No. 18-5464

IN THE SUPREME COURT OF THE UNITED STATES

JOSE BENITEZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the jury instructions given at petitioner's trial, which were consistent with the district court's interpretation of the indictment during pretrial proceedings, amounted to either a constructive amendment of the indictment or a prejudicial variance from the allegations in the indictment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-24) is not published in the Federal Reporter but is reprinted at 732 Fed. Appx. 783.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2018. The petition for a writ of certiorari was filed on July 26, 2018. 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 Middle District of Florida, petitioner was convicted on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Am. Judgment 1. He was sentenced to 122 months of imprisonment, to be followed by five years of supervised release. Am. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-24.

1. On October 8, 2014, petitioner, wearing a mask and dark sunglasses and brandishing what appeared to be a semi-automatic handgun, robbed the Iberia Bank in Cape Coral, Florida. Pet. App. 8-10. Petitioner pointed the gun at the bank teller and ordered her to hand over all her money, and he also ordered others to lie on the floor. Ibid. Petitioner then fled with more than $12,000 in cash. Id. at 8. He was later apprehended after the police identified his fingerprints on the sunglasses that he left on the tellers' counter. Ibid.

A federal grand jury in the Middle District of Florida indicted petitioner on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and one count of using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 2. Under Section 2113(d), a defendant commits armed bank robbery when, in the course of a bank robbery, he "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. 2113(d). The armed bank robbery count in petitioner's indictment alleged

that, "in committing said offense, [petitioner] did assault and put in jeopardy the life of another person by the use of a dangerous weapon, that is a firearm." Pet. App. 2-3 (emphasis omitted).

2. Petitioner offered to plead guilty to the bank robbery charge without a plea agreement, but he stated that he wished to maintain his plea of not guilty on the Section 924(c) charge. Pet. App. 4. The government opposed that proposal, arguing that petitioner could not plead guilty to armed bank robbery without admitting that he used a firearm during the robbery, thereby admitting his guilt on the Section 924(c) charge as well. Ibid. The parties disagreed about whether the term "firearm" in the indictment was surplusage or an element of the offense. Id. at 4-5. The district court agreed with petitioner that "because the firearm phrase * * * was surplusage," petitioner could plead guilty to armed bank robbery while still contesting his guilt on the Section 924(c) charge. Id. at 5-6. Petitioner subsequently informed the court, however, that he did not wish to plead guilty. Id. at 6.

At trial, petitioner admitted that he robbed the bank, but claimed that he carried "a fake, plastic gun." Pet. App. 11; see id. at 7-8. The government proposed that the district court follow the Eleventh Circuit's pattern jury instructions and instruct the jury that a "dangerous weapon or device" is defined as "any object that a person can readily use to inflict serious harm on someone else." Id. at 14-15; see id. at 15 n.5. Petitioner objected,

arguing that the government was estopped from changing its pretrial position and that the government had to prove that petitioner used a real firearm. Id. at 15. The district court disagreed, "explaining that [it] had already ruled that the firearm phrase was surplusage and that it had previously given [petitioner] the option of pleading guilty to [the armed bank robbery count] without admitting that the dangerous weapon in question was a firearm." Id. at 15-16. The court accordingly instructed the jury that a "dangerous weapon or device" includes "any object that a person can readily use to inflict serious bodily harm on someone else." Id. at 16.

The jury found petitioner guilty on the armed bank robbery charge and acquitted him on the Section 924(c) charge. Pet. App. 17. At sentencing, in calculating petitioner's advisory Sentencing Guidelines range, the district court declined to apply a six-level enhancement for use of a firearm during the robbery under Sentencing Guidelines § 2B3.1(b)(2)(B)(2015). Pet. App. 18. The court sentenced petitioner to 122 months of imprisonment. Id. at 18-19.

