No. 25-7165

IN THE

Supreme Court of the United States

PRICE MONTGOMERY,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF FOR PETITIONER

K. ANTHONY THOMAS
EVAN J. AUSTIN
Counsel of Record
ALISON BRILL
OFFICE OF THE FEDERAL PUBLIC DEFENDER
1002 Broad Street
Newark, New Jersey 07102
(973) 282-8658
Evan_Austin@fd.org

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REPLY BRIEF

In its brief in opposition, the government confesses error by conceding that "[u]nder *Alleyne*, [Mr.] Montgomery's indictment should have alleged, and the jury instructions should have defined, the elements of first-degree murder for purposes of triggering the mandatory life sentence authorized by 18 U.S.C. 1111(b)." BIO at 16–17. The government has admitted, in other words, that Mr. Montgomery received a mandatory sentence of life imprisonment—the second most serious sentence a person can receive in the criminal justice system—despite never being charged with an offense that carried that penalty. A concession of that magnitude warrants relief. The Court should grant Mr. Montgomery's petition, vacate the judgment below, and remand for further proceedings, consistent with its ordinary practice for such a serious confession of error. *See, e.g., Grayson v. United States*, No. 25-851 (June 22, 2026); *Montague v. United States*, No. 23-959 (June 17, 2024); *Rojas v. United States*, No. 20-1594 (Nov. 1, 2021); *White v. United States*, No. 17-270 (Jan. 8, 2018). In the alternative, the Court should summarily reverse the decision below.

Despite its confession of error, the government argues this Court should deny Mr. Montgomery relief and leave his illegal sentence intact because the Third Circuit found the error harmless. The Court should reject this argument for several reasons.

First, the Third Circuit held no such thing. The court did not understand the nature of the *Alleyne* error here, because it concluded that Mr. Montgomery's charge of killing a federal witness in violation of 18 U.S.C. § 1512(a)(1)(C) necessarily alleged murder—a plainly erroneous holding the government does not even try to defend.

Had the Third Circuit understood that Mr. Montgomery was neither charged with nor convicted of first-degree murder in the relevant count, as the government now admits, binding circuit precedent would have required it to vacate his life sentence and grant him a new sentencing hearing. *See United States v. Lewis*, 802 F.3d 449, 455–58 (3d Cir. 2015) (en banc).

The government's argument also fails for a second, independent reason: as Justice Scalia explained in his dissent in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), the government's failure to charge an essential element of an offense is a structural error that is not amenable to harmless error review. *Id.* at 116–17 (Scalia, J., dissenting). This Court has yet to decide this critical and recurring issue after granting certiorari to review it almost 20 years ago in *Resendiz-Ponce*. But it recently called for the government to respond to a petition raising the question. *See Nformangum v. United States*, No. 25-7259 (June 8, 2026). Accordingly, if this Court does not grant, vacate, and remand based on the government's confession of *Alleyne* error, it should hold this petition pending consideration of the petition in *Nformangum*, or grant review in this case to decide, once and for all, whether the failure to charge an essential element of an offense can be harmless.

Finally, for the reasons explained in codefendant James Perrin's petition for certiorari and reply, this Court should also grant review to decide whether a state or local jurisdiction's chief prosecutor may delegate authority to apply for wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

I. This Court Should Grant, Vacate, and Remand, or Summarily Reverse, Based on the Government's Confession of *Alleyne* Error.

In his petition, Mr. Montgomery explained how the Third Circuit erred by holding that his sentence did not violate *Apprendi* or *Alleyne*: The Third Circuit held that his charge of killing a federal witness under 18 U.S.C. § 1512(a)(1)(C) necessarily involved malice aforethought, and, therefore, murder—a holding that ignored the plain text and legislative history of § 1512. Pet. at 11–15. Mr. Montgomery further explained that even if the Third Circuit's atextual reading of § 1512 was correct, that would mean he was at most charged with and convicted of *second-degree* murder, which still did not authorize the mandatory life sentence he received. Pet. at 15–16.

The government agrees. It concedes that "under *Alleyne*," the indictment and jury instructions should have included the elements of first-degree murder "for purposes of triggering the mandatory life sentence authorized by 18 U.S.C. [§] 1111(b) for killing with intent to prevent communication of information to law enforcement, in violation of 18 U.S.C. [§] 1512(a)(1)(C)." BIO at 16–17. Likewise, the government does not offer a single word in defense of the Third Circuit's reading of § 1512, and it acknowledges that murder was *not* charged in the relevant count. *See generally id.*

The government's concession is striking. By admitting the indictment failed to charge the elements of first-degree murder on Count 7, the government has acknowledged that Mr. Montgomery was charged with and convicted of one offense, but then sentenced for another. And, even more troubling, the government has acknowledged Mr. Montgomery was subject to a mandatory sentence of life imprisonment despite never being charged with or convicted of an offense that carried

that penalty, a startling bait-and-switch that strikes at the heart of the Fifth and Sixth Amendment rights to fair notice, due process, and grand jury presentment.[1] It is hard to imagine a clearer example of a miscarriage of justice at sentencing. *Cf. Hunter v. United States*, 608 U.S.---, ---S. Ct.---, 2026 WL 1751815, at *8 (2026) (explaining that a miscarriage of justice occurs when a sentencing court exceeds the statutory maximum).

