No. _____

In The
Supreme Court of the United States

JOSE BENITEZ, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeal for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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July 26, 2018

QUESTIONS PRESENTED

The Government charged Mr. Benitez with one count of armed bank robbery and alleged that he "put in jeopardy the life of another person by the use of a dangerous weapon, that is a firearm." The Government also charged him with possession of a firearm during that crime of violence.

Mr. Benitez did not dispute that he robbed the bank, and he attempted to plead guilty to the armed bank robbery count. But he claimed he did not use a firearm, so he sought to proceed to trial on the firearm count. The Government objected. It argued that the use of a firearm in the bank robbery count was an "element" of the crime. According to the Government, entering a guilty plea to the bank robbery count without an admission that Mr. Benitez carried a firearm would constructively amend the indictment. The Government also announced that at trial it "would not suggest to the jury that" Mr. Benitez used "anything other than a firearm."

Having heard these assurances, Mr. Benitez went to trial on both counts. His only defense was that he used a replica gun during the bank robbery, and not a firearm. During the charge conference, the Government reversed its prior position, argued that the firearm language in the robbery count was surplusage, and requested a jury instruction that would not require it to prove that Mr. Benitez used a firearm to commit the robbery. The district court acquiesced and instructed the jury, over objection, that he could be found guilty of armed bank robbery regardless of whether the object used could put someone's life in jeopardy. The Government argued during closing statements that Mr. Benitez could be found guilty of that count even if he used a toy gun. The jury apparently credited Mr. Benitez's defense and found him not guilty of the firearm count. However, it found him guilty of the armed bank robbery count.

Mr. Benitez argued in the Eleventh Circuit that the indictment was constructively amended. In the alternative, he argued that the removal of the firearm language from the indictment constituted a material, prejudicial variance. The Eleventh Circuit affirmed his conviction.

The questions presented are:

1. Does a constructive amendment occur where the jury instructions relieve the Government of proving, as alleged in the indictment, that a defendant committed a crime by using a "firearm," and where the Government argues that the defendant could be found guilty of that crime even if he used a toy gun?

2. Does a material variance arise where a court declines to instruct the jury that the Government has to prove, as alleged in the indictment, that a defendant committed a crime by using a "firearm," where the Government argued prior to trial that the use of a firearm was an element of the offense and stated that it would not argue that the object used was anything other than a firearm, and where the defendant's sole theory of defense depended on disproving that he used a firearm?

PARTIES TO THE PROCEEDING

Petitioner Jose Benitez, Jr., was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondent, the United States, was the appellee in the Eleventh Circuit.

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The Petitioner, Jose Benitez, Jr., respectfully petitions the Court for a writ of certiorari to review the Opinion of the Eleventh Circuit Court of Appeals.

DECISIONS BELOW

The United States District Court for the Middle District of Florida orally overruled Mr. Benitez's objections to the jury instructions on the second day of trial. That unpublished and unreported ruling is reproduced in the appendix at App. 25.

The Eleventh Circuit's opinion affirming Petitioner's conviction is unpublished but is reproduced in the appendix at App. 1.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The Eleventh Circuit issued its Opinion on April 27, 2018. App. 1. This timely petition for writ of certiorari follows. This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."

STATEMENT OF THE CASE

On October 8, 2014, Mr. Benitez walked into a bank, pointed what appeared to be a black handgun at a teller, and demanded money. App. 8. He filled a bag with approximately $12,000 in cash and exited the bank. App. 8. Mr. Benitez fled the scene, but he left behind a pair of sunglasses on the teller's counter. App. 8. Law

enforcement recovered those glasses and found Mr. Benitez's fingerprint on the lens, which led to his apprehension. App. 8.

A grand jury returned an indictment that alleged in Count One that Mr. Benitez robbed a federally insured bank in violation of 18 U.S.C. § 2113(a) and (d). App. 2. The indictment specified that he "did assault and put in jeopardy the life of another person by the use of a dangerous weapon, that is a firearm." App. 2-3 (emphasis in original). In Count Two, the Government alleged that Mr. Benitez used and carried a firearm during the crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). App. 2. The district court exercised jurisdiction over the prosecution pursuant to 18 U.S.C. § 3231.

