No. _____

In the
Supreme Court of the United States

MOHAMED AHMED HASSAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Sixth Amendment's guarantee of a fair trial requires that a trier of fact's verdict in a criminal case be based upon evidence introduced or developed at trial. Can a trier of fact consider a non-identified and non-testifying defendant's in-court presence or demeanor as evidence of guilt?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Mohamed Ahmed Hassan and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Hassan*, No. 23-CR-208-CAB, U.S. District Court for the Southern District of California, Judgment issued January 12, 2024.
- *United States v. Hassan*, No. 22-40132, U.S. Court of Appeals for the Ninth Circuit, Opinion issued on July 22, 2025.

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INTRODUCTION

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI (emphasis added). In *Turner v. Louisiana*, 379 U.S. 466, 472 (1965), this Court recognized that the requirement that a trier of fact's verdict be based on "evidence developed at the trial" is fundamentally intertwined with the constitutional concept of a trial. Lower courts, including the Fourth, Fifth, Eleventh, and D.C. Circuits, have reaffirmed this principle by holding that a defendant's right to a fair trial is violated when a trier of fact relies on a non-identified and non-testifying defendant's courtroom demeanor and presence as evidence of guilt.

Yet, in a published opinion below, the Ninth Circuit creates a circuit split by permitting triers of fact to consider in their deliberations a non-identified and non-testifying defendant's courtroom demeanor and presence, even when there is no support in the record. This case presents an excellent opportunity to resolve the fundamental split, because Petitioner fully preserved the Sixth Amendment claim and the split makes a prejudicial and dispositive difference in his case. This Court should therefore grant review.

OPINION BELOW

A Ninth Circuit panel affirmed Petitioner's convictions, which stemmed from a bench trial where no witness made any reference to him during trial, in a published opinion. Petitioner subsequently filed a petition for rehearing and rehearing en banc, which was denied. *United States v. Hassan*, No. 23-463, Docket No. 45.

JURISDICTION

The Ninth Circuit affirmed Petitioner's conviction on July 22, 2025. Pet. App. A. The court denied Petitioner's petition for rehearing or rehearing en banc on October 30, 2025. Pet. App. B. On January 23, 2026, Justice Kagan extended the time to file this petition until March 27, 2026. *Hassan v. United States*, No. 25A848. The Court has jurisdiction under 28 U.S.C. § 1254(1)(1).

STATUTORY PROVISION INVOLVED

The Sixth Amendment provides in relevant part that all accused shall "enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATEMENT OF THE CASE

I. At trial, the government presented evidence of four bank robberies.

At a two-day bench trial, the government called twelve witnesses and admitted sixty-seven exhibits. Petitioner asserted his right to remain silent and not testify. The following is a summary of the evidence the government presented.

A. A Chase Bank was robbed on January 5, 2022.

In the afternoon of January 5, 2022, a man approached a teller booth at a Chase Bank. After demanding money with a note, the person took $3,400 and walked out of the bank. The teller never identified Petitioner as the individual who robbed the bank that day. The teller also did not reference the person sitting at counsel table in any way.

The government admitted surveillance footage and still photos of the robbery which depicted a man wearing a dark red long-sleeved shirt, a black wide brimmed hat, and mask standing at the teller booth.

The government also introduced surveillance footage of the plaza the Chase bank was located in. The footage showed an individual exit a Toyota, walk towards the Chase bank, and eventually return to the same vehicle. The government called the owner of that Toyota, a rideshare driver, who testified that he provided a roundtrip ride for a customer with the name Mohamed. The government introduced Uber records, in the name of Mohamed Hassan, related to this ride. The driver did not identify Petitioner as the individual who rode in his car on January 5, 2022, or even reference the individual sitting at defense counsel table.

B. A Chase Bank was robbed on January 12, 2022.

On January 12, 2022, a teller working at a Chase Bank interacted with an individual who demanded money. The bank manager, who was at the next station helping another client, walked over and took over the transaction after learning the bank was being robbed. The robber quickly left the bank after receiving $5,000 from the manager. Neither the teller, nor the manager, ever identified Petitioner as the bank robber. They also never referenced the person sitting at defense counsel table.

The surveillance footage and still photos admitted at trial depicted a man wearing a face mask and a white t-shirt.