Although the government concedes this outcome violated Mr. Montgomery's constitutional rights under *Alleyne*, it argues this Court should not correct his illegal life sentence because the Third Circuit treated the error as harmless. But this argument falls apart under even a cursory review of the Third Circuit's opinion. The Third Circuit did not acknowledge Mr. Montgomery's sentence violated *Alleyne*; it repeatedly said the opposite. *See* Pet. App. 25a ("[T]he sentence of life imprisonment for killing Tina Crawford did not violate *Apprendi* or *Alleyne*, nor, by extension, the Sixth Amendment"); Pet. App. 26a (Mr. Montgomery's "punishment under Count 7 did not run afoul of *Apprendi* or *Alleyne*"); Pet. App. 23a ("Montgomery was not therefore sentenced for a different crime than he was charged and convicted [sic]").

More specifically, the Third Circuit did not recognize that the government failed to charge the elements of murder in the relevant count. Instead, it held that Mr. Montgomery *was* "charged with the same crime for which he was sentenced," *i.e.*

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[1] As Mr. Montgomery explained in his petition, he was not facing mandatory life imprisonment on Count 8 because the 18 U.S.C. § 924(j) offense charged in that count carried no mandatory minimum at all. *See* Pet. at 18; *Lora v. United States*, 599 U.S. 453 (2023). The government makes no argument to the contrary.

first-degree murder, based on its erroneous interpretation of 18 U.S.C. § 1512(a)(1)(C). *See* Pet. App. 23a (quoting *United States v. Johnson*, 899 F.3d 191, 198 (3d. Cir. 2018)). To the extent the Third Circuit recognized there was an error, it thought the problem was that "an element" of the offense "was not submitted to the jury." Pet. App. 23a (quoting *Johnson*, 899 F.3d at 198). The Third Circuit therefore applied a "harmless *trial* error analysis," asking "whether a rational jury would have still found Montgomery guilty beyond a reasonable doubt . . . if the elements of murder had been submitted to the jury." *Id.* at 23a–24a (emphasis added).

If the Third Circuit had recognized that, as the government concedes, the indictment failed to charge the elements of first-degree murder, binding circuit precedent would have required that it remand for a new sentencing hearing. *See Lewis*, 802 F.3d at 456. The Third Circuit distinguishes "two different types of errors" in criminal cases: "trial errors" and "sentencing errors." *Id.* at 455. "Trial error . . . occurs when the defendant is charged with, convicted of, and sentenced for a crime, but one of the elements of that crime is not submitted to the jury." *Johnson*, 899 F.3d at 198. "Sentencing error," by contrast, "occurs when a defendant is charged with and convicted of one crime, but sentenced for another." *Id.* A "sentencing error" is harmless only if "the error would have made no difference to the sentence." *Lewis*, 802 F.3d at 456 (internal quotation marks omitted).

The Third Circuit should have treated Mr. Montgomery's error as a sentencing error because, as the government concedes, Mr. Montgomery was "sentenced for [first-degree murder] but indicted, tried, and convicted" of a different, lesser offense.

Lewis, 802 F.3d at 455. And the Third Circuit would not have treated the sentencing error as harmless. The court of appeals has held that an error "[o]bviously" contributes to the sentence where the offense charged in the indictment carries different statutory penalties than the sentence the district court imposed. *Id.* at 458 (remanding for resentencing where defendant was improperly subjected to a seven-year, rather than five-year, mandatory minimum). Thus, if the Third Circuit had properly understood the charges brought in Mr. Montgomery's indictment, it would have immediately remanded so that Mr. Montgomery could be resentenced under the correct statutory penalties. *See id.*

Likewise, the Third Circuit would not have summarily dismissed Mr. Montgomery's notice claim had it understood the nature of the error here. *See* Pet. App. 26a n.14. The court of appeals found there was no notice problem because the indictment "provided Montgomery with notice that he faced a potential life sentence." *Id*. But, as Mr. Montgomery explained in his petition, the question is not whether he had notice of a *potential* life sentence, but whether he had notice of a *mandatory* one. *See* Pet. at 16. As the government concedes, Mr. Montgomery had no such notice: because the indictment failed to allege "the elements of first-degree murder," there was nothing "triggering"—and, therefore, putting Mr. Montgomery on notice of—"the mandatory life sentence authorized by 18 U.S.C. 1111(b)." BIO at 17. The Third Circuit, like the other court of appeals to consider the issue, would grant relief in this circumstance. *See, e.g., United States v. Stevenson*, 832 F.3d 412, 428 (3d Cir. 2016) (asking whether the indictment provided the defendant with "notice of the charge

against which he was to defend" before finding an indictment error harmless); *United States v. Mojica-Baez*, 229 F.3d 292, 310 (1st Cir. 2000) (the "most serious" consequence of a flawed indictment is "when a defendant is without fair notice of the charges against him"); *United States v. Robinson*, 367 F.3d 278, 287 (5th Cir. 2004); *United States v. Allen*, 406 F.3d 940, 946 (8th Cir. 2005).