Mr. Benitez admitted that he robbed the bank and attempted to plead guilty to the bank robbery charged in Count One. App. 4. However, he maintained his innocence as to Count Two and claimed that he did not use a firearm during the robbery, but instead used a non-functioning replica. *See* App. 4.

At the change of plea hearing, the Government opposed the entry of a guilty plea to the bank robbery charge. App. 4. The Government argued that Mr. Benitez could not plead guilty to Count One without admitting that he possessed a firearm during the bank robbery, which would preclude him from pleading not guilty to the firearm offense in Count Two. App. 4.

When Mr. Benitez suggested that the use of the word "firearm" in Count One might be surplusage, and not an element of the offense, the Government took the position that the use a firearm was, in fact, "an element of the offense as charged . . . that is required to be proved to the jury." Tr. of June 4, 2015 Status Conference, Doc. 125 at 5. The Government further argued as follows: "Bank robbery without a dangerous weapon is effectively a lesser included offense of the enhanced bank robbery with a dangerous weapon." *Id.* at 6.

The Government advised the district court and Mr. Benitez that, if it could not prove the use of a firearm at trial, then the defendant could only be found guilty of simple bank robbery:

> [I]f the government puts the defendant on notice that this is the instrumentality, the dangerous weapon that he is alleged to have used during the course of this, then the reality is that's what we're charging

> him with, specific to that instrumentality. If we had left it blank as the use of a dangerous weapon, then certainly I think there would be that support for the claim that he could just plea -- the dangerous weapon could be anything that he says -- he claims it is.
>
> But we went the step further to identify what it was, that the dangerous weapon in this particular case, we believed it was. And counsel is right: If we don't substantiate that at trial, then it's simple bank robbery.

Id. at 9.

In addition, the Government stated as follows: "Our position at trial would be he used a firearm; that is the deadly weapon . . . and we would not suggest to the jury that it was anything other than a firearm based on what we plan to present." *Id.* at 10. Finally, the Government argued that, even if the inclusion of the word "firearm" in the indictment were surplusage, it nevertheless must "bear the consequences" of charging the crime "with more specificity, than, in fact, might have been otherwise required by law." *Id.* at 11. Counsel for the Government explained that "sometimes we raise our burden by pleading facts or circumstances that we're not required to plea, and then sometimes it works out and sometimes it doesn't." *Id.* The district court deferred ruling on the issue and asked the parties for further briefing.

The Government provided additional briefing as instructed. Citing to *Frye v. United States*, 411 F.2d 562 (5th Cir. 1969), the Government argued that Mr. Benitez "cannot plead guilty to Count One without admitting that he used a firearm in the bank robbery." United States' Memorandum of Law regarding Defendant Benitez' Change of Plea, Doc. 45 at 3. Moreover, the Government argued that, under *United States v. Narog*, 372 F.3d 1243, 1249-50 (11th Cir. 2004), the word "firearm" contained in the indictment "is not mere surplusage." *Id.* at 4. Therefore, it argued, allowing a guilty plea without specifically admitting to the use of a firearm as charged would amount to a constructive amendment to the indictment. *Id.* at 4-5 (citing, *inter alia, United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991)). Mr. Benitez did not submit briefing. App. 6.

The district court ultimately ruled that it would allow Mr. Benitez to plead guilty to Count One of the indictment, provided that he admit that the weapon used in the bank robbery was a dangerous weapon. Tr. of July 13, 2015 Status Conference,

Doc. 126 at 2. The district court made no express ruling as to whether the firearm language was surplusage or an element of the offense charged in Count One. *See id.* at 2-3. By the time of the final pretrial conference, however, Mr. Benitez decided that he no longer wanted to enter a guilty plea. App. 6.

The case proceeded to trial in September of 2015. Mr. Benitez admitted during opening statements that he committed the bank robbery. App 7. He argued, however, that the Government would not be able to prove that he used a firearm to do so. App. 7-8. According to Mr. Benitez, whether he used a firearm was the "single trial issue" for the jury to decide. App. 7. Thus, during trial, the parties primarily focused on whether Mr. Benitez possessed a firearm or a non-functioning replica.

In the Government's case-in-chief, three of the bank employees testified that they had little experience with firearms, but they believed at the time that Mr. Benitez was armed with a real handgun. App. 8-9. Two other employees who received Army ROTC training with various weapons also testified to their belief that Mr. Benitez carried an actual gun during the robbery. App. 9-10.

