

ORIGINAL

Supreme Court, U.S.
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No. 19-5910

In The Supreme Court of The United States

Benjamin Carpenter, Petitioner

VS.

The State of Georgia, Respondent

*On Petition for a Writ of Certiorari to
The Supreme Court of Georgia*

PETITION FOR WRIT OF CERTIORARI

Benjamin Carpenter
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Petitioner, Pro Se

Question Presented

1. Can criminal liability for a charged offense be based upon the defendant's complicity in an offense which is clearly distinct from any charged offense, and which is not in any way alleged in the indictment or other charging instrument? Or does this violate the Notice Clause of the 6th Amendment, the Grand Jury Clause of the 5th Amendment, or the Due Process Clauses of the 5th and 14th Amendments?

Introduction : Person A and Person B go to buy drugs from Person C. Person A intends to buy the drugs. Person B intends to rob Person C for

the drugs. Person A does not know of this plan.

When Person A and Person B meet up with Person C,

Person B pulls out a gun, Person C resists, and

Person B shoots and kills Person C. Persons A and

B are charged with attempted armed robbery and

murder. They are not charged with any drug related

offenses. Thinking himself innocent of the charged

offenses, Person A goes to trial and his defense theory

is that he only intended to buy the drugs.

This case is about whether or not it would be unconstitutional to instruct the jury at Person A's

trial in a manner which would allow them to find him/

her liable for the actions of person B, so long as

they had agreed to commit a drug offense together,
and Person B's actions furthered that objective.

The question presented here also implicates whether
or not it would be unconstitutional for an appellate court
to decide that Person A's agreement to commit a drug
offense provided legally sufficient evidence to hold him/her
liable for Person B's actions. However, that is not
what happened in my case, in which the challenge
deals with jury instructions.

List of Parties

All parties to this proceeding are listed in the caption of this petition. Petitioner in this Court, Petitioner-Appellant below, is Benjamin Carpenter (Referred to throughout this document in the first person). Respondent in this court is the State of Georgia, represented by the DeKalb County District Attorney's Office and the Attorney General's Office for that state.

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Petition For A Writ of Certiorari

Petitioner Benjamin Carpenter respectfully petitions for a writ of certiorari to review a judgement of the Georgia Supreme Court.

Opinions Below

The decision of the Georgia Supreme Court is reproduced as Appendix A.

The order of the state trial court denying a motion for a new trial is reproduced as Appendix B.

Jurisdiction

The Georgia Supreme Court entered judgement on April 15, 2019 (Appendix A at 1). This petition was turned over to prison officials for mailing on or before

July 15, 2019 (See Attached Affidavit). U.S. S. Ct. R.

29.2. This Court has jurisdiction under 28 U.S.C. §
~~1257~~ 1257 (a).

Constitutional and Statutory Provisions Involved

This case involves the Notice Clause of the 6th Amendment, the Grand Jury Clause of the 5th Amendment, and the Due Process Clauses of the 5th and 14th Amendments.

This case also involves a judicial interpretation of Georgia's party to a crime law, which I will call the "co-conspirator liability doctrine" (so as not to confuse it with the crime of conspiracy). *Scott v. State*, 229 Ga. 541, 192 S.E.2d 367 (1972). I do not challenge

the co-conspirator liability doctrine on its face, but simply argue that it could have been misapplied in my case as well as in other similar cases, so as to violate the constitution.

My argument also implicates similar situations which can arise under nearly identical statutes and judicially created doctrines in several other jurisdictions.¹

Statement of the Case

Part A: The Facts

On August 11th, 2016, Marina Hemmen arrived at Emory

¹ See *Pinkerton v. United States*, 328 U.S. 640, 646-648 (1946); Tex. Pen. Code § 7.02 (b); Iowa Code § 703.2; Illinois Code § 720 ILCS 5/5-2 (c); N.J.S.A. § 2C:2-6 (b) (4) (NJ Code); *State v. Dricketts No. A-3677-13T2 (II)* (N.J. Super. App. Div. 2018) (quoting jury instructions with language very similar to Georgia's co-conspirator liability doctrine); *Hopkins v. State*, 759 N.E.2d 633, 637 (Ind. 2001) (described as "common design").

Hospital in Atlanta with her boyfriend, Lucio Vasquez (who is the victim, and is also known as Geo) (Appendix C at 121). Geo had been shot once beneath his left armpit and once in his left temple (Appendix D at 31-32). He was pronounced dead at Emory (Appendix C at 121).

Marina was taken to the DeKalb County Police Headquarters and gave a statement (Appendix C at 121-122). She stated that Geo had asked her to drive him to the Sloan Square Apartments in DeKalb County so that he could make a marijuana deal (Id.). She said that one hispanic male and one white male entered the car (Id.). The white male sat behind the driver's seat (where she was sitting), and the hispanic male sat behind the passenger seat (where

Geo was sitting)(Id.). Geo turned around, said "Oh Shit" and "tried to fight them off"(Id.). She heard ~~the~~ two gunshots, and the two males fled (Id.).

