Nos. 15-588 and 15-6755

In the Supreme Court of the United States

DANIEL JOHNSON AND CHRISTOPHER NAPOLI,
PETITIONERS

v.

UNITED STATES OF AMERICA

JOSEPH CAROZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' convictions by a petit jury rendered harmless alleged misstatements of government agents before the grand jury.

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OPINION BELOW

The amended opinion of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is reprinted at 608 Fed. Appx. 532.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2015. A petition for rehearing was denied

[1] Citations to the petition and petition appendix are to the petition and appendix filed in No. 15-588. The petition and appendix filed in No. 15-6755 are substantively identical.

on that same day (Pet. App. 2a). The petitions for writs of certiorari were filed on October 21, 2015. 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 Northern District of California, petitioners were convicted of conspiracy to distribute and to possess with intent to distribute Schedule III and IV controlled substances, in violation of 21 U.S.C. 846; and distributing and possessing with intent to distribute a Schedule IV controlled substance, in violation of 21 U.S.C. 841(a)(1) (2006). Napoli and Johnson were also convicted of conspiracy to launder money, in violation of 18 U.S.C. 1956(h). Napoli was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Johnson was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Carozza was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-11a.

1. Between April 2005 and January 2007, petitioners Napoli and Johnson created and operated internet pharmacies (including Safescripts Online) that sold millions of dollars in diet pills, anxiety medications, and other federally controlled substances to customers who did not have or could not obtain a prescription. Gov't C.A. Br. 6, 10, 29. Customers arriving at the Safescripts website selected their drug of choice from a list of available options, answered a brief online questionnaire about their medical history, and provided a credit card number and shipping address. *Id.* at 12-13. Customers were not required to submit a valid

form of identification or a valid prescription for the controlled substances they ordered. *Id.* at 13, 34.

Doctors employed by the pharmacy, including petitioner Carozza, purported to review the orders and authorized the prescriptions. Gov't C.A. Br. 12-13. Approving physicians did not physically examine or obtain a complete medical history from customers, nor did they make any effort to confirm the accuracy of the information provided by the customers in online questionnaires. *Id.* at 13-14. Rather, after reviewing only the customer's questionnaire, Carozza or another physician would approve the customer's order. *Id.* at 20. Carozza approved hundreds, and in some cases thousands, of orders a day. *Id.* at 29. Between April 2005 and January 2007, petitioners' internet pharmacies made nearly $25 million. *Ibid.*

2. In March and August 2010, agents of the Drug Enforcement Agency (DEA) testified before a federal grand jury in the Northern District of California that was investigating, among other crimes, petitioners' drug-distribution scheme. Gov't C.A. Br. 85-90. In his March 2010 testimony, DEA Special Agent Jason Chin answered "yes" to the prosecutor's question whether "a valid doctor-patient relationship requires at least one face-to-face visit." C.A. E.R. 380. Agent Chin also stated additional reasons that prescriptions filled by these internet pharmacies were not valid, including that no physician had evaluated the customer to determine a legitimate medical need for the drugs, the average doctor review of the online questionnaire lasted only a few seconds, and the doctors and pharmacies were not licensed in the States to which they were sending drugs to customers. *Id.* at 380-381.

In his appearances before the grand jury in August 2010, Special Agent Brandon Bridgers testified that a valid prescription "requires a face-to-face relationship with your physician" and that the DEA has "published regulations that require that you have at least one face-to-face visit with your doctor before he can prescribe a controlled substance." C.A. E.R. 388-389. Agent Bridgers described Carozza's role in approving prescriptions, explaining that Carozza was a New York licensed doctor who authorized drug orders for customers in all 50 States without examining any patients, contacting them by telephone or e-mail, or reviewing their medical records. Supp. C.A. E.R. 8-9. Agent Bridgers further described evidence that petitioners' operation was outside the scope of professional practice, including that two doctors with whom Napoli had first worked quit after being informed by the DEA that they were involved in an illegal business, that petitioners continued their operation after the DEA shut down brick-and-mortar pharmacies that had filled the Safescripts orders, and that Napoli had instructed Johnson to delete an internet link to prevent the DEA from using it as evidence. Gov't C.A. Br. 89.

