No. 18-5464

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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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

1. Comment on the Government's Statement of the Facts

In its recitation of the facts, the Government omits key aspects of the proceedings before the district court. The Government excludes any reference to its assurance during a pretrial hearing that it "would not suggest to the jury" that Mr. Benitez used "anything other than a firearm." Tr. of June 4, 2015 Status Conference, Doc. 125 at 10. The Government neglects to mention another assurance it gave Mr. Benitez during the same hearing—if he negated the use of a firearm, then he could defeat the aggravated offense of bank robbery with a deadly weapon, leaving him only liable for a lesser offense: "And [defense] counsel is right: If we don't substantiate [the use of a firearm] at trial, then it's simple bank robbery." *Id.* at 9.

Finally, the Government fails to acknowledge that it argued strenuously prior to trial that the omission of the firearm language from Count One would amount to a constructive amendment. The Government only saw fit to reverse its position on this point *in the middle of trial*, after it became clear that Mr. Benitez could mount a formidable defense against the allegation that he used of a firearm.

These omitted facts are significant because they explain why Mr. Benitez made the decision to take Count One to trial instead of pleading guilty to that charge: the Government led him to believe that he could defend against the enhanced bank robbery count by showing that he did not use of a firearm, the use of which the Government had previously described as an "essential element" of that charge.

Instead of acknowledging that the removal of the firearm language prejudiced Mr. Benitez, who structured his entire case around disproving that allegation, the Government suggests that he should have known all along that the language was "surplusage" because of a pretrial ruling to that effect. Br. for the United States in Opp. at 3. This is false. The transcripts of the pretrial proceedings show that the district court never ruled that the firearm phrase was surplusage.

The district court ruled that Mr. Benitez could plead guilty during the July 13, 2014 Status Conference. There is no mention of surplusage anywhere to be found during that hearing. Tr. of July 13, 2015 Status Conference, Doc. 126 at 2-3. Nor is

there any express or implied ruling that the firearm language contained in Count One would be stricken from the indictment. *Id.*

In fact, at the subsequent Final Pretrial Conference, the district court advised the parties, after consulting with them, that it would read the firearm language contained in the indictment to the jury:

> THE COURT: . . . I just had a question on the indictment because the indictment does read in Count 1 a firearm. Is the government still asking that that's how the Court read Count 1?
>
> MR. BAGGE-HERNANDEZ: Your Honor, that's -- yes, that's what's in the indictment; that's what we would ask.
>
> THE COURT: Okay. And both parties did approve that, so I just wanted to make sure anyway. And it does read at the end, 'That is, a firearm.' So that is how the Court would intend to read it then to jury as well. Okay.
>
> [DEFENSE COUNSEL]: Yes.

Tr. of July 13, 2015 Status Conference, Doc. 128 at 31-32.

This colloquy conclusively refutes the suggestion that the district court ruled prior to trial that the firearm language was surplusage. If the district court had already determined that the language was surplusage, then it would not have asked the parties whether it should read that surplusage to the jury. And the district court certainly would not have concluded that it would be appropriate read that phrase to the jury if it believed it was surplusage.

Given the foregoing, one can hardly fault Mr. Benitez for electing to take Count One to trial on the theory that he did not carry a firearm. After all, the Government alleged in the indictment that the instrument was a firearm, it took the position at a pretrial hearing that a firearm was an element of the offense, it agreed prior to trial that it would not suggest that the device was anything other than a firearm, and it stipulated that Mr. Benitez could defeat the enhanced bank robbery charge if he

established that he did not use a firearm. Then, at the Final Pretrial Conference, the district court confirmed that the firearm language would be read to the jury.

Mr. Benitez relied on these aspects of the pretrial proceedings in formulating his defense. The clearest evidence of this reliance can be found in his opening statement to the jury, where he admitted to robbing the bank and told the jury that the "single trial issue" was whether he used a firearm or a replica in doing so. App. 7. Hiring an expert to prove that it was a replica also would have made no sense if he could be found guilty even if he used a toy. The Government suggests that Mr. Benitez might have chosen to dispute the use of a firearm to avoid a six-level sentencing enhancement for use of a firearm during the robbery under Sentencing Guidelines § 2B3.1(b)(2)(B) (2015), but there was no guarantee that this enhancement would be inapplicable even if he prevailed on the Section 924(c) charge. Indeed, during sentencing, the Government argued that he should still receive the enhancement, even though the jury acquitted him on the Section 924(c) charge. *See* United States' Sentencing Memorandum, Doc. 96 at 9-10.

In sum, Mr. Benitez lacked notice that the firearm language would be omitted from the jury charge. He lacked notice that the jury would be instructed that the device he used did not need to be "capable of putting life -- a person in jeopardy." And Mr. Benitez could not have reasonably foreseen that, despite its assurances to the contrary, the Government would assert during closing arguments that he could be found guilty even if he used a toy. Whether these deviations from the language of the indictment constitute a constructive amendment is question of doctrine that this Court now has the opportunity decide. What is beyond dispute, though, is that the removal of the firearm language stripped Mr. Benitez of his only theory of defense to Count One and deprived him of a fair trial. If ever a case called for reversal based on a prejudicial variance, this is the case.

2. <u>There is a Split in the Circuits as to 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.</u>

The Government disputes the existence of a circuit split on the constructive amendment question presented. Br. for the United States in Opp. at 10. According to the Government, "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." *Id.* This is incorrect.

