No. 23-959

In the Supreme Court of the United States

COLIN MONTAGUE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Principal Deputy Assistant Attorney General
NATASHA K. HARNWELL-DAVIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the indictment sufficiently alleged that petitioner engaged in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 67 F.4th 520. The order of the district court (Pet. App. 50a-55a) is unreported but is available at 2018 WL 1317347.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2023. A petition for rehearing was denied on October 18, 2023 (Pet. App. 56a-64a). On December 20, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 1, 2024. The petition for a writ of certiorari was filed on February 29, 2024. 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 Western District of New York, petitioner

was convicted on one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848(a) and (b); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (h); and six counts of engaging in monetary transactions with property derived from unlawful activity, in violation of 18 U.S.C. 1957(a) and (b)(1). Judgment 1-2. The district court sentenced petitioner to life imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-49a.

1. From 2008 to 2014, petitioner "was the head of a vast drug ring" in western New York that purchased cocaine, often 50 kilograms at a time; transported it across the country to the Rochester area; sold it to "lower-level drug dealers, and [then] laundered the profits through [petitioner's] real-estate business." Pet. App. 3a, 24a-25a. The drug ring distributed approximately 360 kilograms of cocaine yearly and, during one six-month period, petitioner sold "over 120 kilograms to a single person." *Id.* at 24a-25a; see C.A. App. 802-803 (criminal complaint affidavit); *id.* at 806-822 (excerpts from petitioner's drug ledgers detailing individually dated drug transactions); *id.* at 824-826 (petitioner's payroll figures).

In 2012, local authorities began investigating petitioner; in 2013, they presented evidence to a state grand jury, which declined to indict petitioner. Pet. App. 3a. In January 2014, the investigation expanded into a joint federal-state investigation that obtained wiretap orders for the phones of petitioner and his associates. *Ibid.* In June 2014, investigators obtained and executed a search warrant for petitioner's home, which resulted in the seizure of petitioner's drug ledgers and other items. *Ibid.* The "drug ledgers contain[ed] detailed information

about [petitioner's] drug customers and workers, cocaine amounts distributed, dollar quantities owed and paid" and the dates of numerous drug transactions. C.A. App. 747; see *id.* at 802 (explaining ledgers); *id.* at 5769.1-5769.34 (drug-ledger excerpts admitted as Gov't Exhibits 162A and 162B).

2. a. In July 2014, following the collection of that additional evidence through the joint investigation, the government filed a criminal complaint that charged petitioner with (*inter alia*) conspiring to distribute and to possess with intent to distribute five kilograms or more of cocaine and 280 grams or more of cocaine base, in violation of 21 U.S.C. 846, and distributing and possessing with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1). C.A. App. 742. The complaint incorporated (*ibid.*) the affidavit of a Drug Enforcement Administration special agent, who detailed the evidence against petitioner, including the contents of numerous calls intercepted in 2014; visual and video surveillance of numerous drug transactions in 2014; and evidence seized in the 2014 searches of the homes of petitioner and his coconspirators, including petitioner's drug ledgers, which were seized from a desk in petitioner's bedroom. *Id.* at 752-803; see *id.* at 806-826 (excerpts of ledgers attached as exhibits to the complaint).

The government was not able to arrest petitioner promptly in New York based on that complaint. Instead, after a federal grand jury indicted petitioner and issued the second superseding indictment underlying his eventual conviction, the government arrested petitioner after tracking him to Atlanta, Georgia. Pet. App. 3a-4a.

b. The operative indictment (C.A. App. 31-48; see Pet. App. 65a-67a), charged petitioner with one count of

engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a) and (b) (Count 1); one count of conspiring to distribute and to possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 846 (Count 2); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h) (Count 3); and six counts of engaging in monetary transactions with property derived from unlawful activity, in violation of 18 U.S.C. 1957(a) (Counts 4-9). C.A. App. 31-36.

Section 848 makes it unlawful to "engage[] in a continuing criminal enterprise." 21 U.S.C. 848(a). A "person is engaged in a continuing criminal enterprise if": "(1) he violates any provision of" the drug laws in 21 U.S.C. 801-971 "the punishment for which is a felony" and "(2) such violation is a part of a continuing series of violations of" those laws "which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management" and "from which such person obtains substantial income or resources." 21 U.S.C. 848(c).

