No. 23-959

In the Supreme Court of the United States

COLIN MONTAGUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY

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PETITIONER'S REPLY

The government's brief in opposition acknowledges that petitioner Colin Montague's conviction under 21 U.S.C. § 848—which alone supported his mandatory life sentence—is constitutionally deficient under the Grand Jury Clause. But while the government abandons any defense of the Second Circuit's reasoning, it does not concede that the Second Circuit's judgment is incorrect. It thus (stunningly) urges the Court to deny the petition, which would leave the Second Circuit's plainly errant interpretation of the Grand Jury Clause undisturbed. As a fallback, it suggests that the Court should grant the petition, vacate the judgment, and remand (GVR) for the Second Circuit to affirm on alternative grounds.

Neither of those options is appropriate under the circumstances. If left to stand, the Second Circuit's decision will continue working unconstitutional mischief, both in the CCE context and others like it. And because a majority of the three-judge panel below held that its decision was dictated by circuit precedent and the full Second Circuit already has declined to reconsider the issue *en banc*, a GVR would be pointless. The Court should either summarily reverse or grant plenary review.

A. The parties agree that the Second Circuit's decision is wrong

Both sides agree that the Second Circuit's decision is wrong. In a stark reversal of position, the government now concedes (at 12) that "[t]he indictment in this case * * * failed to allege sufficiently the CCE offense."

As the government explains (at 11), "the indictment requirement" under the Grand Jury Clause "track[s] the jury-trial requirement * * * under the Fifth and Sixth Amendments." After the Court's decision in *Richardson*

v. *United States*, 526 U.S. 813 (1999), each predicate offense underlying a CCE charge is a "separate element" that must be found by the petit jury for it to convict. *Id.* at 818. Accordingly, probable cause as to each predicate offense must be found by the grand jury for it to indict. See U.S. Br. 10-11.

The government thus embraces the premise of the petition: "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," including sufficient detail concerning each alleged predicate offense to fairly notify the defendant of the identities of the offenses and the facts underlying them. U.S. Br. 10-11. Because the indictment in this case omits any such details, it "failed to allege sufficiently the CCE offense." U.S. Br. 12.

The Second Circuit's contrary holding below misconstrues the Grand Jury Clause and this Court's cases interpreting it. As explained by the four amicus briefs filed in support of the petition, the result is as much an offense to the American legal tradition as it is to the fairness of the proceedings below. The Second Circuit's decision therefore must be reversed.

B. The Court should either summarily reverse or grant plenary review

Although the government agrees that the decision below is indefensible, it urges the Court to deny the petition or at least afford the Second Circuit an opportunity to reconsider its decision. The Court should decline that suggestion and reverse either summarily or following a grant of plenary review.

1.a. The Court certainly should not deny the petition. The Second Circuit's opinion is an invitation for pro-

secutors to include constitutionally insufficient CCE charges in indictments, which they will be encouraged to do because of the bargaining leverage it provides. As Clause 40's *amicus* brief explains (at 14), the prospect that "prosecutors may deliberately overcharge to obtain a desirable plea agreement" is very real. In this context especially, the incentives are too strong to ignore: A CCE conviction often carries a mandatory life sentence, as it did for Montague. The opinion below allows prosecutors to include such charges without developing the facts of the required predicate offenses.

And because plea agreements typically contain appeal waivers, the sufficiency of most CCE indictments will never be subjected to judicial scrutiny. That is why the government's assurance (at 15) that future judicial decisions will be informed by "the position expressed in this brief" is no comfort at all.