3. On December 7, 2010, the grand jury returned a superseding indictment charging petitioners and eight co-defendants with conspiracy to distribute and to possess with intent to distribute Schedule III and IV controlled substances, in violation of 21 U.S.C. 846; distributing and possessing with intent to distribute a Schedule IV controlled substance, in violation of 21 U.S.C. 841(a)(1) (2006); and conspiracy to launder

money, in violation of 18 U.S.C. 1956(h). Superseding Indictment 8-10.[2]

Before trial, petitioners moved to dismiss the superseding indictment on the ground that Agents Chin and Bridgers had incorrectly testified in the grand jury that prescriptions issued by Safescripts were invalid because Safescripts doctors did not have any face-to-face meetings with customers. Pet. App. 30a-31a. At the time of the charged conduct, the Controlled Substances Act, 21 U.S.C. 829(b) (2006), prohibited the distribution of controlled substances without a prescription issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. 1306.04 (2006). In 2008, after the charged conduct, Congress passed the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (Haight Act), Pub. L. No. 110-425, 122 Stat. 4820, which amended the Controlled Substances Act to address explicitly the distribution of controlled substances over the Internet. 21 U.S.C. 829(e)(1), 841(h). As relevant here, the Haight Act defined the term "valid prescription" in the context of the Internet as one made by "a practitioner who has conducted at least 1 in-person medical evaluation of the patient." 21 U.S.C. 829(e)(2)(A)(i). Petitioners argued that, before passage of the Haight Act, federal law had not expressly prohibited their conduct and that the grand jury had returned the

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[2] On the government's motion, the district court dismissed the money-laundering count against Carozza before trial. Gov't C.A. Br. 3. Of the co-defendants charged in the superseding indictment, two were convicted in a severed trial, four pleaded guilty, one remained a fugitive, and one died. *Id.* at 3 n.1.

indictment only because of the DEA agents' testimony about face-to-face meetings. Pet. App. 30a-32a.

The district court denied petitioners' motion. Pet. App. 43a. The court found that the agents had testified to a number of different factors that determined whether a prescription was valid, that prosecutors had not engaged in misconduct or intentionally misstated the law, and that petitioners' arguments did not "come[] close" to "render[ing] the [i]ndictment constitutionally suspect." *Ibid.*; see *id.* at 32a-34a. Petitioners proceeded to trial and were convicted on all counts. *Id.* at 4a.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-11a. The court held that "any misstatements by the DEA agents before the grand jury were rendered harmless by the petit jury's guilty verdict." *Id.* at 10a. That conclusion, the court explained, followed from *United States* v. *Mechanik*, 475 U.S. 66 (1986), in which this Court had held that "a petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted." Pet. App. 10a (quoting *Mechanik*, 475 U.S. at 67) (brackets omitted).

The court of appeals recognized that dismissal of an indictment is permitted when irregularities in the grand jury proceedings "substantially influenced the grand jury's decision to indict," Pet. App. 10a (quoting *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988)), and noted petitioners' contentions that the grand jury in this case would have been swayed by the agents' allegedly "false testimony that prescriptions issued without in-person examinations were *per se* invalid under federal law." Pet. C.A. Br. 118. But the

court explained that when, "as here, a district court denies a defendant's motion * * * to dismiss the indictment, and the defendant is subsequently convicted beyond a reasonable doubt, the *Bank of Nova Scotia* standard does not apply on appeal; rather, '*Mechanik* controls and the conviction establishes that [any] error was harmless.'" Pet. App. 10a-11a (quoting *United States* v. *Navarro*, 608 F.3d 529, 540 (9th Cir. 2010), cert. denied, 562 U.S. 1159 (2011)).