In *United States v. Nuñez*, 180 F.3d 227, 230 (1999), the Fifth Circuit considered the 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. The *Nuñez* Court found a constructive amendment because the trial court instructed the jury that it could convict the defendant without the use of a dangerous weapon. *Id.* at 231-33. That fact pattern resembled what happened in this case—the Government alleged that Mr. Benitez used *a firearm* but argued to the jury that he could be convicted even if he only used a toy. If this case had originated from the Fifth Circuit, *Nuñez* would have compelled a different result.

The Tenth Circuit in *Bishop* similarly held that a constructive amendment had occurred where the indictment charged the defendant with unlawfully possessing "any ammunition and firearm which has been shipped or transported in interstate commerce, that is a Hi-Point 9mm pistol, serial number P117787," but the Government introduced evidence and received a jury instruction referring to a .38 caliber bullet as well as the Hi-Point pistol. *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). The Tenth Circuit reasoned that "the government could have left the indictment language broad, but here [chose] to limit the bases for possible conviction to a specific firearm," and so it found a constructive amendment. *Bishop*, 469 F.3d at 903 (internal quotation marks omitted).

That reasoning is equally applicable to this case. Here, the Government chose to limit the bases for possible conviction by specifying the dangerous weapon Mr. Benitez employed—"that is, a firearm." However, the jury instructions and closing argument broadened the basis for conviction and permitted the jury to convict Mr. Benitez if he used a replica or even a toy gun. Therefore, if this case had originated from the Tenth Circuit, that court would have reached a different result.

Finally, consistent with *Nuñez* and *Bishop*, the Seventh Circuit in *Leichtnam* found a constructive amendment where a defendant was charged with "knowingly use[ing] and carr[ying] a firearm: to wit, a Mossberg rifle, Model 250CA with no serial number," but the district court instructed the jury that it could convict the defendant if it found he used and carried a firearm, and the government introduced evidence of three firearms at the trial, only one of which was a Mossberg rifle. *United States v. Leichtnam*, 948 F.2d 370, 374 (7th Cir.1991). In reaching its decision, the Seventh Circuit observed that the text specifying the type of firearm "was not merely

surplusage" because "[b]y the way the government chose to frame Leichtnam's indictment, it made the Mossberg an essential part of the charge." *Id.* at 379.

This case would have come out differently if the Eleventh Circuit followed *Leichtnam*. Under the logic of *Leichtnam* the use of the phrase "that is, a firearm" modified the essential element of a deadly weapon and therefore became "an essential part of the charge." *Id.* Removing that language and allowing the jury to convict Mr. Benitez even if he held a toy broadened the bases for conviction, and under *Leichtnam*, constituted a constructive amendment.

The divergence between these three cases and the contrary cases from other circuits, such as the Eleventh Circuit's opinion below, is not explained by the "fact-dependent" nature of the cases. Instead, it stems from a doctrinal disagreement regarding the centrality of the "essential elements" of an offense to constructive amendment inquiry. The Eleventh Circuit concluded that the use of a firearm in this case was not an "essential element" of the offense based on the elements contained in the statutory text, and therefore it concluded that no constructive amendment occurred.

Other courts, such as the Seventh, Fifth and Tenth Circuits, have embraced a stricter approach that looks not just to the elements of the offense, but also to the language in the indictment. On this view, if the Government includes additional information in its indictment, such as the particular make and model of a weapon, that additional information becomes an essential element of the offense charged. That element cannot later be removed without effecting a constructive amendment because doing so would broaden the possible bases for conviction. As explained in *Bishop*, "[i]f an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars." *Bishop*, 469 F.3d at 902.

This view draws on the logic of *Stirone*. The "essential elements" of the Hobbs Act crime in *Stirone* had nothing to do with sand or steel. Nevertheless, because 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," this Court concluded that a constructive amendment had occurred. *Stirone v. United States*, 361 U.S. 212, 214 (1960). That is because the additional proof of the interference with steel shipments broadened the potential bases for conviction.

In this case, the Government alleged that Mr. Benitez used a firearm to commit bank robbery, but the district court broadened the possible bases for his conviction by allowing the jury to convict him even if he used a replica or a toy. In certain circuit courts of appeals his conviction would stand, but in others it would be reversed.

The splintered constructive amendment doctrine has resulted in uneven protection of a defendant's Fifth Amendment right to a grand jury indictment. If the Court believes that a defendant's constitutional protection should turn on more than the luck of the draw, then it should grant this petition and resolve the confusion between the circuits on this fundamental issue of criminal law.

3. The Government's Argument for Harmless Error Provides another Reason for Granting Certiorari Review.

This Court held in *Stirone* that 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 Government, however, questions whether that holding remains good law. Br. of United States in Opp. at 16. According to the Government, "defects in the grand-jury proceedings are susceptible to the usual harmless-error analysis. *Id.*

This argument hardly seems like a reason to deny this petition. On the contrary, the tension between the language of *Stirone* and subsequent harmless error cases cited by the Government provides yet another compelling reason to grant this petition for writ of certiorari. Accordingly, based on the foregoing, this Court should grant this petition and review the proceedings below.

CONCLUSION

Petitioner Jose Benitez, Jr., respectfully requests that this Court grant this petition for a writ of certiorari and review the proceedings below.

Respectfully submitted on this 19th day of December, 2018.

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