Moreover, if the Court lets the Second Circuit's decision stand, there is a troubling risk that it will erode the protections of the Grand Jury Clause more generally. As the *amicus* brief of the New York State Association of Criminal Defense Lawyers explains (at 21-23), several other federal statutes incorporate predicate-offense elements in a manner similar to 21 U.S.C. § 848. There is no reason to doubt that the decision in this case will be leveraged in those other contexts as well.

b. The government says (at 15) that "charging CCE offenses" in the manner authorized by the Second Circuit's opinion is not a "widespread" practice. For support, it notes (at 14) that approximately seven offenders are sentenced under the CCE statute each year. Of course, that is no small number when mandatory life sentences are at stake. But either way, annual *sentencings* on CCE

convictions reflect only a fraction of annual *indictments* on CCE counts. The Syracuse University Transactional Records Access Clearinghouse Reports, which compile data from PACER and other public sources, show that over the past two decades, roughly 40 CCE prosecutions have commenced each year—more than six times the government's sentencing statistic. See Pet. 20-21 (citing *Prosecutions for 2023*, Transactional Records Access Clearinghouse Reports (TRAC), Syracuse University, perma.cc/U2UW-F6LP). In 2023, for example, there were 48 such prosecutions pending, half of them in the Second Circuit. *Ibid.*

The data thus suggest that, in most CCE cases, defendants accept plea deals with lengthy sentences in exchange for the prosecutor's agreement to drop the CCE charge and its mandatory life sentence—precisely the scenario that the Clause 40 brief predicts. When the CCE charge lacks specificity, at least two constitutional errors will be compounded atop one another, because an insufficient CCE indictment denies the defendant knowledge of "what the [government] has to prove," meaning that the plea will not have been an informed one. *Henderson* v. *Morgan*, 426 U.S. 637, 648 n.1 (1976) (White, J., concurring). We made these points in the petition (at 20), and the government does not expressly dispute them.

The practice exemplified in this case, already more common than the government lets on, is thus certain to proliferate if the Court does not reverse. Because it often will evade review, the time for intervention is now.

2. The government asserts (at 13) that the decision below is unworthy of the Court's attention because it does not conflict with *United States* v. *Bansal*, 663 F.3d 634 (2011). That is a strange contention for a party that has

just conceded that the decision below is indefensible. Given the government's confession of error, the notion that another circuit might align with the Second Circuit would be a reason to grant the petition, not the other way around. Regardless, the government is mistaken.

In the government's view, *Bansal* held only that the indictment there "passed muster under *Richardson*," and it did "not directly resolve what would be *in*sufficient to charge a CCE offense." U.S. Br. 13 (alterations incorporated). The government thus implies (*ibid.*) that the Third Circuit has not actually rejected the Second Circuit's reasoning and may yet agree with its answer to the question presented.

That is incorrect. The Third Circuit expressly settled the test for the sufficiency of CCE indictments before applying it to the facts of the case: A CCE indictment, the Third Circuit opined, "must include the facts and circumstances comprising at least three felonies." 663 F.3d at 647-648. That is the exact standard that the majority below rejected. See Pet. App. 13a n.3. Given the clarity of this conflict, the five judges dissenting from denial of rehearing concluded that "[t]here can be no doubt of the circuit split" and observed that this Court's "[i]ntervention is needed." Pet. App. 62a-64a. Quite so.

3. The government next contends (at 15-18) that the Court's review is unwarranted because there are alternative grounds for affirmance. At the threshold, that is no basis for denying the petition. As the government admits (at 9), the Second Circuit's decision upholding the CCE charge in this case rests entirely on its conclusion that the indictment complied with the Grand Jury Clause. This case thus presents a clean opportunity to review that holding. The question whether the government might

prevail for other reasons—ones not previously addressed by any lower court—is, at most, an issue for remand. See, *e.g.*, *Kisor* v. *Wilkie*, 588 U.S. 558, 563 (2019) (reserving subsequent issues for the lower courts to address on remand in the first instance).

But even on their own terms, the government's alternative bases for affirmance are wrong. First, the government says (at 15-16) that any constitutional defect in the indictment was harmless because "the jury unanimously found beyond a reasonable doubt that petitioner engaged in a series of (at least three) violations of federal drug laws." That ignores the crux of the case: Because the indictment here included neither standalone controlled substances charges nor any details concerning uncharged predicate offenses, the jury were not instructed on the elements of any other federal drug laws. See Pet. 7-8; U.S. Br. 8. The jury thus logically could not have concluded that Montague violated any such laws, let alone that he did so on three separate occasions.