3. The court of appeals affirmed. Pet. App. 1-24. The court rejected, "[f]or several reasons," petitioner's contention that the jury instructions had constructively amended the indictment by allowing the jury to find petitioner guilty of armed bank robbery without finding that he possessed a working firearm. Id. at 19; see id. at 19-20. The court first determined that no

constructive amendment occurred because the firearm phrase in the indictment was not an element of the armed bank robbery offense. Id. at 19-20. The court further explained that this was "not a case where the government removed 'firearm' from the indictment and then tried to prove that the defendant carried a knife, a bomb, or another dangerous weapon." Id. at 20. The court observed that the only question at the trial was whether the apparent weapon petitioner carried was real or fake. Ibid. As the court had earlier noted, the jury had been instructed that proof of a working firearm was necessary to find petitioner guilty on the Section 924(c) count. See id. at 17 n.7. The court explained, however, that that issue did not "broaden the elements of the conviction" on the armed bank robbery charge. Id. at 20.

For similar reasons, the court of appeals also rejected petitioner's argument that there was a variance between the indictment and the trial evidence. Pet. App. 21-22. The court emphasized that the indictment and the evidence "both indicated that [petitioner] had a firearm of some sort (either real or a replica)." Id. at 21. The court further determined that, even if petitioner had been able to show a variance, petitioner suffered no prejudice because he was "on notice," based on the district court's pretrial ruling, that the firearm phrase in the indictment was surplusage and not an element of the offense, and therefore "knew that the government would not have to prove that [he] used

a real firearm in order to obtain a conviction" on the armed bank robbery charge. Id. at 21-22.

ARGUMENT

Petitioner renews his contention (Pet. 12-13, 15-16) that the district court erred by allowing the jury to find him guilty of armed bank robbery without finding that he used a firearm. The court of appeals's fact-bound decision is correct and its unpublished per curiam disposition does not conflict with any decision of this Court or another court of appeals. This Court has previously denied similar petitions for writs of certiorari seeking review of lower courts' rejections of constructive-amendment claims, see, e.g., Davis v. United States, 138 S. Ct. 1591 (2018), Brown v. United States, 138 S. Ct. 468 (2017), and it should do the same here.

1. a. The Grand Jury Clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. That right protects 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).

Lower courts have adopted two analytical approaches when the government's evidence at trial arguably diverges from the factual theory specified in the indictment, depending on the nature of the divergence. Where the divergence does not substantially alter the

charged theory of guilt, lower courts have characterized the situation as a "variance" from the indictment. 5 Wayne R. LaFave et al., Criminal Procedure § 19.6(c), at 396 (4th ed. 2015); see id. at 396 n.31. A variance does not require reversal unless the divergence "is likely to have caused surprise or otherwise been prejudicial to the defense." Id. at 396; see id. at 396 n.31 (citing cases). Where a divergence is so great that it essentially allows a defendant to be convicted for a crime not charged in the indictment, lower courts characterize the divergence as a "constructive amendment" of the indictment. Id. at 396; see, e.g., United States v. Mubayyid, 658 F.3d 35, 49 (1st Cir. 2011) ("In contrast to a variance, a constructive amendment occurs where the crime charged has been altered, either literally or in effect, after the grand jury last passed upon it.") (citations and internal quotation marks omitted), cert. denied, 566 U.S. 1005 (2012); see also 3 Charles Alan Wright & Sarah N. Welling, Federal Practice and Procedure § 516, at 48-49 (4th ed. 2011) ("[A] constructive amendment involves a difference between the pleading and proof so great that it essentially changes the charge."). Courts have generally held that a constructive amendment requires automatic reversal, at least where an objection has been properly preserved. See, e.g., United States v. Crocker, 568 F.2d 1049, 1060 (3d Cir. 1977). But see pp. 15-16, infra.

b. The court of appeals correctly determined that no constructive amendment occurred in this case. As the court

explained, the jury instructions did not broaden the basis for conviction by permitting the jury to find petitioner guilty for an offense not charged in the indictment. Pet. App. 20. Instead, petitioner was convicted based on the same essential conduct alleged in the indictment -- robbery using an object that "looked like a firearm," rather than "a knife, a bomb, or another dangerous weapon." Ibid. And because the functionality of the "dangerous weapon" is not an essential element of the offense, id. at 19-20; see United States v. Hernandez, 232 Fed. Appx. 561, 566-567 (6th Cir. 2007) (citing cases); cf. McLaughlin v. United States, 476 U.S. 16, 17-18 (1986) (an unloaded gun is a "dangerous weapon"), the district court was not required to include the firearm phrase in its instructions to the jury.