At the conclusion of the first day of trial, the district court conducted a charge conference on the jury instructions. Mr. Benitez objected to an instruction that defined "dangerous weapon" as "any object that a person can readily use to inflict serious bodily harm on someone else." App. 14-15. He maintained that the Government was required to prove that the object he held during the robbery was an actual firearm. App. 15. As Mr. Benitez reasoned, the Government "put [itself] into a corner by getting an indictment where the dangerous weapon that must be proven must be a firearm." App. 15.

In response, the Government reversed its prior position. It acknowledged that the indictment had alleged that the dangerous weapon was a firearm but argued that the firearm phrase was surplusage, and not an element of the offense. App. 15.

Mr. Benitez did not dispute that a toy gun could be a dangerous weapon under 18 U.S.C. § 2113. App. 15. Nevertheless, he argued that the Government "could have simply left it as a dangerous weapon for the grand jury." Tr. of Jury Trial – Vol. 1, Doc. 129 at 268. And, since the "United States has argued this is not mere surplusage, this is an element they've adopted. They added it in as part of the charge and now they're bound by it. They have to prove that the dangerous weapon was indeed a firearm." *Id.* Finally, Mr. Benitez reminded the district court that, when

the parties "had the argument about this on the day that Mr. Benitez was about to enter a plea, the United States made the same arguments that [defense counsel is] making to you today." *Id.*

The district court observed that it ultimately ruled that it would allow Mr. Benitez to plead guilty to Count One. *Id.* at 269. The district court further noted that it had disagreed with the Government's previous position and concluded the use of the word "firearm" in the indictment was surplusage. *Id.* Nevertheless, the district court deferred ruling on the issue. *Id.* at 271.

After the Government rested its case, Mr. Benitez took the stand and testified that he used a "fake, plastic gun" that was a replica of a real firearm. App. 11. Mr. Benitez also called his 15-year-old daughter, Blanca Vega, to testify. App. 12. Ms. Vega testified that she took a "selfie" the previous year with a toy gun and posted the photograph on Instagram in September of 2014, shortly before the robbery, which took place in October of that same year. App. 12. After school officials became aware of the photograph, they contacted Mr. Benitez, who told the school officials that the firearm was not real, but a toy gun. App. 12. Ms. Vega testified that she had looked at videos and photographs of Mr. Benitez robbing the bank and believed that he was carrying that same firearm replica when he robbed the bank. App. 12. The defense's third witness was Michael Galbreath, Vega's school principal. Mr. Galbreath testified that he had investigated Ms. Vega's picture found no reason for concern. App. 12.

The fourth defense witness was Alfred Olsen, a private investigator and former law enforcement officer. App. 12. Mr. Olsen testified that he evaluated the security video from the bank and attempted to determine what type of weapon or instrument was used during the robbery. App. 12. Mr. Olsen stated that the weapon held by Mr. Benitez appeared to be a Browning Hi-Power handgun, but that the weapon was distinguishable from a Browning Hi-Power handgun in several respects. App. 12. Mr. Olsen then opined that the weapon was actually an Ekol Aras Magnum replica gun that fired blanks. App. 12-13. Mr. Olsen also acknowledged that the Ekol Aras Magnum could be converted so that it could fire live rounds. App. 13. However, Mr. Olsen stated that the conversion would require changing out the barrel and rechambering the gun, which was a complicated process. App. 13. Based on his evaluation, Mr. Olsen did not believe Petitioner used a real firearm during the robbery. App. 13.

In rebuttal, the government called Max Kingery, the chief of the firearms technology criminal branch of the Bureau of Alcohol, Tobacco, Firearms, and Explosives. App. 13. Mr. Kingery reviewed the security video from the bank, but he could not definitively say if it was a handgun or a firearm replica. App. 13. Mr. Kingery explained that it was impossible to tell based on a video whether the weapon was a replica of a firearm, an actual firearm, or something that could be readily converted into a firearm. App. 13.

Mr. Kingery also testified that some of the features of an Ekol Aras Magnum could be present on firearms that are capable of firing projectiles. App. 13. Mr. Kingery further noted that the Ekol Aras Magnum could be readily converted into a weapon capable of firing a projectile using a relatively simple process, and that his own office had made such a conversion. App. 13-14. Finally, Mr. Kingery opined that the gun in the photo of Mr. Benitez's daughter and the gun used in the robbery were not the same. App. 14.