ARGUMENT

Petitioners contend (Pet. 7-14) that the court of appeals erred in concluding that any misstatements of government agents before the grand jury were rendered harmless by the petit jury's guilty verdict and that the court's conclusion conflicts with the decisions of other courts of appeals. Those contentions lack merit. The court of appeals' unpublished decision is both correct and consistent with the decisions of this Court and other courts of appeals. This case would also be an unsuitable vehicle for addressing any conflict because petitioners are not entitled to relief even under the legal standard that they advocate. Further review is therefore unwarranted.

1. The court of appeals correctly held that any misstatement of the law by government agents before the grand jury was harmless in light of the petit jury's finding that petitioners were guilty beyond a reasonable doubt.

a. As the court of appeals determined (Pet. App. 10a-11a), the result in this case follows from the Court's decision in *Mechanik*, *supra*. In *Mechanik*, the district court denied at the conclusion of trial the defendants' motion to dismiss the indictment based on a violation of Federal Rule of Criminal Procedure

6(d), which (the defendants claimed) barred two government agents from appearing simultaneously before the grand jury. 475 U.S. at 68-69. This Court recognized that the federal rules governing grand jury proceedings "protect[] against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty," and that an error in grand jury proceedings can have "the theoretical potential to affect the grand jury's determination whether to indict." *Id.* at 70. But the Court held that, outside of claims of racial discrimination in the composition of the grand jury, *id.* at 70 n.1, any claim of actual prejudice from a violation of such rules is foreclosed once a petit jury has returned a conviction. *Id.* at 70. "[T]he petit jury's subsequent guilty verdict," the Court explained, "means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty," rendering any error "harmless beyond a reasonable doubt." *Ibid.*; see *id.* at 73.

Under *Mechanik*, the court of appeals correctly held that petitioners' claimed errors were harmless. Pet. App. 10a-11a. Petitioners argue (Pet. 9) that the grand jury indicted them because the agents testified that the Controlled Substances Act required doctors to have a face-to-face meeting with a patient before prescribing a controlled substance, not because the evidence before the grand jury otherwise established that petitioners had violated federal law. But the misstatements alleged by petitioners were not presented to the petit jury at trial. And the petit jury—applying instructions that correctly stated the law, see Pet. App. 7a-10a (rejecting challenges to the instruc-

tions)—found beyond a reasonable doubt that petitioners had distributed controlled substances "by means of a prescription issued by a physician not for a legitimate medical purpose and not in the usual course of professional practice, and knowing and intending that the distribution was by means of a prescription issued by a physician not for a legitimate medical purpose and not in the usual course of professional practice." C.A. E.R. 171 (jury instructions). That "verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge [petitioners] with the offenses for which they were convicted," *Mechanik*, 475 U.S. at 67, rendering any error in the grand jury proceedings harmless.

b. Contrary to petitioners' contention (Pet. 7-11), the court of appeals' analysis is fully consistent with this Court's decisions in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), and *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989). The Court in *Bank of Nova Scotia* addressed the standard that district courts exercising their supervisory powers must apply in deciding whether to dismiss an indictment "prior to the conclusion of the trial." 487 U.S. at 256 (holding that "dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations" (quoting *Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring in the judgment)). *Bank of Nova Scotia* did not address, as had *Mechanik*, the principles governing review of a district court's decision *not* to dismiss an indictment after a guilty verdict has been entered. Indeed, the Court in *Bank of Nova*

Scotia explicitly reaffirmed *Mechanik* and reiterated that mistakes in the grand jury process are subject to harmless-error analysis unless the error is "fundamental." *Id.* at 256-257. Fundamental errors are limited to those "in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair," such as claims of racial or gender discrimination in the selection process. *Id.* at 257. Petitioners assert no such claims in this case.[3]

