No. 24-3631 (9th Cir.)

No. 24-6687 (Supreme Court)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING

JASON JAYAVARMAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JASON JAYAVARMAN
(Your Name)
FEDERAL CORRECTIONAL INSTITUTION
TERMINAL ISLAND
(Address)
1299 South Seaside Avenue
Terminal Island, California 90731
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Is indictment duplicitous when it charges two or more offenses in a single count?
2. Does Federal Rule of Criminal Procedure 8(a) prohibit the charging of multiple offenses in one count?
3. Does district court violate Rule 8(a) of the Federal Rules of Criminal Procedure when it knowingly divides Count One of the Indictment into two separate sub-counts or charges?
4. Do the words **"and"** and **"or"** have different meanings (especially when they are tucked into different clauses of federal statute or indictment)?
5. Is trial counsel ineffective when he fails to object to the duplicitous indictment and to the jury charge allowing conviction on sub-counts?
6. Is trial counsel ineffective when he fails to communicate a government's formal plea offer prior to the offer's expiration?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix on file to the petition and is

[x] reported at 871 F.3d 1050 (9th Cir. 2017); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix on file to the petition and is

[x] reported at 2014 U.S. Dist. LEXIS 167421 (Alaska); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 30, 2024.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 6, 2024, and a copy of the order denying rehearing appears at Appendix on file.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Jason Jayavarman ("Jayavarman") is a federal prisoner proceeding pro se. Subsequent to his trial and conviction, Jayavarman filed a timely Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. Section 2255, in which he raised two claims of ineffective assistance of counsel. (Dkt 317). First, Jayavarman alleged that trial counsel was ineffective for failing to communicate a formal plea offer prior to the offer's expiration. Id. at 8. Second, he argued that trial counsel was ineffective for failing to object to the duplicitous superseding indictment and for failing to object to the jury charge allowing conviction on sub-counts of the indictment. Id. at 12.

I. TRIAL COUNSEL'S INEFFECTIVENESS

Claims of ineffective assistance of counsel are governed by the familiar two-prong test set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) and Missouri v. Frye, 566 U.S. 134, 145 (2012). Here, Trial counsel's performance fell below the standard guaranteed by the Sixth Amendment when he failed to communicate and advise Jayavarman of the formal plea offer to Count 6 of the Indictment. Thus, Jayavarman met the first prong of the Strickland test with regard to this claim. However, Jayavarman must also demonstrate prejudice.

Jayavarman submits that had he had effective assistance of counsel, he would have accepted the government's formal plea offer, which would have carried no mandatory minimum prison sentence. It is evident that Jayavarman received ineffective assistance of counsel when his trial counsel did not communicate the government's formal plea offer to him prior to the offer's expiration. Jayavarman suffered prejudice as a result. The proper remedy

under these circumstances would be to vacate Jayavarman's conviction and sentence and for the government to re-offer its formal plea agreement.

II. INDICTMENT DUPLICITY

Inclusion of two or more offenses in a single count is called "duplicity" and is prohibited by Rule 8(a) of the Federal Rules of Criminal Procedure. Upon objection, the government must elect one offense on which to proceed. Should it refuse to elect, the remedy is dismissal. United States v. Bradford, 344 A.2d 208, 210 (DC 1975); Murray v. United States, 358 A.2d 314, 317 (DC 1976).

In this case, each count of the Superseding Indictment contained two sub-counts, and each sub-count charged separate and distinct crime. Count One charged Jayavarman as follows:

> Between on or about April 7, 2010 and August 14, 2013, in the District of Alaska and elsewhere, the Defendant, JASON JAYAVARMAN, did, and did attempt to, employ, use, persuade, induce, entice, and coerce a minor child to engage in any sexually explicit conduct outside of the United States for the purpose of producing a visual depiction of such conduct and thereafter transported such visual depiction to the United States by any means, including using any means of facility of interstate or foreign commerce.

All of which is in violation of Title 18 U.S.C. §§2251(c) and (e). (Dkt 75) Emphasis added.

Given the above, the Superseding Indictment was duplicitous because it charged both the substantive and attempted crimes in one count.

Duplicitous charging documents threaten the defendant's right to notice of the charges, freedom from double jeopardy, and a unanimous jury verdict. See United States v. Bradford, 344 A.2d 208, 210 (DC 1975). Id. at 211-12.