After Mr. Kingery testified, Mr. Benitez recalled Mr. Olsen, who disputed Mr. Kingery's testimony about the viability of converting an Ekol Aras Magnum into an operable firearm. App. 14.

After the close of evidence, the district court returned to the jury instructions and the issue of whether the Government needed to prove that Mr. Benitez used a "firearm," as it alleged in Count One of the indictment. App. 25. Counsel for Mr. Benitez relied on the authority in Government's own previously-submitted memorandum of law, including the Seventh Circuit's decision in *United States vs. Leichtnam*, 948 F.2d 370 (7th Cir. 1991), and argued that allowing the Government to prove anything less than what the Government alleged—that Mr. Benitez used *a firearm* to commit the robbery—would amount to a constructive amendment to the indictment. App. 27-28.

Mr. Benitez further argued that he prepared his defense at trial based on the "very argument that the United States had already made, that the government now needed to prove that this was a firearm not just a dangerous weapon." App. 28. Mr. Benitez maintained that the Government should have to prove not just that he used a dangerous weapon, but also that he used a firearm, because that was the theory it presented to the grand jury to obtain an indictment. App. 28-29. In response, the Government argued that the "firearm" language was mere surplusage and relied

primarily on an unpublished decision from the Sixth Circuit Court of Appeal, *United States v. Savoca*, 166 F. Appx. 183 (6th Cir. 2006). App. 30-31.

The district court ruled in favor of the Government. It pointed out that Mr. Benitez was given the opportunity to plead guilty to Count One without having to admit that he carried a firearm, which, according to the district court, put him on notice that the firearm language was surplusage. App. 31-32. The district court then found that the use of a firearm was not an element of the offense and therefore concluded that the phrase could "be deleted by the Court." App. 35.

The district court subsequently used a pattern instruction and advised the jury that Count One only required that the defendant use a "dangerous weapon or device." Tr. of Jury Trial – Vol. 2, Doc. 130 at 231. The district court explained that a "dangerous weapon or device does not require proof that the dangerous weapon or device is actually capable of putting life -- a person in jeopardy, but rather incitement of fear is sufficient to characterize an apparently dangerous weapon or device is dangerous within the meaning of the statute." *Id.* at 232. The verdict form also permitted Mr. Benitez to be convicted if he used a "dangerous weapon," without any mention of a firearm. Verdict, Doc. 87 at 1.

During closing arguments, the Government stressed that it could convict Mr. Benitez on Count One even if he only used a toy: "a dangerous device really more focuses on not necessarily the instrument itself but how the people feel about that instrument . . . it could technically be a toy gun and still be a dangerous device. . . . whether it's real or fake doesn't matter." Tr. of Jury Trial – Vol. 2, Doc. 130 at 198, 200. The Government emphasized Mr. Benitez's own testimony: "even the defendant admits that it's . . . a toy gun. So I submit to you that he's guilty of the bank robbery by assaulting and putting in jeopardy the life of another person by the use of a dangerous weapon. So we've proven that." *Id.* at 200.

After nearly three hours of deliberations, the jury found Benitez guilty of the § 2113(a) and (d) armed bank robbery charged in Count One, but found him not guilty of the § 924(c) firearm offense charged in Count Two. App. 17.

On appeal, Mr. Benitez argued that the district court constructively amended the indictment when it instructed the jury that he could be found guilty even if he used a dangerous device, which, under the instructions given, did not need to be dangerous at all. Defendant-Appellant's Initial Br. at 15. Mr. Benitez noted that the

Government initially narrowed the indictment by alleging that he used a firearm but then argued to the jury that he could be convicted even if he used a toy, which broadened the basis for conviction and constructively amended the indictment. *Id.* at 19. He also pointed out that the Government argued to the district court prior to trial that the use of a "firearm" was not surplusage, but instead was an element of the crime. *Id.*

In his second point on appeal, Mr. Benitez argued that, even if there was no constructive amendment, the jury instructions amounted to a material and prejudicial variance. Defendant-Appellant's Initial Br. at 20. Mr. Benitez stressed that the Government stipulated in open court that it would not argue to the jury that the object he used was anything other than a "firearm," only to turn around at trial and take the opposite position. *Id.* at 20-21. Mr. Benitez also noted that he prepared his entire defense, which included securing an expert witness, calling his own daughter to the stand and subjecting himself to cross-examination or prior felonies, based on the assurance that the Government would have to prove that he carried a firearm. *Id.* at 21. Hence, he argued that, when the Government took a contrary position at trial, convinced the district court that he could be convicted even if he held a toy gun, and then argued as much during closing, the variance effectively precluded him from raising his theory of defense, which was entirely predicated on the premise that he did not commit the robbery using a firearm. *Id.* at 21.