In *Richardson* v. *United States*, 526 U.S. 813 (1999), this Court addressed whether Section 848's textual reference to a continuing "'series of violations'" was a single element of a CCE offense ("namely a 'series'") or whether the words "'series of violations'" also "create several [other] elements, namely the several 'violations,' in respect to *each* of which the jury must agree unanimously and separately." *Id.* at 817-818; see *id.* at 815. The court concluded that "the statute makes each 'violation' a separate element" of a CCE offense. *Id.* at 818; see *id.* at 815, 824. In so doing, it observed that "[c]alling a particular fact an 'element' carries certain legal

consequences," and explained that "[t]he consequence that matter[ed]" was that "the jury must agree unanimously about which three crimes the defendant committed." *Id.* at 817-818; see *id.* at 818 (noting that the Court "assume[d], but d[id] not decide, that the necessary number is three").

Count 1 of the indictment in this case alleged that, during a more than six-year period "[f]rom in or about 2008 * * * through and including on or about July 1, 2014," petitioner "engage[d] in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 841(a)(1) and 846, which violations were part of a continuing series of violations of said statutes." Pet. App. 66a. Section 841(a)(1) makes it unlawful knowingly or intentionally "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a)(1). Section 846 makes it unlawful to "conspire[] to commit any offense defined in" 21 U.S.C. 801-904. See 21 U.S.C. 846. Count 1 does not itself further describe three predicate federal-drug-law violations.

Count 2 of the indictment alleges that petitioner violated Section 846 in that, during the same six-year period from 2008 to 2014, he and others conspired "to commit the following offenses, that is, to possess with intent to distribute, and to distribute, five (5) kilograms or more * * * of cocaine" and "280 grams or more * * * of cocaine base," in violation of "Sections 841(a)(1) and 841(b)(1)(A)." C.A. App. 33. No other count or portion of the indictment identified any drug violations that might qualify as part of the continuing series of violations that forms the basis for a CCE offense.

The government disclosed "voluminous" pretrial discovery, including "thousands of pages of documents,"

"many hours" of surveillance video, and "several hundred hours" of wiretapped telephone conversations in an electronic "format [that] is now common in both civil and criminal litigation," C.A. App. 370, but which was unfamiliar to petitioner's then-counsel, who informed the court that he had "never used a computer," *id.* at 220. Petitioner requested a bill of particulars (*id.* at 142-152) and, in relevant part, asked that the government "[s]tate specifically the dates, times and places that the alleged series of violations by [petitioner] took place." *Id.* at 143. The government opposed the motion, arguing that it had already disclosed the details of petitioner's criminal activity in a lengthy criminal complaint (which, as noted, included excerpts of petitioner's drug ledgers listing individual transactions), affidavits supporting wiretaps, a motion for a restraining order, and electronic discovery. D. Ct. Doc. 164, at 2-3 (June 25, 2015). After holding a hearing, C.A. App. 202-352, a magistrate judge interpreted petitioner's request as a "complain[t]" about the "voluminous" electronic discovery, *id.* at 371-372, and "resolved" the request by ordering the government to more specifically identify the evidence that it intended to use at trial, *id.* at 376. See *id.* at 370-376; see also *id.* at 1350-1351 (discussing the "very detailed list" of evidence that the government subsequently provided to petitioner).

c. Petitioner subsequently moved to dismiss the CCE count on the ground that it did not contain essential facts about the predicate violations. C.A. App. 1089-1094. The district court denied that motion. Pet. App. 50a-55a. The court reasoned that, under the Second Circuit's decision in *United States* v. *Flaharty*, 295 F.3d 182, cert. denied, 537 U.S. 936 (2002), and 538 U.S. 915 (2003), Count 1 sufficiently alleged a CCE offense under

Section 848 because it "closely track[ed] the language of [Section] 848"; "allege[d] a continuing series of felony drug violations," specifically, violations of Sections 841(a)(1) and 846; and "identifie[d] the time and location of the alleged enterprise." Pet. App. 53a-54a.

