

IN THE
SUPREME COURT OF THE UNITED STATES

No. ____

JASON LAUT,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

**APPLICATION TO THE HON. BRETT M.
KAVANAUGH FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

Pursuant to Supreme Court Rule 13(5), Jason Laut hereby moves for an extension of time of 30 days, to and including May 8, 2020, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be April 8, 2020.

In support of this request, Applicant states as follows:

1. The United States Court of Appeals for the Seventh Circuit rendered its decision on December 6, 2019 (Exhibit 1), and denied a timely petition for rehearing on January 9, 2020 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case concerns the extent to which the requirements of Federal Rule of Criminal Procedure 52(b) preclude defendants from seeking appellate relief from a constructive amendment, where the defendants' counsel failed to object at trial. Here, although the government effectively conceded that it had constructively amended Laut's operative indictment both in its appellate brief and at oral argument, the Seventh Circuit determined that Laut was precluded from relief under the plain error standard. *See United States v. Laut*, 790 Fed. Appx. 45 (7th Cir. 2019). Specifically, the Seventh Circuit found that since no circuit precedent existed concerning whether providing the indictment and verdict form to the jury in the deliberation room might mitigate the harm of a constructive amendment, any error was not plain. *Id.* at 48-49. Further, the Seventh Circuit determined that the evidence was sufficiently strong to convict Laut even absent the constructive amendment, and that Laut therefore could not demonstrate that he was prejudiced. *Id.* at 49.

3. The Seventh Circuit's application of the plain error standard to a constructive amendment conflicts with decisions from several other circuits—as the Seventh Circuit itself acknowledged earlier last year. *See United States v. Pierson*, 925 F.3d 913, 924-25 (7th Cir. 2019) (citing *United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001) (noting that “a constructive amendment is a *per se* prejudicial violation of the Grand Jury Clause of the Constitution”); *United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002) (applying a rebuttable presumption that constructive amendments prejudice a defendant); *United States v. Floresca*, 38 F.3d 706, 713 (4th Cir. 1994) (explaining how “a constructive amendment always ‘affects substantial

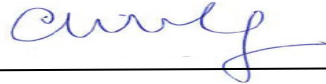
rights”); *United States v. Gavin*, 583 F.3d 542, 547 (8th Cir. 2009) (employing an approach similar to the Seventh Circuit); *United States v. Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018) (requiring merely “[a] reasonable probability [of prejudice] sufficient to undermine confidence in the outcome”—not proof that but for the error the result would have been different); *United States v. Madden*, 733 F.3d 1314, 1323 (11th Cir. 2013) (requiring reversal unless the court can determine “with certainty” that the constructive amendment did not impact the jury’s decision to convict)); *see also Floresca*, 38 F.3d at 712 (concluding that error is “plain” where it is plain that the grand jury did not return an indictment covering the additional areas presented to the petit jury).

4. Between now and the current due date of the petition, Applicant’s counsel, Erin E. Murphy, has substantial briefing and oral argument obligations, including a petition for certiorari in *Seng v. United States*, (U.S.) due March 16; a reply brief in *Thompson v. Hebdon*, No. 17-35019 (9th Cir.) due March 31; a petition for certiorari in *Kansas City Royals Baseball Corp. v. Senne*, (U.S.) due April 2; and an oral argument in *Duncan v. Becerra*, No. 19-55376 (9th Cir.) on April 2.

5. Applicant’s counsel thus requests a modest extension to prepare a petition that fully addresses the important issues raised by the decision below and frames those issues in a manner that will be most helpful to the Court.

WHEREFORE, for the foregoing reasons, Applicant requests that an extension of time to and including May 8, 2020, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,



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