Marina's Lexus was taken to a crime lab. Approximately \$30 worth of marijuana was found in the corner of the rear driver's side seat (Appendix C at 95 and 99-103). \$30 in cash was located on the floorboard right next to the center console (Appendix C at 93, 97, and 105). One unfired .25 caliber bullet was found on the floorboard near the center console (Appendix D at 19-23; Appendix A at 3). A DNA sample was taken from the car which was later matched to me, Benjamin Carpenter (Appendix A at 3). A fired shell casing was later found in the parking lot of the apartments (Appendix

D at 25-27). A second fired shell casing was never found.

Marina was later able to identify the Hispanic male as Christian Hernandez through Facebook. She gave ~~another~~

another police statement detailing how this happened (Appendix

D at 35). In this police statement she also stated, for the first

time, her belief that the white guy was the shooter (Appendix D

at 37). She explained that she had come to believe this because

when Geo turned around, he went behind her seat, which is

where the white guy was sitting ~~there~~ (Ibid.). She also

stated that she didn't know what he saw behind her seat

(Appendix D at 38).

I was indicted, along with Christian Hernandez, for 6 offenses stemming from the murder (Appendix A at 1-2, n.1).

Christian co-operated with the state, accepted a plea bargain, and testified at my trial that I concocted a plan to rob Geo while smoking marijuana with him and Tyler Wofford (Appendix A at 2). According to him I then provided guns for this plan, and we arranged to meet Geo at Sloan Square to ~~buy~~ buy \$30 worth of marijuana (Appendix A at 2; Appendix B at 5; Appendix D at 16). He said that when we got there, I got in the car and sat behind Marina, then pulled out a gun and said "Give it up!" (Appendix A at 2-3; Appendix B at 5; Appendix D at 7 and 13). He said that I briefly struggled with Geo and then shot him (Id.).

Marina testified at trial and said for the first time that she saw the barrel of a gun in the white guy's hand right

before Geo was shot (Appendix C at 29). She said that she remembered this after dreaming about it and the first person she told this to was the prosecutor (Appendix C at 30 and 36-37). She testified that neither of the guys said anything (Appendix C at 23). She also testified that the marijuana deal had been for \$30 (Appendix C at 44-46). She did not see any money exchange hands, but she was unable to explain exactly how the \$30 on the floorboard got there (Id.).

DeKalb Medical Examiner Geoffrey Smith testified that based upon the position of the victim's body as described by Marina, and the location of the gunshot wounds, it was "more plausible" that the shots came from behind the passenger's seat (where Christian was sitting) (Appendix C at 61-64). But

he also said it was possible that I could have fired the shots
If I had twisted my arm in a L shape so that the gun would
be pointing from behind the passenger's seat, through Geo's body
(which was extended over the center console), toward the
driver's seat (Ibid.).

GBI Ballistics Expert Vanna Kelly testified that the
locations of the fired and unfired shells could not tell us where
the shooter was sitting, since shell casings can be ejected in
many directions, and can bounce in many directions once
they hit a ceiling, seat, car door, floor, ect. (Appendix C at
47-59).

Verizon phone records placed me near the scene of the
crime (Appendix C at 115-117; Appendix B at 5). An extraction

report from Geo's phone showed a series of texts and calls arranging a drug deal (Appendix C at 107-112; Appendix B at 5).

The defense did not present any witnesses. Tyler Wofford never testified. I never testified.

I was convicted and sentenced to life in prison.

Part B: The Defense Strategy

My defense was that I accompanied Christian to meet Geo for the purpose of buying \$30 worth of marijuana, and that it was Christian who shot him (Appendix C at 1-14). The defense theorized several possible motives for the murder, one of which was that Christian may have decided on his own to try to rob Geo (Appendix C at 12). My attorneys argued that

Marina may have simply been mistaken as to who the shooter was, and that she missed the money being passed right as the deal went bad. They relied heavily on their impeachment of her on cross-examination (Appendix C at 25-46). They also argued that Christian could not be believed because he had a strong motive to shift blame for the murder (Appendix C at 13).

My defense was supported by the \$30 found in the car (which we argued I was passing to Geo when the deal went bad) and the Medical Examiner's testimony that Christian was a more likely shooter. The defense strategy was dependent upon the fact that no ~~drug~~ drug offense was indicted. See Oral Argument Video, 36:15-38:00.² Hence, we did not believe that my

² This video is online at <https://scgtv.new.swagit.com/videos/26725>

complicity in a drug deal could provide a basis to hold me liable for Christian's actions.

Part C: The Defense Objection at Trial

The state requested a jury charge based on the co-conspirator liability doctrine (Appendix D at 43).

The defense objected that this instruction could permit the jury to find that the marijuana deal was the unlawful enterprise, and that based upon my agreement to commit that offense I could be found guilty for any act done by Christian to further that enterprise (Appendix D at 43; Appendix C at 73 and 83-89). My lawyers argued that the problem with this was that I was not indicted for any drug charges, and therefore had not been put on notice that

I was facing drug charges (Ibid.). They argued that the instruction constructively amended the indictment, since it allowed the jury to find me liable for Christian's actions based only on an agreement to buy marijuana (Appendix C at 83).