Petitioner's trial lasted seven weeks, during which the government presented "extensive evidence" of petitioner's continuing criminal enterprise, including testimony from "dozens of witnesses," "scores of telephone calls collected from wiretaps," and "thirty-four pages of [the] drug ledger seized at [petitioner's] residence," which documented drug transactions involving "more than 150 kilograms of cocaine" during the "six-month span" from "September 2013 to February 2014" (a portion of the charged six-year criminal enterprise). Pet. App. 4a, 24a. And government counsel explained during closing arguments that there was "overwhelming" evidence that petitioner had been the head of a continuing criminal enterprise that repeatedly distributed kilogram-quantities of cocaine and more than 150 kilograms overall. C.A. App. 5567-5568, 5575, 5596.

Government counsel also acknowledged that "[o]ne of the elements" of the CCE offense "is three or more distributions [of cocaine] or three or more predicate acts." C.A. App. 5581. And counsel observed that those predicates were established by just the "first three lines of page 1 in [petitioner's drug] ledger." *Ibid.* Counsel explained that that "first page alone" showed 15 kilograms of cocaine sales involving one individual and 12 kilograms involving another, and noted that the 34 pages of ledger admitted into evidence themselves reflected only one six-month span of transactions within the more than six-year period that petitioner ran the

criminal enterprise. *Ibid.*; see *id.* at 5961.1-5961.34 (excerpts from ledgers).

The jury instructions on the CCE count observed that the government had to prove beyond a reasonable doubt a continuing "series of three or more offenses committed by [petitioner] in violation of the narcotics laws[,] which make[] it a crime [1] to conspire to distribute narcotics or to possess with intent to distribute narcotics, [2] to distribute narcotics, or [3] to possess with intent to distribute narcotics or an attempt to do so." C.A. App. 5679-5680. And the district court explicitly instructed the jury that:

> A continuing series of violations is three or more violations of the federal narcotics laws committed over a definitive period of time. These three or more violations do not have to be convictions or separate counts in the indictment. They may even be acts not mentioned in the indictment at all. * * * [Y]ou must . . . unanimously agree on which three acts constitute the continuing series of violations.

Pet. App. 5a; C.A. App. 5680-5681.

The jury found petitioner guilty on all counts. Pet. App. 6a. The court subsequently dismissed the drug-conspiracy count (Count 2) as a lesser-included offense of engaging in a CCE. *Id.* at 5a.

At sentencing, after petitioner informed the district court that he "maintain[ed] [his] innocence," the court addressed petitioner directly, stating that "I've had a lot of cases, and I don't think I've seen such overwhelming evidence of guilt." C.A. App. 5917. The court stated that it was sentencing petitioner to life imprisonment for his CCE conviction, adding that "I can't imagine anybody [who] more deserves it than you based upon

your life's conduct, previous drug distribution and your continuous and extensive drug distribution." *Id.* at 5918.

3. The court of appeals affirmed. Pet. App. 1a-49a. The court noted that "[i]t is undisputed that the violations composing a continuing series are elements of the CCE offense and must appear in the indictment" and that "[t]he question is the level of detail with which the violations must appear." *Id.* at 9a. And relying on its prior decision in *Flaharty*, the court found that the CCE charge here was sufficient because it "'closely tracked the language of [Section] 848(c),' it 'alleged that the continuing series of felonies were violations of [Sections] 841(a)(1) and 846,' and it stated the time frame and location at which the enterprise was conducted." *Id.* at 10a (quoting *Flaharty*, 295 F.3d at 198).

Judge Bianco concurred but wrote separately to express his disagreement with the majority's resolution of a different issue. Pet. App. 31a-40a. Judge Jacobs dissented. *Id.* at 41a-49a. Judge Jacobs acknowledged that trial "evidence showed that [petitioner] trafficked a whole lot of narcotics over thousands of individual transactions." *Id.* at 41a. But he concluded that Count 1 of the indictment failed to sufficiently allege a CCE offense because, under *Richardson*, "[e]ach 'predicate offense' making up the continuing series [of drug-offense violations] is itself an element of the broader CCE charge" and the indictment here "failed to describe any offense comprising th[at] continuing series." *Ibid.* Judge Jacobs emphasized that an indictment "need not designate the three predicate[offenses]" but concluded that "it must include (somewhere) the offenses (of whatever number) from which the petit jury can unanimously select those that support a conviction." *Id.* at 43a.