C. A Chase Bank was robbed on January 18, 2022.

On the afternoon of January 18, 2022, an individual approached a teller at a Chase bank and demanded money. In response, the teller withdrew $2,000 from her station and put it on the counter. The robber took the money and left the bank.

The admitted surveillance footage and photos showed an individual wearing a camouflage jacket and pants, a brimmed cap, and a white surgical mask. The teller provided no physical description of the robber. Like the other witnesses, she also never identified Petitioner at trial or referenced the individual sitting at counsel table.

The government also introduced evidence of the area surrounding the bank. The footage showed a Chevrolet, Cruise LT and an individual dressed in camouflage in the area around the bank. The government called the owner of that car who testified that on January 18, 2022, she worked as a Lyft driver and provided a roundtrip ride for a customer named Mohamed to an address near the bank. The government introduced corresponding Lyft records in the name of Mohamed Hassan. While on the witness stand, the driver never identified Petitioner as the passenger she drove on January 18, 2022. She also never referenced the person sitting at defense counsel table.

D. A Chase Bank was robbed on January 26, 2022.

On January 26, 2022, an individual walked out of a Chase bank after taking $5,000. The teller described the robber as having a slight accent and perhaps being Asian or Spanish given the way he pronounced her name. She did not, however, identify Petitioner as the robber or reference the individual at counsel table.

The admitted surveillance footage and still photos depicted an individual wearing a checkered dress shirt, a checkered fedora style hat, and a light-colored face mask.

E. The government presented cellphone evidence.

The government also called an FBI agent as an expert to speak about historical cellphone location records. Through the agent, the government introduced cellphone records for a cellphone that was registered to an individual named Mohamed Ahmed Hassan.

Based on his review of the records, the agent testified that the cellphone was near three of the four banks around the time of their respective robberies: the Chase bank on January 12; the Chase bank on January 18; and the Chase bank on January 26.

Notably, the government never introduced any evidence that Petitioner ever used that cellphone or that it belonged to him. The government also never introduced any evidence as proof that the person at counsel table was named Mohamed Ahmed Hassan.

F. The trier of fact relied on evidence not admitted at trial.

Without any evidence in the record identifying Petitioner as Mohamed Hassan, the government began its closing arguments by stating: "[t]he defendant in this case who the government argues is Mohamed Hassan sitting at counsel's table to my right is the person who committed these four bank robberies in the month of

January." The government then submitted to the court that the person in the surveillance videos matched the physical description of Petitioner.

Because his physical description was never introduced as evidence, and Petitioner never testified, the defense objected. During its own closing statement, the defense argued that the court could not compare the surveillance footage to Petitioner's physical appearance because it was not presented as evidence.

After hearing closing arguments and taking a recess, the district court found Petitioner guilty of robbing all four Chase banks. The court set out findings pursuant to Federal Rule of Criminal Procedure 23(c). The court found the government had failed to offer any evidence connecting Petitioner to the historical cellphone location records or the ride share records. Because it failed to introduce any evidence that Petitioner's name was in fact Mohamed Hassan or that he was associated with the listed address on the accounts, the court did not rely on any of the cellphone or business records in evidence.

Instead, the court relied solely on a comparison of the surveillance footage with Petitioner's physical appearance at trial to determine guilt. The district court explained:

> I'm going to have to rely solely on my looking at the video. And my conclusion based on the video and what I could see in watching the video and sort of being in the replay booth and not the ref on the field. The tellers couldn't make identifications, but the Court had plenty of time to look at and study those pictures, the defendant is sitting in front of me, and I find the government has met their burden that it was the defendant on each of the four counts.

Petitioner appealed, arguing among other things that the trier of fact improperly relied on extrinsic evidence by comparing Petitioner's physical appearance to the bank surveillance footage and photos admitted into evidence. The Ninth Circuit affirmed Petitioner's conviction. Pet. App. A. at 3.

The panel held that Petitioner's physical appearance was not extrinsic evidence because he was "present during his trial and displayed himself before the district judge acting as the trier of fact." *Id.* at 7. Ignoring cases that have held that a defendant's right to a fair trial is violated when a trier of fact relies on a defendant's courtroom demeanor and presence without any supporting evidence in the record, the Ninth instead focused on cases addressing the demeanor of testifying witnesses. *Id.* at 7–8. Following the panel's decision, Petitioner filed a petition for rehearing en banc, alerting the Ninth Circuit that its published opinion permitting triers of fact to consider the demeanor and presence of a non-testifying defendant created a circuit split. The appellate court nevertheless refused to grant rehearing.