The Government, in its appellate briefing, responded that a number of circuit courts of appeals have held that "altering a means of committing an offense does not constructively amend the indictment because it does not alter an essential element of the crime such that the defendant may have been convicted of an offense other than that charged in the indictment." Br. of Gov't at 29 (citing *United States v. Sammour*, 816 F.3d 1328 (11th Cir. 2016)). It then argued that the inclusion of "the language 'that is a firearm' did not alter any of the essential elements" but instead described a means of committing the crime, and so was not a constructive amendment. *Id.* With regard to the second argument, the Government asserted that no variance occurred because the firearm language was surplusage and that Mr. Benitez, in any event, failed to demonstrate substantial prejudice. *Id.* at 14-15.

The Eleventh Circuit affirmed Mr. Benitez's conviction. It adopted the Government's arguments and ruled that the armed bank robbery statute does not include as an essential element that the defendant used a firearm to carry out the offense. App. 19. It concluded that the "removal of the firearm phrase from the jury

instruction did not broaden the elements of the conviction under Count One," so "no constructive amendment occurred." App. 20.

With respect to the second argument on appeal, the Eleventh Circuit held that "there was no variance . . . between the indictment and the evidence at trial because both indicated that Benitez had a firearm of some sort (either real or a replica)." App. 21. The Eleventh Circuit also ruled that he had "not shown the required prejudice." App. 21. Mr. Benitez now petitions this Court for a writ of certiorari to review those decisions.

REASONS FOR GRANTING THE WRIT

1. This Court should Clarify whether a Constructive Amendment Occurs when the Removal of a Phrase in an Indictment Serves to Broaden the Manner in which the Crime could be Committed.

The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." This Court has construed the Fifth Amendment to prohibit a defendant from being "tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

Since the founding of the Republic, the grand jury has served as a "protective bulwark standing solidly between the ordinary citizen and the overzealous prosecutor." *United States v. Dionisio*, 410 U.S. 1, 17 (1973). The "grand jury brings suspects before neighbors, not strangers," *Hannah v. Larche*, 363 U.S. 420, 498 (1960) (Douglas, J., dissenting), and the "very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone*, 361 U.S. at 218.

The Fifth Amendment's grand jury requirement therefore establishes the "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *United States v. Miller*, 471 U.S. 130, 140 (1985). Accordingly, "after an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself." *Stirone*, 361 U.S. at 215-16. Doing so amounts to a "constructive amendment," which occurs when a court, "through its instructions and facts it permits in evidence, allows proof of an essential element of

a crime on an alternative basis permitted by the statute but not charged in the indictment." *United States v. Griffin*, 324 F.3d 330, 355 (5th Cir. 2003) (quoting *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991)). This Court has held that a constructive amendment is per se reversible error, as the deprivation of "the right to be tried only on charges presented in an indictment and returned by a grand jury . . . is far too serious to be treated . . . as harmless error." *Stirone*, 361 U.S. at 217.

The seminal case on constructive amendment is *Stirone*. In *Stirone*, this Court considered whether there had been a constructive amendment of the indictment that charged the defendant with using his union position to "unlawfully obstruct, delay [and] affect interstate commerce . . . and movement of [sand] by extortion," in violation of the Hobbs Act. *Id.* at 213-14. Over objection, the district court allowed the Government to introduce "evidence of an effect on interstate commerce not only in sand . . . but also in interference with steel shipments." *Id.* at 214. The trial court's jury instructions also permitted the jury to convict the defendant on either basis. *Id.* The Third Circuit affirmed the conviction, reasoning that the evidence did not surprise the defendant and supported his conviction. *United States v. Stirone*, 262 F.2d 571, 574 (3d Cir. 1958).