Petitioners' reliance (Pet. 8-9) on *Midland Asphalt*, *supra*, is equally misplaced. The Court held that a district court order denying a pretrial motion to dismiss an indictment based on an alleged violation of Rule 6(e)—which generally prohibits public disclosure of matters before a grand jury—is not immediately appealable as a collateral order. 489 U.S. at 795, 799-802. In so holding, the Court did not, as petitioners

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[3] Petitioners err in suggesting that, in the decision that bound the panel here, the court of appeals "essentially overrule[d] *Bank of Nova Scotia* by declaring that *all* grand jury errors—no matter how fundamental or serious—are rendered harmless by a petit jury conviction." Pet. 10 (citing *Navarro*, 608 F.3d at 540). *Navarro* recognizes both that a guilty verdict does not render harmless a structural error in grand jury proceedings and that district courts may dismiss an indictment based on non-structural errors that satisfy the standard for prejudice set forth in *Bank of Nova Scotia*. 608 F.3d at 539-540; cf. *United States* v. *Caruto*, 663 F.3d 394, 402 (9th Cir. 2011) ("The alleged error was not structural error and was rendered harmless by [the defendant's] subsequent conviction."). But *Navarro* also correctly holds that, because "a petit jury's verdict of guilty beyond a reasonable doubt establishes a *fortiori* that there was probable cause to charge," a non-structural error that at most calls into doubt whether the grand jury had probable cause to indict the defendant *is* rendered harmless by a guilty verdict. 608 F.3d at 540.

suggest (Pet. 8), confine *Mechanik*'s harmless-error analysis to a class of "technical" violations of Rule 6 or distinguish such violations "from fundamental grand jury errors" subject to dismissal under *Bank of Nova Scotia*. See *Midland Asphalt*, 489 U.S. at 799-800 (declining to address "the scope of *Mechanik*," but acknowledging that lower courts had applied it "to bar postconviction review of alleged violations of Rule 6(e)"). The Court instead made clear that even violations of Rule 6(e) that could support dismissal under *Bank of Nova Scotia* did not implicate the kind of "right not to be tried" that would justify immediate appeal under the Court's precedents. *Id.* at 802.

In this case, petitioners did not raise claims of racial or gender discrimination in the jury selection process, the only two structural grand jury errors that this Court has recognized. See *Bank of Nova Scotia*, 487 U.S. at 256-257. Petitioners instead argued that the grand jury's decision to indict was attributable to a misstatement of the law by the DEA agents. See Pet. App. 41a ("[I]f the law was not misstated, we wouldn't have brought this motion."). Even assuming that such an error occurred, the court of appeals correctly determined that petitioners' convictions by the petit jury cured it and demonstrated that the grand jury had probable cause to indict petitioners.

2. Petitioners contend (Pet. 7, 11-14) that the decision below implicates an "entrenched circuit split" on a court's post-verdict authority to dismiss an indictment based on errors in the grand-jury proceedings. Petitioners are incorrect. The courts of appeals are not in disagreement on that question, and this case would not be an appropriate vehicle for resolving such disagreement in any event.

a. In accord with the decision below (Pet. App. 10a-11a), every court of appeals to address the question has held that, under *Mechanik*, a petit jury's finding of guilt beyond a reasonable doubt renders harmless a non-structural error alleged to have affected the grand jury's determination of probable cause. See *United States* v. *Soto-Beníquez*, 356 F.3d 1, 25 (1st Cir. 2003), cert. denied, 541 U.S. 1074 (2004); *United States* v. *Lombardozzi*, 491 F.3d 61, 80 (2d Cir. 2007); *United States* v. *Bansal*, 663 F.3d 634, 660 (3d Cir. 2011), cert. denied, 132 S. Ct. 2700, and 133 S. Ct. 225 (2012); *United States* v. *Masiarczyk*, 1 Fed. Appx. 199, 213-214 (4th Cir. 2001); *United States* v. *Combs*, 369 F.3d 925, 936-937 (6th Cir. 2004); *United States* v. *Vincent*, 416 F.3d 593, 602 (7th Cir. 2005); *United States* v. *Sanders*, 341 F.3d 809, 818-819 (8th Cir. 2003), cert. denied, 540 U.S. 1227 (2004); *United States* v. *Hillman*, 642 F.3d 929, 936 (10th Cir.), cert. denied, 132 S. Ct. 359 (2011); *United States* v. *Flanders*, 752 F.3d 1317, 1333 (11th Cir. 2014), cert. denied, 135 S. Ct. 1188 (2015); see also *United States* v. *Seals*, 130 F.3d 451, 456 n.3 (D.C. Cir. 1997) (recognizing that, "if the petit jury ultimately returns a guilty verdict, any error committed at the grand jury stage is * * * nonprejudicial"), cert. denied, 524 U.S. 928, and 525 U.S. 844 (1998).