SUMMARY OF THE ARGUMENT

In the published decision below, the Ninth Circuit created a conflict with the Fourth, Fifth, Eleventh, and D.C. Circuits as to whether a trier of fact can consider as evidence of guilt the demeanor and physical appearance of a non-testifying defendant. The precedent from other circuits agree that a non-identified and non-testifying defendant's courtroom demeanor and appearance cannot be relied upon as evidence of guilt by a trier of fact during its deliberations.

Yet, the Ninth Circuit rejects this constitutional principle and holds that simply being present during trial permits a trier of fact to consider a non-testifying defendant's courtroom demeanor and appearance, even when there is no support in the record. This petition should be granted to affirm the Sixth Amendment's guarantee of a fair trial, which requires that a verdict be solely based on evidence developed at trial.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit has created a split with other circuits that unanimously agree that courtroom demeanor and appearance of a non-testifying defendant cannot be relied upon as evidence.

In the opinion below, the Ninth Circuit rejected Petitioner's argument that his physical appearance, which was never admitted into evidence, was extrinsic evidence that the trier of fact impermissibly relied upon. Specifically, the Ninth Circuit reasoned: "[s]uch an overbroad conception of extrinsic evidence would sweep factors like courtroom demeanor, tone of voice, and body language, all of which are routine considerations for the jury." Pet. App. A. at 8. The Ninth Circuit, however, failed to make any distinction between the demeanor and appearance of a testifying defendant with that of a non-testifying defendant. Its failure to do so conflicts with all other circuits that have addressed the issue.

Contrary to the Ninth Circuit, at least the Fourth, Fifth, Eleventh, and D.C. Circuits have consistently held that a defendant's right to a fair trial is violated

when a trier of fact relies on a non-testifying defendant's courtroom demeanor and presence as evidence of guilt.

The Fourth Circuit addressed this issue in *United States v. Carroll*, a bank robbery case. 678 F.2d, 1208, 1209 (4th Cir. 1982). In that case, the prosecutor in closing argument highlighted that at one point during trial, the defendant and defense counsel had received permission to view some exhibits—blowups of the bank surveillance photographs. *Id.* The prosecutor asked the jurors to recall that during the viewing it was the defendant "who was doing most of the pointing" and suggested that it was because "he was in the bank there at the robbery." *Id.* The Fourth Circuit held that the prosecutor's reference to defendant's courtroom behavior was clearly improper. *Id.* Specifically, the Fourth Circuit held that "the defendant had the right to a jury trial at which, if he elected not to testify, the fact of his presence and his non-testimonial behavior in the courtroom could not be taken as evidence of his guilt." *Id.*

Similarly, the D.C. Circuit in *United States v. Wright*, reversed a conviction based, in part, on a prosecutor's reference to the defendant's demeanor at trial. 489 F.2d 1181, 1185 (D.C. Cir. 1973). In that case, the defendant did not take the stand but the prosecutor during closing urged the jury to consider his courtroom demeanor during their deliberations. *Id.* Importantly, *Wright* found the prosecutor's comments improper despite the jury having witnessed the defendant's behavior during trial. *Id.* at 1186. Specifically, the D.C. Circuit reasoned: "[t]hat the jury

witnesses the courtroom behavior in any event does not make it proper for the prosecutor to tell them, with the court's approval, that they may consider it as evidence of guilt." *Id.*

Following the D.C. Circuit's lead, in *United States v. Mendoza*, the Fifth Circuit found a prosecutor's comments about a non-testifying defendant's demeanor at trial improper. 522 F.3d 482 (5th Cir. 2008). There, during closing arguments, the prosecutor urged the jury to look at the defendant and observe his calm demeanor. *Id.* at 490. The Fifth Circuit held that "courtroom demeanor of a non-testifying criminal defendant is an improper subject for comment by a prosecuting attorney." *Id.* at 491. Though it acknowledged that it was inevitable for a jury to observe a defendant at counsel table during trial, and for jurors to form opinions from those observations, a "prosecutor may not elevate these opinions that may arise with 'no help from the court' to the status of evidence which jurors should consider during their deliberations." *Id.* (quoting *Wright*, 489 F.2d at 1186).