This Court reversed that ruling. It reasoned that "when only one particular kind of commerce is charged to have been burdened[,] a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." *Stirone*, 361 U.S. at 218.

The federal courts of appeal have been somewhat inconsistent in their application of *Stirone*. The Fifth Circuit, for instance, has strictly adhered to *Stirone*. For instance, in *United States v. Nuñez*, 180 F.3d 227, 230 (1999), the Fifth Circuit stated that it has "consistently followed *Stirone*," and it overturned a conviction of a defendant indicted for "knowingly and by means and use of a dangerous weapon, that is, a fully loaded .40 caliber Beretta semi-automatic," assaulting a federal officer, where the trial court instructed the jury that it could convict the defendant of forcibly assaulting a federal officer without the use of a dangerous weapon. *Id.* at 231-33. Similarly, in *United States v. Doucet*, 994 F.2d 169, 170-73 (5th Cir. 1993), the Fifth Circuit found a constructive amendment where the indictment charged a defendant with possessing an "assembled" automatic machine gun, but at trial he was potentially convicted for possessing a "combination of parts from which a machine gun [could] be assembled."

The Seventh Circuit likewise ruled that a constructive amendment occurred in *United States v. Leichtnam*, where the Government alleged in the indictment that the firearm used in a crime was a Mossberg rifle, but at trial introduced evidence to suggest that the firearm could have been two other handguns. *Leichtnam*, 948 F.2d at 374-75. The Seventh Circuit construed *Stirone* to prohibit specifying one type of firearm in the indictment, and then presenting alternative firearms that were not mentioned in the indictment: "New [bases for conviction] may not be added without resubmitting the indictment to the grand jury, whether they are added literally, by a formal amendment to the indictment . . . or by instructions to the trial jury which would allow a conviction on grounds not charged by the grand jury." *Leichtnam*, 948 F.2d at 379 (internal citations omitted). Thus, the *Leichtnam* Court held that "the introduction of the handguns, together with the jury instructions, impermissibly amended the indictment by broadening the possible bases for conviction to include knowingly using or carrying any firearm." *Leichtnam*, 948 F.2d at 380-81.

In much the same vein, the Tenth Circuit has held that an indictment charging a defendant with unlawfully possessing "any ammunition and firearm . . ., that is[,] a Hi–Point 9 mm pistol" under 18 U.S.C. §§ 922(g) and 924(a) was constructively amended by jury instructions allowing conviction on the basis of unlawfully possessing a .38 caliber bullet. *United States v. Bishop*, 469 F.3d 896, 901, 903 (10th Cir. 2006), *abrogated on other grounds by Gall v. United States*, 552 U.S. 38 (2007).

Other appellate courts have taken a more permissive approach to constructive amendments. As the Eleventh Circuit observed in *United States v. Sammour*, 816 F.3d 1328, 1338 (2016), some circuits, including the Second Circuit, "draw a distinction between a jury instruction that changes an element of the crime and a jury instruction that merely changes a *means* of satisfying an element of the crime." *Sammour*, 816 F.3d at 1338 (emphasis in original) (citing *United States v. D'Amelio*, 683 F.3d 412, 422 (2d Cir. 2012)).

In *D'Amelio*, the Second Circuit emphasized that its constructive amendment jurisprudence has "consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *D'Amelio*, 683 F.3d at 417 (quoting *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007)). It rejected an argument by the defendant that the district court properly concluded that a "to wit" clause in the indictment, which identified only the Internet as a facility of interstate commerce used to commit the crime, was constructively

amended by the jury instructions, which listed both the Internet and telephone as facilities of interstate commerce. *D'Amelio*, 683 F.3d at 417, 421.

The Second Circuit has also expressly declined to follow the analysis of the Seventh Circuit in *Leichtnam* and the Tenth Circuit in *Bishop*. *United States v. Bastian*, 770 F.3d 212, 221 (2d Cir. 2014). In *Bastian*, the Second Circuit found no constructive amendment, even though the Government substituted a .32 caliber revolver for the Excel 20–gauge shotgun identified in the "to wit" clause of the indictment. *Id.* It further stated it that it has "never suggested that a 'to wit' clause binds the government to prove the exact facts specified in a criminal indictment," and instead adhered to the "liberal approach toward constructive amendment" adopted by other circuits. *Id.* at 221-22.