4. The court of appeals denied rehearing en banc over the dissent of five judges. Pet. App. 56a-64a.

ARGUMENT

Petitioner contends (Pet. 14-19) that his indictment did not sufficiently allege three predicate violations needed to establish a CCE. The government agrees that the indictment in this case did not sufficiently allege the predicate violations reflecting a continuing "series of violations" of federal drug laws necessary to establish a CCE offense. 21 U.S.C. 848(c)(2). Nevertheless, this Court's plenary review is unwarranted. Petitioner fails to identify any disagreement in the courts of appeals that warrants further review, and the question presented has limited practical significance. The government infrequently brings CCE prosecutions and the bare-bones indictment in this case is an outlier that does not reflect the government's standard charging practices for such offenses. Moreover, petitioner would not be entitled to relief because the indictment error here is harmless beyond a reasonable doubt and, in any event, would not affect petitioner's life sentence. The Court should therefore deny certiorari; or at most, grant certiorari simply to vacate and remand for further proceedings, rather than ordering plenary review.

1. The Fifth Amendment provides in pertinent part that "[n]o 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." U.S. Const. Amend. V. This Court has identified "two constitutional requirements for an indictment: 'first, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction

in bar of future prosecutions for the same offense.'" *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)) (brackets in original).

"It is generally sufficient that an indictment set forth the offense in the words of the statute itself" because those words are typically sufficient to "set forth all the elements necessary to constitute the [charged] offence." *Hamling*, 418 U.S. at 117; see *Resendiz-Ponce*, 549 U.S. at 109 ("[A]n indictment parroting the language of a federal criminal statute is often sufficient."). The statutory text is what defines the offense, and "the time-and-place information" specified in an indictment typically provides "adequate notice" of which act or acts are the basis for the charge. *Resendiz-Ponce*, 549 U.S. at 108.

Here, however, the statutory definition of the CCE offense cross-references the commission of predicate drug offenses, which the Court has found to themselves be "separate element[s]" that the jury must unanimously find. *Richardson* v. *United States*, 526 U.S. 813, 819 (1999); see *id.* at 817-820. And although *Richardson* concerned the requirements for a finding of guilt by a petit jury, the indictment requirement has tracked the jury-trial requirement in recent decisions of this Court involving the charging and proof requirements under the Fifth and Sixth Amendments. See, *e.g.*, *United States* v. *Cotton*, 535 U.S. 625, 627 (2002). It follows that an indictment charging a CCE offense cannot merely mirror Section 848's reference to a "series of violations" but must go beyond the statutory text to identify the predicate drug-law violations alleged to be a part of that series.

The indictment in this case (C.A. App. 31-48) alleges in Count 1 that, from about 2008 to about July 2014, petitioner "did violate * * * Sections 841(a)(1) and 846, which violations were part of a continuing series of violations of said statutes." Pet. App. 66a. But that allegation—which alludes to an unspecified number of violations of Sections 841(a)(1) and 846 over a six-or-more-year period—does not itself sufficiently allege any particular predicate violations of those provisions. Count 2 does identify one such predicate: a particular drug conspiracy, in violation of Section 846. C.A. App. 33. But that single alleged predicate violation is insufficient to establish the "series of violations" of drug law required by Section 848. And unlike a typical CCE indictment, the indictment here does not identify other predicate violations by including additional counts alleging that petitioner violated federal drug laws, by alleging overt acts that would constitute such violations, or by describing more fully in Count 1 particularized violations serving as those predicates. The indictment in this case thus failed to allege sufficiently the CCE offense.

2. Notwithstanding that error, this Court's plenary review in this case is unwarranted. Petitioner principally contends (Pet. 11-14) that review is necessary to resolve a conflict between the decision below and the Third Circuit's decision in *United States* v. *Bansal*, 663 F.3d 634 (2011), cert. denied, 566 U.S. 1028, and 568 U.S. 865 (2012). But any disagreement is shallow, nascent, and of limited practical significance.