This Court should accordingly grant Mr. Montgomery's petition for review, vacate the decision below, and remand for further proceedings in light of the government's confession of error, consistent with its ordinary practice. *See, e.g., Grayson v. United States*, No. 25-851 (June 22, 2026) (granting, vacating, and remanding for further proceedings in light of government confession of error); *Montague v. United States*, No. 23-959 (June 17, 2024) (same); *Rojas v. United States*, No. 20-1594 (Nov. 1, 2021) (same); *White v. United States*, No. 17-270 (Jan. 8, 2018) (same). Alternatively, this Court should summarily reverse the decision below. *See, e.g.*, *Pitts v. Mississippi*, 607 U.S. 1, 5 (2025). Either remedy would grant Mr. Montgomery needed relief from his illegal life sentence and vacate the Third Circuit's obvious misreading of § 1512, which will remain binding in the circuit unless corrected.[2]

[2] To be clear, vacating Mr. Montgomery's mandatory life sentence on Count 7 will not lead to his release or guarantee he will receive a shorter sentence on remand. Given the seriousness of the offenses in this case and the number of counts, the District Court will have the discretion to reimpose a life sentence if it believes such a sentence is "sufficient, but not greater than necessary" to satisfy the factors in 18 U.S.C. § 3553(a). The key point is that Mr. Montgomery should receive a sentencing hearing at which the correct statutory penalties are applied and the District Court understands a term of life imprisonment, while permitted, is not mandatory.

II. Alternatively, this Court Should Hold This Petition Pending Consideration of the Petition in *Nformangum v. United States*, No. 25-7259, or Grant Review to Decide Whether the Admitted Failure to Charge Essential Elements of the Witness Tampering Charge Was Structural Error.

The government's confession of error under *Alleyne*, and subsequent reliance on harmless error, also raises a second question that warrants this Court's review: whether the failure to charge an essential element of an offense can be harmless at all. This Court took up this important question almost 20 years ago in *Resendiz-Ponce*. 549 U.S. at 103. But it did not resolve the issue because it held that the indictment in that case was not defective. *Id.* at 104. In dissent, Justice Scalia explained that he would have reached the question and "[found] the error to be structural." *Id.* at 117.

In the years since *Resendiz-Ponce*, the circuits have remained stubbornly split over whether the failure to charge an element of an offense is structural error or subject to harmless error review. The majority of circuits, including the Third, have found such errors to be non-structural. *See, e.g., Stevenson*, 832 F.3d at 428 (citing cases from the First, Fourth, Fifth, Sixth, and Eighth Circuits applying harmless error review). The Ninth Circuit, on the other hand, continues to deem the failure to charge an essential element a structural error warranting automatic reversal. *See United States v. Qazi*, 975 F.3d 989, 992 (9th Cir. 2020).

This Court need not reach this question in this case because the Third Circuit should have the opportunity to resolve in the first instance whether the *Alleyne* error, properly understood, was harmless. *See supra* at 6–7. If this Court disagrees,

however, it should hold this petition pending the Court's consideration of the petition in *Nformangum v. United States*, No. 25-7259 (Apr. 1, 2026). There, the Fifth Circuit found the petitioner's indictment failed to include the *mens rea* element of 18 U.S.C. § 875(c) but that the omission was harmless. The petitioner is asking this Court to decide whether such an omission can be harmless or whether it constitutes structural error. This Court requested a response from the government on June 8, 2026, which is currently due on July 8, 2026. If this Court grants review in *Nformangum*, the outcome could affect this case because a finding that the omission of essential elements from an indictment constitutes structural error would defeat the government's claims of harmlessness and entitle Mr. Montgomery to relief.

Thus, if this Court does not grant, vacate, and remand, or summarily reverse, in light of the government's confession of error, it should hold this petition pending its consideration of the petition in *Nformangum*. And, if this Court denies review in *Nformangum*, it should grant review in this case to decide, once and for all, whether the failure to charge an essential element of an offense, as the government concedes happened here, constitutes structural error.

III. This Court Should Also Grant Review to Decide Whether a State or Local Jurisdiction's Chief Prosecutor May Delegate Authority to Apply for Wiretaps Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. (Issue Raised in James Perrin's Petition for a Writ of Certiorari).

Finally, Mr. Montgomery incorporates by reference the arguments presented in codefendant James Perrin's reply. *See Perrin v. United States*, No. 25-7146. For the reasons set forth therein, this Court should also grant review to decide whether a state or local jurisdiction's chief prosecutor may delegate authority to apply for wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

K. ANTHONY THOMAS
FEDERAL PUBLIC DEFENDER

s/Evan J. Austin
EVAN J. AUSTIN
Counsel of Record
ALISON BRILL
OFFICE OF THE FEDERAL PUBLIC DEFENDER
1002 Broad Street
Newark, New Jersey 07102
(973) 282-8658
Evan_Austin@fd.org