Petitioners have not identified any court of appeals decision to the contrary. They cite (Pet. 12-13) two decisions in which the Fifth Circuit addressed not "irregularities in the grand jury process" leading to indictment, *Mechanik*, 475 U.S. at 75 (O'Connor, J., concurring in the judgment), but claims that the resulting indictment was defective for omitting an element of the charged offense. See *United States* v.

Dentler, 492 F.3d 306, 309-312 (2007); *United States* v. *Robinson*, 367 F.3d 278, 284-289, cert. denied, 543 U.S. 1005 (2004). The Fifth Circuit has elsewhere recognized that *Mechanik* governs claims falling within the former category. See *Wilkerson* v. *Whitley*, 28 F.3d 498, 503 (1994) (en banc) ("[P]rosecutorial misconduct in a grand jury proceeding may be deemed harmless if the petit jury convicts.") (citing *Mechanik*, 475 U.S. at 72)), cert. denied, 513 U.S. 1085 (1995); see also, *e.g.*, *United States* v. *Mells*, No. 98-51174, 2000 WL 180870, at *1 (5th Cir. Jan. 28, 2000) (rejecting defendant's claim of "perjured testimony before the grand jury" because his conviction "rendered any errors occurring before the grand jury harmless"); *United States* v. *Castro-Cuellar*, No. 95-20764, 1996 WL 405759, at *1 (5th Cir. July 1, 1996) (same as to claim of prosecutorial misconduct before the grand jury). And even in the omitted-elements cases, the Fifth Circuit has considered the petit jury's verdict as "persuasive evidence of how a grand jury would find." *Robinson*, 367 F.3d at 289; see *Dentler*, 492 F.3d at 311-312; see also *United States* v. *Higgs*, 353 F.3d 281, 307 (4th Cir. 2003) (concluding that "the petit jury's finding of all the aggravating factors beyond a reasonable doubt demonstrate[d] that Higgs was not prejudiced"), cert. denied, 543 U.S. 999 (2004).

Petitioners also cite (Pet. 12-13) decisions of the First, Second, and Tenth Circuits that, they assert, suggest a possibility that "prosecutorial misconduct" in grand jury proceedings could justify dismissal of an indictment following a guilty verdict. See *Soto-Beníquez*, 356 F.3d at 25 (1st Cir.); *Lombardozzi*, 491 F.3d at 80 (2d Cir.); *United States* v. *Lopez-Gutierrez*, 83 F.3d 1235, 1246 (10th Cir. 1996). But in none of