The court of appeals's determination that petitioner's indictment was not constructively amended is consistent with this Court's decision in Stirone. In that case, the indictment charged that the defendant had obstructed interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951 (1958), by interfering with a concrete supplier's shipments of sand into Pennsylvania. 361 U.S. at 213-214. At trial, however, the government presented evidence that the defendant had obstructed interstate commerce because concrete made from the sand was to be used to build a steel plant, which would then export steel from Pennsylvania to other States once it was completed. Ibid. The district court instructed the jury that it could find the defendant guilty based on a finding

either that he obstructed the interstate market for sand shipped into Pennsylvania or that he obstructed the interstate market for steel shipped out of Pennsylvania. Id. at 214. This Court concluded that, by allowing the jury to rely on the defendant's alleged interference with the market for steel shipped out of Pennsylvania, the district court had unconstitutionally broadened the indictment, thereby potentially allowing the defendant to be "convicted on a charge the grand jury never made against him." Id. at 219.

Stirone does not suggest that petitioner's indictment was constructively amended in the circumstances of this case. This Court recognized in Stirone that not every divergence between the indictment and the proof at trial requires reversal. See 361 U.S. at 215, 217-218. Unlike in Stirone, where the additional proof established a factually unrelated means of obstructing commerce (impeding steel shipments out of Pennsylvania rather than sand shipments into Pennsylvania), the proof and jury instructions here matched the basic crime charged in the indictment. The only difference was the question whether the gun petitioner used was real or fake, but that was not an essential element of the offense.

2. Petitioner contends (Pet. 10) that the courts of appeals are "somewhat inconsistent" in applying Stirone. Specifically, he argues (Pet. 10-11) that the Fifth, Seventh, and Tenth Circuits have "strictly adhered" to Stirone, while the Second and Eleventh Circuits have taken a "permissive approach to constructive

amendments." But petitioner has only identified cases reaching different outcomes on different facts; he has not shown any disagreement on a question of law that would warrant this Court's review. The courts of appeals have rejected claims alleging an impermissible variance or constructive amendment where, as here, the proof at trial did not alter an essential element of the offense charged in the indictment. By contrast, in the cases cited by petitioner, the divergence between the indictment and the trial evidence was severe, much more so than in this case. None of the decisions that petitioner cites as examples of the "strict adherence" approach demonstrates that those courts would have reached a different result on the facts of this case.

In United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991), the indictment charged the defendant with using and carrying a firearm, "to wit," a particular Mossberg rifle, during and in relation to drug trafficking, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990). Id. at 374. The Seventh Circuit determined that "[i]n the context of the entire jury charge and the entire trial," 948 F.3d at 379, the indictment had been constructively amended by allowing the jury to find guilt based either on the Mossberg rifle or on either of two additional handguns found in a different part of the defendant's residence, id. at 374-381. The court's determination that the handgun evidence was "distinctly different" from the rifle evidence relied on case-specific factors: the prosecutor's admission at oral argument that "he

purposefully did not charge the two handguns" because "he 'felt that they were sufficiently attenuated from the drug evidence that it would be inappropriate'" to do so, id. at 380 & n.2, and the court's observation that while the defendant's former girlfriend had "testified that he carried a gun, obviously a handgun and not a rifle, in the saddle bag of his motorcycle when he delivered narcotics," the record contained "no evidence that the rifle was actually used in a narcotics transaction," id. at 380 n.2. Here, unlike in Leichtnam, the government did not attempt to prove at trial that petitioner used more than one "dangerous weapon" or a weapon that was different from the one charged in the indictment.