Lastly, in *United States v. Pearson*, the Eleventh Circuit held that the prosecutor improperly commented on the defendant's behavior during trial because it violated his right not to be convicted except based on evidence admitted at trial. 746 F.2d 787 (11th Cir. 1984). There, during closing, the prosecutor urged the jury to consider the defendant's "leg going up and down" during trial as a sign of nervousness. *Id.* at 796. The Eleventh Circuit reaffirmed that a defendant's

appearance off the witness stand was not evidence and "that a prosecutor may not seek to obtain a conviction by going beyond the evidence before the jury." *Id.*

Though Petitioner agrees with the Ninth that triers of fact routinely consider demeanor, the above cases which reach back to the 1970's and 1980's demonstrate that the Sixth Amendment's right to a fair trial has long limited that consideration to the demeanor of a testifying defendant—evidence that was developed at trial. The Ninth Circuit's stark divergence from these other circuits must be addressed because the requirement that guilt "be based upon the evidence developed at trial, goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner*, 379 U.S. at 472 (quotations omitted).

II. This case is the right vehicle to resolve this issue.

This case is the proper vehicle to resolve the circuit split for several reasons.

First, the record makes clear that there was no evidence developed during the evidentiary phase of trial establishing or even referencing Petitioner's physical demeanor or appearance. Petitioner invoked his right to remain silent and did not testify. None of the witnesses at trial identified Petitioner during their testimony. None of the witnesses ever even referenced the person sitting at counsel table. The government also never introduced any evidence that Petitioner's name was Mohamed Hassan. In fact, the first and only time the person sitting at counsel table was even referenced was during the government's closing arguments when the prosecutor urged the trier of fact to compare the surveillance footage admitted into

evidence with Petitioner's physical appearance in the courtroom. Because the government failed to develop any evidence about Petitioner's demeanor or physical appearance, defense counsel promptly objected.

Second, there is no doubt that the trier of fact's consideration of extrinsic evidence was prejudicial and dispositive, as Petitioner's physical appearance and presence at trial formed the only basis of his guilty verdict. Because the district court served as the trier of fact in this case, it clearly explained its guilty verdict during its Rule 23(c) colloquy. It unequivocally asserted that its verdict was based *solely* on a comparison of the surveillance footage and photos with Petitioner's in-court appearance. Nothing more.

Lastly, Petitioner properly raised the issue in his appeal to the Ninth Circuit. In fact, in his petition for rehearing on banc, Petitioner alerted the Court that its decision disregarded the well-established rule and constitutional guarantee affirmed by sister circuits that a verdict must be based on evidence developed at trial.

III. This Ninth Circuit is wrong to permit triers of fact to rely on evidence not developed at trial.

The Ninth Circuit justifies abandoning longstanding constitutional guarantees by concluding that triers of fact routinely consider factors such as courtroom demeanor, tone of voice, and body language. Pet. App. A. at 8. Specifically, the Ninth's error comes from its failure to distinguish between the demeanor of testifying witnesses and defendants with the demeanor and presence of

non-testifying defendants. In failing to make this distinction, the Ninth Circuit conflicts with sister circuits which have held that a non-testifying defendant's presence and non-testimonial behavior in the courtroom cannot be taken as evidence of guilt.

Today, in the Ninth Circuit, a defendant's mere presence permits a trier of fact to consider a defendant's off-the-stand demeanor and appearance during its deliberations, regardless of whether it was evidence developed or presented during the evidentiary phase of trial. But, as sister circuits have explained, a defendant's courtroom behavior or presence off the witness stand are not "in any sense legally relevant to the question of his guilt or innocence of the crime charged." *Wright*, 489 F.2d at 1186. There is no denying that a trier of fact will observe a defendant at counsel table during the course of trial and may inevitably even form opinions from these observations. However, these opinions may not be elevated "to the status of evidence which [triers of fact] should consider during their deliberations." *Mendoza*, 522 F.3d at 491.

The Court should grant this petition to bring the Ninth Circuit into conformity with this Court's and sister circuit's precedent interpreting the Sixth Amendment's guarantee of a fair trial.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: March 11, 2026

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