petitioners' cited decisions did the court of appeals hold that claimed irregularities in the grand jury proceedings could justify reversal of a petit jury's subsequent guilty verdicts. In *Lopez-Gutierrez*, the Tenth Circuit held that false statements by an agent about the defendant's prior convictions, as well as the agent's reference to the defendant's invocation of his Fifth Amendment rights, were "technical errors potentially affecting only the grand jury's finding of probable cause" and that the petit jury's "guilty verdict" rendered "moot" "the question as to whether there was probable cause to bring an indictment." 83 F.3d at 1246. Likewise, in *Lombardozzi*, the Second Circuit stated that even if the court "were to find that the grand jury indictment was defective" because of misleading statements, "a guilty verdict at trial remedies any possible defects in the grand jury indictment." 491 F.3d at 80 (internal quotation marks and citation omitted). And in *Soto-Beníquez*, the First Circuit held that the unknowing submission of perjured testimony to the grand jury would have been harmless because "a petit jury subsequently found the defendants guilty beyond a reasonable doubt of the charges," and "[s]uch a finding demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted." 356 F.3d at 25 (internal quotation and citation omitted). The holdings in all three cases are thus fully in accord with the decision below.

In short, petitioners have not established a conflict between the court of appeals' unpublished decision in this case and the decision of any other court of appeals. This Court has previously denied a petition for a writ of certiorari claiming the same circuit conflict,

see *Bolden* v. *United States*, 558 U.S. 1077 (2009) (No. 09-5694), and the same result is warranted here.

b. In any event, this case would not be a suitable vehicle for addressing any conflict in the circuits even if one existed. That is because, even if the Court's decision in *Bank of Nova Scotia* permitted review of non-structural errors in grand jury proceedings following a petit jury's finding of guilt beyond a reasonable doubt, petitioners would not be entitled to relief.

Under *Bank of Nova Scotia*, a court is permitted to dismiss a grand jury indictment under its supervisory powers only when the violation "substantially influenced the grand jury's decision to indict" or "grave doubt" exists that the decision to indict was free from the substantial influence of such violations. 487 U.S. at 256 (citation omitted). Petitioners' claim that the testifying agents misstated the legal significance of a face-to-face meeting with a prescribing physician does not meet that standard. As the district court determined, the absence of a physical examination by the prescribing doctor was just one factor from which the grand jury could find probable cause that petitioners' scheme violated the Controlled Substances Act. Pet. App. 33a-34a. The grand jury also heard testimony from Agent Chin that no doctor actually evaluated a customer before the prescription was filled, doctors' review of each online questionnaire lasted just seconds, and the doctors and the pharmacies were sending drugs to States where they were not licensed. C.A. E.R. 380-381. Agent Bridgers further testified to multiple ways in which the petitioners' conduct was outside the usual course of professional practice. He described the cursory review process that permitted petitioner Carozza in particular to authorize hundreds

of prescriptions a day, as well as evidence that all three petitioners knew—including because of contact with or actions of the DEA—that the scheme was outside the bounds of professional practice but elected to continue it anyway. Gov't C.A. Br. 88-90 (summarizing such evidence). In light of that testimony, any misstatement of the law by the agents was not "central to," Pet. App. 32a, and therefore could not have substantially influenced, the grand jury's decision to indict. See *Bank of Nova Scotia*, 487 U.S. at 256.

Petitioners' passing assertion that the agents' testimony was "perjurious" (Pet. 6) does not support a contrary result. As an initial matter, that assertion is unfounded. The agents' testimony correctly reflected the express requirements of federal law in effect at the time of their respective grand jury appearances and was consistent with case law applying federal law before the Haight Act took effect. See Gov't C.A. Br. 91-92 (citing cases); cf. *United States* v. *Grayson*, 438 U.S. 41, 54 (1978) (explaining that perjury statutes "punish those who willfully give false testimony"). Moreover, petitioners have not claimed that the misstatements were the product of prosecutorial misconduct. See Pet. C.A. Br. 118-120 (describing the agents' alleged misstatements before the grand jury as "errant testimony"). And the district court expressly found any such misconduct to be lacking on this record. Pet. App. 33a (finding that prosecutors had not "engaged in any intentional misconduct here or intentionally misstated what the law was"). Accordingly, the claimed misstatements could "provide no ground for dismissing the indictment." *Bank of Nova Scotia*, 487 U.S. at 260 (so holding as to an alle-

gation that government "agents gave misleading and inaccurate summaries to the grand jury").

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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