The other decisions that petitioner cites similarly involved situations in which the district court charged the jury in a manner that allowed it to find guilt on a basis markedly different from what the indictment charged. In United States v. Nuñez, 180 F.3d 227 (5th Cir. 1999), the indictment charged the defendant with assault, in violation of 18 U.S.C. 111 (1994 & Supp. IV 1998), by means of a fully loaded handgun, but the trial court instructed the jury that it could find guilt even without the defendant's use of a weapon. 180 F.3d at 230. In United States v. Doucet, 994 F.2d 169 (5th Cir. 1993), the indictment charged the defendant with possessing an unregistered firearm modified to fire as a machinegun, but the government argued and the district court instructed the jury that the defendant could be found guilty for possessing the unassembled parts of a machinegun. Id. at 170-172.

Likewise, in United States v. Bishop, 469 F.3d 896 (10th Cir. 2006), cert. denied, 551 U.S. 1133 (2007), overruled on other grounds by Gall v. United States, 552 U.S. 38 (2007), the indictment charged the defendant following a "'to wit'" clause with possession of a "Hi-Point 9-mm pistol," but the evidence and jury instructions permitted conviction for the defendant's separate possession of ammunition. Id. at 902-903 (citation omitted).[1]

Conversely, in circumstances closer to those here, the Fifth and Tenth Circuits have rejected constructive-amendment claims when the proof at trial did not alter an essential element of the charged offense. In United States v. Munoz, 150 F.3d 401 (5th Cir. 1998), cert. denied, 525 U.S. 1112 (1999), the court of appeals determined that the indictment was not constructively amended when, in a prosecution for possession of a firearm by a felon in violation of 18 U.S.C. 922(g)(1), in which the indictment

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[1] Petitioner cites (Pet. 12) United States v. Bastian, 770 F.3d 212 (2d Cir. 2014), as an example of the Second Circuit's "flexible approach." Id. at 221. In that case, the court of appeals, on plain-error review, rejected the defendant's reliance on Leichtnam and Bishop where the Second Circuit had not "squarely addressed" whether substitution of a different firearm constructively amends an indictment charging a violation of 18 U.S.C. 924(c). 770 F.2d at 221. The court also observed that, although "'a complex of facts distinctly different from that' charged by the grand jury" would constitute a constructive amendment, a "typical case rejecting a claim of constructive amendment" is when "the divergence between the indictment and the proof was limited to the description of a firearm allegedly possessed on a particular occasion." Id. at 223 (citation omitted).

alleged that the defendant carried a 12-gauge shotgun, the government proved at trial that petitioner carried a 20-gauge shotgun. 150 F.3d at 407, 417-418. See also United States v. Wallace, 647 Fed. Appx. 842, 843-844 (10th Cir.) (determining that, despite discrepancy between indictment and proof regarding firearm's serial number, "there can be no serious question either that [the defendant] received his fair notice or that the government prosecuted the specific crime on which the grand jury indicted, for it is beyond cavil that the gun described in the indictment was the same gun produced at trial") (citation and internal quotation marks omitted), cert. denied, 137 S. Ct. 254 (2016); United States v. Hamilton, 992 F.2d 1126, 1129-1130 (10th Cir. 1993) (determining that no constructive amendment occurred where indictment charged that defendant used a .38-caliber revolver but evidence showed that he used a gun of unknown caliber, and stating that "[w]hen the language of the indictment goes beyond alleging the elements of the offense, it is mere surplusage and such surplusage need not be proved") (citation omitted).

3. Petitioner asserts (Pet. 13) that this Court's review is needed to "[e]lucidate" the difference between a constructive amendment and a variance. Although not every court of appeals articulates the standard in precisely the same way, they agree with the court of appeals here that not every divergence between allegations in an indictment and proof at trial is a constructive amendment; that the question is one of degree; and that a

constructive amendment occurs only when the circumstances permit conviction on a significantly different set of facts or for a different offense. See Pet. App. 20-21.[2] The various decisions