This Court should resolve the conflicts between the circuits regarding the scope of the constructive amendment doctrine. In doing so, the Court should affirm the test formulated by the Fifth Circuit, which asks, consistent with *Stirone*, whether the petit jury is permitted to consider proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment. *See Griffin*, 324 F.3d at 355.

Where, as here and in *Nuñez*, *Leichtnam*, and *Bishop*, the Government obtains an indictment that specifies that a defendant committed an offense through the use of a firearm, the "language employed by the Government in its indictments becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars." *Farr*, 536 F.3d at 1181 (internal quotation marks omitted). Holding otherwise would contravene the core holding of *Stirone*, which cautioned that courts cannot broaden the possible bases for conviction beyond those found in the operative charging document.

In this case, the Government charged Mr. Benitez with armed bank robbery *using a firearm*. But it obtained a conviction based on jury instructions and closing argument that left open the possibility that he was convicted for robbing a bank using a toy. Removing the "firearm" from the indictment and replacing it with a "toy" broadened the basis for his conviction beyond that which was presented to the grand jury. Under *Stirone*, this constitutes a constructive amendment. Moreover, as the Government argued prior to trial (before it began to fear that it might not be able to prove that he used a firearm), the failure to substantiate that Mr. Benitez used the

specific instrumentality alleged in the indictment—a firearm—should have left him culpable for a different crime: simple bank robbery. *See Miller*, 471 U.S. at 144 (a constructive amendment occurs when the evidence presented at trial, together with the jury instructions, "so alter[s] [the indictment] as to charge a different offense from that found by the grand jury"). On these facts, the Eleventh Circuit erred when it concluded that no constructive amendment occurred.

Accordingly, this Court should grant this petition, resolve the conflict between the circuit courts of appeal on this important issue, and hold that the constructive amendment in this case violated Mr. Benitez's rights under the Fifth Amendment.

2. This Court should Elucidate the Difference between a Constructive Amendment and a Variance and Explain when a Variance Requires Reversal.

This Court addressed the difference between a constructive amendment and a variance in *United States v. Miller*, 471 U.S. 130 (1985). Yet, in the ensuing years, federal appellate courts and commentators alike have described the distinction between these two concepts as "sketchy." *United States v. Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002) ("the distinction between a variance and a constructive amendment is sketchy"); *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008) (the "distinction between the concept of a permissible variance . . . and an impermissible constructive amendment . . . 'has been aptly described as 'sketchy'") (quoting 1 Charles Alan Wright, Fed. Prac. & Proc. Crim. 3d § 128)).

Miller dealt with an indictment that alleged two methods by which the defendant defrauded his insurer: by consenting to a burglary in advance and by lying to the insurer about the value of his loss. *Miller*, 471 U.S. at 131-32. At trial, the proof only concerned the latter of these methods. *Miller*, 471 U.S. at 132-33.

This Court concluded that the deviation from the indictment was only a variance, and not a constructive amendment. *Id.* at 147. The Court reasoned that competent defense counsel "certainly should have been on notice that that offense was charged and would need to be defended against." *Id.* at 134. Thus, the defendant could not claim that he was "prejudicially surprised at trial by the absence of proof concerning his alleged complicity in the burglary" or that the "variance prejudiced the fairness of [his] trial in any other way." *Id.* at 134-35.

The Court distinguished the facts of *Miller* from *Stirone* by stating that in "*Stirone* the offense proved at trial was not fully contained in the indictment, for trial evidence had 'amended' the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment." *Id.* at 138 (emphasis in original). In *Miller*, by contrast, the variance occurred by narrowing the grounds for conviction, that is: "His complaint is not that the indictment failed to charge the offense for which he was convicted, but that the indictment charged more than was necessary." *Id.* at 140. Thus, since any part of the indictment that is "unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment,'" this Court found no error of constitutional magnitude. *Id.* at 136 (quoting *Ford v. United States*, 273 U. S. 593, 602 (1927)).