Nor, in any event, is it plausible to suppose that a properly instructed jury *could* have found that Montague committed three predicate drug crimes. The witness testimony and wiretap evidence cited in the government's brief (at 16) were introduced to prove crimes committed by Montague's alleged co-conspirators, and otherwise to establish the money laundering offenses. The only direct evidence introduced with respect to the CCE charge was the ledger, which alone was insufficient to establish the elements of any other count besides the Section 846 drug conspiracy. Indeed, it was a premise of the Section 846 charge that Montague had not committed any drug crimes himself. Were it otherwise, the prosecution assuredly would have sought to indict Montague on

such charges, which it did not do. Nor did the New York state prosecutors, who sought but failed to obtain an indictment two years prior. Pet. App. 3a.

Second, the government asserts (at 17) that Montague's "life sentence would be unaffected" by a vacatur of the CCE conviction because his "advisory guidelines range would still be life imprisonment." That argument does not adequately account for the fact that Montague's life sentence was imposed by statutory mandate pursuant to 21 U.S.C. § 848(b). The Sentencing Guidelines are "merely advisory." *United States* v. *Booker*, 543 U.S. 220, 233 (2005). And as the Second Circuit has said, "a remand to afford the [district] judge an opportunity to determine whether the original sentence would have been nontrivially different" under an advisory sentencing regime is, in this circumstance, "necessary to determine whether the error is harmless." *United States* v. *Crosby*, 397 F.3d 103, 119 (2d Cir. 2005).

In short, the government's harmless-error arguments are dubious at best. In all events, they are questions that will arise only on remand, after this Court reverses on the merits of the question presented.

4. The government twice suggests, only in passing, that the Court should enter a GVR order "rather than ordering plenary review." U.S. Br. 10; accord U.S. Br. 15. The Court should not oblige. Given the prior course of proceedings in the Second Circuit, there is no reasonable basis to presume that a GVR order, entered without direction from this Court on the merits, would produce any different an outcome.

In seeking a remand without a reversal on the merits, the government effectively urges the Court to "assume that a court of appeals * * * adopted a legal position only

because the government supported it." *Stutson* v. *United States*, 516 U.S. 163, 182 (1996) (Scalia, J., dissenting). But that assumption makes no sense in this case. The government's newly revised position would not be a new argument for the Second Circuit—it is the same position that Montague unsuccessfully advanced below and that was adopted by Judge Jacobs in his panel dissent and by five of his colleagues in their dissent from denial of rehearing. The Second Circuit rejected that position, not because it deferred to the government, but because it viewed the position as foreclosed by *Flaharty*. And a majority of the Second Circuit already has declined to convene *en banc* to reconsider *Flaharty*.

Against that backdrop, the government's suggestion (at 14) that the Court should stay silent on the merits and leave it to the Second Circuit to "reconcile" its admittedly wrong precedent with other cases is a bewildering one. There have been no "intervening developments" in this Court's precedents that "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). And especially in light of the Second Circuit's well-known institutional aversion to *en banc* rehearings (it holds them only once every few years *) there is no basis to presume that the full Second Circuit will all of a sudden be willing to rehear this case simply because the government has changed its mind on its original argument and now wishes to raise alternative grounds for affirmance instead.

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* See Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review In the Second Circuit*, New York Law Journal (Aug. 24, 2016).

A GVR thus would not be appropriate in these circumstances. Given the confession of error, summary reversal may be warranted. But if there is any doubt about the requirements of the Grand Jury Clause or the nature of the Second Circuit's error, the Court should grant plenary review.

CONCLUSION

In light of the government's concession that the Second Circuit's decision in this case is wrong, the Court may wish to reverse summarily. If it does not, it should grant the petition and set the case for briefing and argument on the merits.

Respectfully submitted.

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