> [T]he deliberations would not only be confused by a duplicitous count but a verdict of guilty would be improper, since a unanimous finding of guilt is required by Rule 31(a) of the Federal Rules of Criminal Procedure. A general verdict of guilty .. . would not reveal whether the defendant was unanimously found guilty of one crime or innocent of the others or unanimously found guilty of all. Id. at 212.

The Bradford indictment charged both voluntary and involuntary manslaughter in one count. Because these are separate crimes, the Court affirmed an order dismissing the indictment. Id. at 218.

The right to a unanimous verdict does, however, require that the jurors reach a "consensus as to the defendant's course of action," agreeing on "just what a defendant did as a preliminary step to determining whether the defendant is guilty of the crime charged." United States v. Gibson, 553 F.2d 453, 457-58 (5th Cir. 1977); see also Ruth v. United States, 438 A.2d 1256, 1262 (DC 1981) (reference to two robberies as predicate of single felony murder count was not duplicitous because language required unanimous finding of both robberies, and separate convictions of both robberies demonstrated that finding).

In this case, the district court's instructions to the jury did not cure the duplicity, but rather improperly broadened the Indictment. The Preliminary Closing Jury Instruction No. 11 stated as follows:

> A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count. In this case, there are separate theories for each count. The Verdict Form gives you instructions on how to consider these theories.

(Dkt 128) at 12. The verdict form itself contained the instructions under Part A:

> If you find the defendant not guilty on Part A of Count One, continue to Part B of Count One. If you find the defendant guilty on Part A of Count, continue to Verdict: Count Two.

(Dkt 130).

Here, had trial counsel properly objected to the duplicity contained in the Superseding Indictment, the government would have been forced to elect one offense on which to proceed to trial, rather than both being submitted to the jury.

Based on the language of the Superseding Indictment, Jayavarman could only be convicted of Count One if the jury found he "did, and did attempt to," violate 18 U.S.C. §§2251(c) and (e). Because the Superseding Indictment contained the joinder "**and**" rather than "or," each would have had to be proven in order to convict on Count One. However, the jury did not return a unanimous finding of guilt on the substantive act of Count 1A. Therefore, Jayavarman should not have been convicted of Count One per the language of the Indictment.

Counsel's failure to object on this ground constitutes ineffective assistance counsel which plainly prejudiced Jayavarman as a result. As such, Jayavarman is entitled to §2255 relief.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT MR. JAYAVARMAN'S PETITION FOR WRIT OF CERTIORARI, RESOLVE A CONFLICT AND DIFFERENCES AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHETHER A UNITED STATES DISTRICT COURT SHOULD RULE ON CLAIMS FOR RELIEF RAISED IN A PETITION BEFORE ENTERING A FINAL JUDGMENT, AND REMAND THE CASE FOR FURTHER PROCEEDINGS OR REVERSE THE NINTH CIRCUIT FOR NOT FOLLOWING LEGAL STANDARDS OR CONTROLLING PRECEDENTS.

Supreme Court Rule 10.

CONSIDERATIONS GOVERNING REVIEW
ON WRIT OF CERTIORARI

A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reason that will be considered:

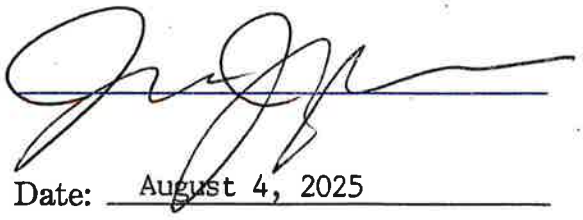
(a) a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. ...Id.

Jayavarman's petition for writ of certiorari should be granted for the following reasons: (1) the district court in this case denied Jayavarman's timely habeas motion without resolving the claim that the court made a mistake in applying the federal statute of limitations. ... Because the court failed to rule on the claim of constitutional error, it never issued a final judgment on Jayavarman's §2255 motion; (2) the Superseding Indictment charged two distinct crimes in one count, which was divided into two separate charges. The charges were joined by the joinder "and," and the language of the Indictment required a unanimous finding of guilt on both charges in Count One, of which separate convictions would have demonstrated that finding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: August 4, 2025