The decision below relied (Pet. App. 9a-13a) on the circuit's prior decision in *United States* v. *Flaharty*, 295 F.3d 182 (2d. Cir.), cert. denied, 537 U.S. 936 (2002), and 538 U.S. 915 (2003), which upheld an indictment that in-

cluded a CCE charge, along with charges of two potential conspiracy offenses that could serve as predicates but were not specifically identified as such, see *id.* at 187-188. And it distinguished (Pet. App. 12a-13a) its prior decision in *United States* v. *Joyner*, 313 F.3d 40 (2d Cir. 2002), cert. denied, 540 U.S. 1127, and 540 U.S. 1201 (2004), where the court found error in (but upheld on plain-error review) an indictment that included a CCE charge along with only one charge of a potential predicate offense, see *id.* at 47-48.

Like Judge Jacobs, who dissented from the decision in this case (see Pet. App. 45a-47a), the Third Circuit's decision in *Bansal* understood *Flaharty* to have addressed only the question whether a CCE count itself must specify which of multiple alleged drug violations "within the indictment" are "the specific three [violations]" in the requisite series of violations. *Bansal*, 663 F.3d at 647. As Judge Jacobs explained, the indictment in *Flaharty* could be read to "allege[] a felony drug violation in the CCE count" itself, "and then two other violations" in "other counts" to "allege[] a 'series' of three." Pet. App. 46a n.4. And *Bansal*, "[u]sing the *Flaharty* court's reasoning to guide [its] analysis," found the indictment before it to be constitutionally sufficient. *Bansal*, 663 F.3d at 647, 649; see *id.* at 648-649 & n.4 (identifying numerous drug-law violations alleged in the indictment in other counts).

Bansal's holding that the indictment in that case was "sufficient" and "passe[d] muster under * * * *Richardson*," 663 F.3d at 647, 649, does not directly resolve what would be *in*sufficient to charge a CCE offense. And to the extent that the decision below has now read *Flaharty* differently from how the Third Circuit read it in *Bansal*, such recent non-outcome-determinative differ-

ences in the interpretation of a two-decade-old circuit case do not warrant this Court's review. Instead, it would be the Second Circuit's task to reconcile *Flaharty* and *Joyner*, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), as it might do if it perceived an actual conflict. Cf. Pet. App. 13a n.3 (declining to commit to the view that a "split" exists).

In any event, the issue lacks prospective importance. The government litigates CCE offenses only infrequently. Data from the U.S. Sentencing Commission identify only 59 federal criminal sentences in the nine-year period from FY15 to FY23—less than seven per year—that implicated the advisory Sentencing Guideline for a CCE offense (Sentencing Guideline § 2D1.5). See United States Sentencing Commission, *Interactive Data Analyzer* (last visited May 12, 2024) (data available at Home tab using Section 2D1.5 as the "Primary Guideline" data filter), https://ida.ussc.gov/analytics/saw.dll?Dashboard. And this particular issue may not—and should not—arise again.

The indictment in this case was an outlier that does not reflect the government's standard practice when it charges a CCE offense. The indictments in *Flaherty* and *Joyner* predated *Richardson*, which the Court decided in June 1999.[1] Since *Richardson*, the Department of Justice has advised federal prosecutors to include three or more specific predicate acts when they charge

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[1] See *Flaharty*, 295 F.3d at 182 (stating that the case was "tried in the spring of 1999"); Superseding Indictment, *United States* v. *Johnson* (*Flaharty*), No. 1:98-cr-420 (E.D.N.Y. Mar. 8, 1999) (available with restrictions as Document 73 on PACER); see also *Joyner*, 201 F.3d at 61 (argument on appeal was in February 1999); Second Superseding Indictment, *United States* v. *Joyner*, No. 95-cr-232, 1996 WL 33431245 (N.D.N.Y. Jan. 11, 1996).

a defendant with a violation of Section 848. Neither published case law, internal examination, nor anything in the petition suggests a widespread, or even a recurrent, practice of charging CCE offenses in the different manner reflected by the indictment in this case. When and if the issue were to arise again, its resolution would be informed by the position expressed in this brief, and the Court would have additional opportunity to consider plenary review. The most that might be appropriate here, however, would be to grant certiorari, vacate the judgment of the court of appeals, and remand for further proceedings in light of the government's confession of error in this aberrant circumstance.

