard of review utilized by the Fifth Circuit is allowed to stand, it is easy to see how a judge's view of the evidence could restrict the jury's role. So long as the trial court believed that the

evidence in the light most favorable to the government supported conviction on the greater offense, it could deny the lesser-included-offense instruction, knowing it would not be reversed. This dangerous precedent usurps the jury's role, and thus impairs a defendant's right to due process and trial by jury.

This Court should grant certiorari to correct this dangerous and unconstitutional precedent.

CONCLUSION

FOR THESE REASONS, Crittenden asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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