Since this Court's decision in *Miller*, the appellate courts have differed in their description of what constitutes a variance. The Eighth Circuit, for instance, has opined that the "basic difference between a constructive amendment and a variance is this: a constructive amendment changes the charge, while the evidence remains the same; a variance changes the evidence, while the charge remains the same. *United States v. Johnson*, 719 F.3d 660, 668 (8th Cir. 2013) (internal quotation marks and citation omitted), *cert. denied*, 134 S. Ct. 705 (2013). The Tenth Circuit, in contrast, has used the terms "variance" and "constructive amendment" synonymously, although the case in question was analyzed as one of constructive amendment. *See United States v. Crockett*, 435 F.3d 1305, 1315 (10th Cir. 2006) ("If the district court's instructions and the proof at trial broaden the indictment, the variance constitutes a constructive amendment, violates the Fifth Amendment, and is reversible per se.").

The conceptual ambiguity between a variance and a constructive amendment has posed problems because the "line that separates a constructive amendment from a variance is not always easy to define." *United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014). Some appellate courts have found that the language specifying the way an offense was committed to be surplusage and thus constituted a variance. In *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006), for instance, the Second Circuit affirmed a conviction for wire fraud where the only wire transfer actually alleged in the indictment was not proven. *Dupre*, 462 F.3d at 140-141. Surprisingly, the Second Circuit held that no constructive amendment occurred "because the evidence at trial concerned the same elaborate scheme to defraud investors as was described in the indictment," even though none of the wire transfers presented in the trial had been alleged in the indictment. *Id.*

Other courts have concluded that even the removal of unnecessary language may rise to the level of a constructive amendment if the excision of that language prejudiced the defense. *See United States v. Cancelliere*, 69 F.3d 1116, 1121 (11th Cir. 1995). In *Cancelliere*, the Government charged the defendant with "knowing and willful" money laundering, but then sought to remove that language because willfulness is not a statutory element of money laundering. *Id.* Since the defendant prepared his "whole defense" based on the willfulness language in the indictment, the Eleventh Circuit held that its removal amounted to an impermissible amendment to the indictment: "The government alleged it even though it need not have, and it must be charged with proving it. The government may not decide after the close of evidence that it would prefer not to have the jury hear that term again." *Id.* at 1122.

Most courts, however, consider the prejudice to the defendant primarily in connection with whether a variance can be considered harmless error, as a constructive amendment is per se reversible error in any event. *See Farr*, 536 F.3d at 1184-86; *United States v. Mize*, 814 F.3d 401, 409 (6th Cir. 2016). "A variance between the indictment and the proof is only reversible error . . . if it is prejudicial — that is, if it affects the substantial rights of the accused. Such a variance can prejudice a defendant's Sixth Amendment right to notice of the charges against him if he could not have anticipated from the allegations in the indictment what the evidence would be at trial." *United States v. Bowling*, 619 F.3d 1175, 1182 (10th Cir. 2010) (internal quotation marks and citations omitted); *see also Mize*, 814 F.3d at 409.

As argued above, this case concerns a constructive amendment that broadened the basis for Mr. Benitez's conviction. But even if the removal of the firearm language only constituted a variance, Mr. Benitez still should have prevailed. As defense counsel explained to the district court, Mr. Benitez relied on the firearm language in the indictment, coupled with the Government's pretrial assurances that it would not attempt to prove that the object was anything other than a firearm, in preparing for trial.

Indeed, Mr. Benitez's entire defense, which included the testimony of an expert firearms witness, his own testimony, and the testimony of his daughter, rested on refuting the Government's allegation that he used a firearm to rob the bank. It would have made no sense to call these witnesses if he could have been found guilty even if he held a toy. And he prevailed on the factual predicate of his defense—the jury

necessarily found that he did not possess a firearm as it acquitted him of the firearm count. Mr. Benitez, moreover, reasonably relied on the Government's pretrial averment that the failure to establish that it was a firearm would leave Mr. Benitez only liable for simple bank robbery. However, the Government vitiated this defense by obtaining a jury instruction and arguing to the jury that he could be convicted even if he used a toy. If Mr. Benitez could not establish prejudice on these facts, no defendant ever could.

Based on the foregoing, this Court should grant this petition and review the proceedings below.

CONCLUSION

The proceedings below violated Mr. Benitez's rights under the Fifth Amendment because the indictment was constructively amended to broaden the factual basis for his conviction. Even if there was no constructive amendment, the variance prejudiced Mr. Benitez because it foreclosed his only theory defense. Petitioner Jose Benitez, Jr., therefore respectfully requests that this Court grant this petition for a writ of certiorari and review the proceedings below.

Respectfully submitted on this 26th day of July, 2018.

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