3. The Court need not do even that, however, because the indictment error here is harmless beyond a reasonable doubt and, in any event, would not affect petitioner's life sentence.

The evidence against petitioner—which included petitioner's own drug ledgers documenting his numerous drug transactions—was overwhelming. See pp. 7-8, *supra*. Indeed, at sentencing, the district judge observed that "I've had a lot of cases, and I don't think I've seen such overwhelming evidence of guilt." C.A. App. 5917.

Even Judge Jacobs acknowledged in his dissent that "[t]he evidence showed that [petitioner] trafficked a whole lot of narcotics over thousands of individual transactions." Pet. App. 41a. And the jury was instructed that it could find petitioner guilty of the CCE offense only if it found violations of federal-drug laws comprising a series of violations by unanimously agreeing on three particular violations in the series. See p. 8, *supra*.

There is thus no question that the jury unanimously found beyond a reasonable doubt that petitioner en-

gaged in a series of (at least three) violations of federal drug laws. That verdict based on overwhelming evidence of petitioner's guilt rendered "any error in the grand jury proceeding connected with the charging decision * * * harmless beyond a reasonable doubt." *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986); see Br. in Opp. at 7-10, *Leonard* v. *United States*, 142 S. Ct. 2709 (2022) (No. 21-1082).[2]

Petitioner here was undoubtedly aware of the basis for the CCE charge through the discovery process, see pp. 5-6, *supra*, and no reasonable jury would have acquitted petitioner of that charge on these facts. As the district court recounted, the "overwhelming" evidence of petitioner's guilt encompassed testimony from dozens of witnesses, including ten "co-conspirators" as well as "confidential informants"; wiretap evidence from "intercepted phone conversations and text messages"; "surveillance" evidence including from "pole cameras at various locations which showed delivery of either cash and/or drug proceeds"; and evidence from warrant-based seizures, "all [of which] point to [petitioner] as the person who organized a very sophisticated drug operation between the West Coast and Rochester and brought hundreds of kilos of cocaine in th[e] community." C.A. App. 5917, 5921; see *id.* at 5896 (discussing evidence in denying petitioner's Rule 29 motion for acquittal).

As the district court observed, "the smoking gun" evidence was "the drug ledger which was found in [petitioner's] home" and which detailed "very specifically amounts of cocaine, the cost[] of the cocaine, the individuals who the cocaine was sold to, [and] amounts owed by those individuals over a long period of time," which

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[2] The government has served petitioner with a copy of its brief in *Leonard*.

was "a clear demonstration of a long-term conspiracy conducted by [petitioner]." C.A. App. 5921. The district court also noted that petitioner's own testimony at trial was "a bizarre story"—"like listening to a fantasy"—admonishing petitioner at sentencing that "[i]f you thought the jury bought that for a minute, you're deluded" because the jury "obviously" did not "believe a word you said." *Id.* at 5918-5919.

At all events, even if the indictment error were not harmless and petitioner's CCE conviction were vacated, petitioner's life sentence would be unaffected. If petitioner's CCE conviction were vacated, the government would be entitled to reinstate the jury's finding of guilt on petitioner's narcotics-conspiracy count (Count 2), which the district court dismissed as a lesser-included offense of engaging in a CCE. See *Rutledge* v. *United States*, 517 U.S. 292, 306 (1996) (noting that courts of appeals appear to "uniformly" permit "the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense"); see also Pet. App. 5a. Without the CCE count, petitioner's advisory guidelines range would still be life imprisonment. See Presentence Investigation Report ¶¶ 97-115, 126 (offense level without CCE count is 43 resulting in a "guideline imprisonment range [of] life"). And the district court made clear at sentencing that petitioner's sentence of life imprisonment was "well deserved," stating that "I can't imagine anybody [who] more deserves it than you based upon your life's conduct, previous drug distribution and your continuous and extensive drug distribution." C.A. App. 5918-5919.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Principal Deputy Assistant Attorney General
NATASHA K. HARNWELL-DAVIS
Attorney

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