[2] See also, e.g., United States v. Dupre, 462 F.3d 131, 140-141 (2d Cir. 2006) (constructive amendment occurs when "either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment") (citations omitted), cert. denied, 549 U.S. 1151 (2007); United States v. Allmendinger, 706 F.3d 330, 339 (4th Cir.) (constructive amendment occurs when "the indictment is altered to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment") (citation omitted), cert. denied, 569 U.S. 1005 (2013); United States v. Thompson, 647 F.3d 180, 184 (5th Cir. 2011) (constructive amendment occurs when defendant could "be convicted upon a factual basis that effectively modifies an essential element of the offense charged or permits the government to convict the defendant on a materially different theory or set of facts than that with which she was charged") (citation omitted); United States v. Ferguson, 681 F.3d 826, 830 (6th Cir. 2012) (constructive amendment occurs when "the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment") (citations omitted); United States v. Ratliff-White, 493 F.3d 812, 820 (7th Cir. 2007) (constructive amendment occurs when a "complex set of facts" is presented at trial that is "distinctly different from the set of facts set forth in the charging instrument," or the crime charged in the indictment is "materially different or substantially altered at trial") (citations omitted), cert. denied, 552 U.S. 1141 (2008); United States v. Yielding, 657 F.3d 688, 709 (8th Cir. 2011) (constructive amendment occurs when jury instruction "alters the essential elements of the offense charged in the indictment and thereby creates a 'substantial likelihood' that the defendant was convicted of an uncharged offense") (citation omitted), cert. denied, 565 U.S. 1262 (2012); United States v. Mincoff, 574 F.3d 1186, 1198 (9th Cir. 2009) (constructive amendment occurs when "there is a complex of facts presented at trial distinctly different from those set forth in the charging instrument" or "the crime charged in the indictment was substantially altered at trial") (citation omitted), cert.

cited by petitioner simply reflect the application of a fact- and context-intensive inquiry to factually different cases. The court of appeals's unpublished decision below, which applies a generally agreed upon standard to the particular facts of this case, does not warrant this Court's review. See Sup. Ct. R. 10.

4. Finally, a writ of certiorari is not warranted because petitioner has not shown any prejudice from the error he asserts. Contrary to petitioner's contention (Pet. 15), a constructive amendment is not automatically reversible error.

To the extent that lower courts have held otherwise, they have relied principally on this Court's decision in Stirone. See, e.g., Crocker, 568 F.2d at 1060. But Stirone was decided before this Court held in Chapman v. California, 386 U.S. 18 (1967), that harmless-error analysis generally applies to constitutional errors. Id. at 21-22. And although this Court has identified certain structural errors that are exceptions to that principle, it has never listed constructive amendments to an indictment among them. E.g., United States v. Gonzalez-Lopez, 548 U.S. 140, 148-149 (2006); Neder v. United States, 527 U.S. 1, 8 (1999); Johnson v.

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denied, 558 U.S. 1116 (2010); United States v. Edwards, 782 F.3d 554, 561 (10th Cir.) (constructive amendment results "when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment") (citation omitted), cert. denied, 136 S. Ct. 153 (2015).

United States, 520 U.S. 461, 468-469 (1997). To the contrary, this Court has repeatedly held that defects in grand-jury proceedings are susceptible to the usual harmless-error analysis. See United States v. Cotton, 535 U.S. 625, 628-631 (2002) (holding that the failure of an indictment to list an element of the offense -- a fact that enhanced the defendant's statutory maximum sentence -- is not jurisdictional and is subject to plain-error review if the defendant did not object in the district court); see also Bank of Nova Scotia v. United States, 487 U.S. 250, 255-256 (1988); United States v. Mechanik, 475 U.S. 66, 71-72 (1986).

Here, both the district court and the court of appeals determined that petitioner suffered no prejudice from the jury instructions in his case. See Pet. App. 21-22. The government's theory remained the same throughout the case, and petitioner had notice in advance of trial that the government would charge him with using a dangerous weapon in the commission of the crime. He also was on notice, following the district court's pretrial ruling, that the government would not be required to prove that the dangerous weapon was an actual firearm. And although he contends that he tailored his defense to accord with the government's initial view of the firearm phrase in the bank robbery charge -- a view that the district court rejected -- he nonetheless had an incentive to put forward the very same defense in order to defeat the Section 924(c) charge. His evidence also enabled him to avoid

application of a Guidelines enhancement. See Pet. App. 18. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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