In order to fix this problem, my lawyers proposed that the court limit the instruction, so that it would be clear that the only unlawful enterprise that could support a finding of liability was one to commit a charged offense (Appendix C at 73 and 83-84).

Part D: Motion for New Trial and Appeal

My attorneys filed a motion for new trial and raised the conspiracy issue in the same manner that they did at

trial. The motion was denied (Appendix B).

The same attorneys then appealed directly to the

Georgia Supreme Court, and raised the conspiracy issue.

The trial court's judgment was affirmed (Appendix A).

My argument was essentially that, if the jury did

in fact find that I only intended to buy drugs, and

that Christian decided to rob Geo on his own, then they

still find me liable for his actions using an erroneous theory

of co-conspirator liability (one which broadened the

indictment). See Oral Argument Video, supra at 14:00-

14:30; Appellate Brief at 31 (not in appendix); MNT Brief at

11-12 (not in appendix).

Both the trial court and the Georgia Supreme

Court relied heavily on *Mister v. State*, 286 Ga. 303, 307-308 (5)(b), 687 S.E.2d 471 (2009), which is a similar case dealing with the same issue. The Mister Court held that it would not be error to allow the jury to use an agreement to commit an ~~unindicted~~ unindicted drug offense as the unlawful enterprise for the purpose of co-conspirator liability.

In an abundance of caution, the Georgia Supreme Court also reasoned that the conspiracy instruction could not have been applied in such a way in light of other instructions on intent, knowledge, the burden of proof, and felony murder. (Appendix A at 8-9; Court's Ex. 3 at 1, 3, 10, and 13 (not included in appendix)). However, this

view does not account for broad language in the conspiracy instruction which would allow the jury to impute Christian's intent, knowledge, and acts to me (Appendix D at 43).

Reasons for Granting the Petition

1. A Constitutional Issue was Sufficiently Raised in the State Courts

As an initial matter, my counsel's objections in the trial court and on appeal were sufficient to raise a constitutional issue. They did not specifically refer to any constitutional amendments, but they described the issue in terms of "constructive amendment" to the indictment (Appendix C at 83). Constructive Amendment is a term used in the federal courts to describe the

broadening of an indictment. *U.S. v. Floresca*, 38 F.3d 706, 710 (4 cir. 1994). This was clearly the substance of my argument as presented to the state courts, and my lawyers cited state case law dealing with the broadening of indictments. Appellant's Brief at 31 (not in appendix); MNT Brief at 11-12 (not in appendix). They also described their argument as "constitutional". Appellant's Brief at 1.

This Court addressed constructive amendment in the landmark decision of *Stirone v. United States*, 361 U.S. 212 (1960).

The Stirone decision found constructive amendment to violate the Grand Jury Clause. *Stirone*, supra at 217. It also found two other decisions of this Court to be controlling. *Stirone*, supra at 219; *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937)

("conviction upon a charge not made would be sheer denial of due process"); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (Conviction of uncharged crime violates the Notice Clause).

Simply put, Constructive amendment implicates the Grand Jury Clause, the Notice Clause, and the Due Process Clauses.

It is true that the Grand Jury Clause does not always apply to the states. *Hurtado v. California*, 110 U.S. 516 (1884).

However, this Court has held that once a state has chosen to use a system of grand jury indictment, it must follow the precedents of this Court that interpret the Grand Jury Clause. *Alexander v. Louisiana*, 405 U.S. 625, 635-636 (1972).

2. This Court Has Never Before Addressed the
Constitutional Questions that Arise When
A Theory of Criminal Liability is Premised
Upon Complicity in an Uncharged Crime

This Court has repeatedly made clear that an indictment defines the extent of a prosecution, and that the broadening of an indictment is unconstitutional. *DeJonge v. Oregon*, *supra*; *Cole v. Arkansas*, *supra*; *Stirone v. United States*, *supra*; *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Criminal defendants are also entitled to notice of the nature of the accusation they face. *Cole v. Arkansas*, *supra*; *Russel v. United States*, 369 U.S. 749, 761 (1962); *Eaton v. Tulsa*, 415 U.S. 697, 698-699 (1974).

But is the constitution violated when criminal liability

for a charged offense rests upon the defendant's complicity and participation in a distinct, uncharged?

To clarify, I do not attempt to argue that the prosecution's theory of accomplice liability must always be pled in the indictment. It is fairly settled that it need not be.³ My argument is that when a particular factual theory of co-conspirator liability is dependent upon the defendant's complicity in a distinct uncharged crime (or an attempt or conspiracy to commit such a crime), then that particular theory of liability broadens the allegations of the indictment. See LaFare, Isreal, and King, *Criminal Procedure* §19.6(c) (2000 ed. Abridged)

³ *Carothers v. Rhay*, 594 F.2d 225 (9 cir. 1979); *U.S. v. Emery*, 186 F.3d 921, 927 (8 cir. 1999).

(expressing the view that "all possible factual theories of liability should be alleged in the initial indictment" to avoid variance).

If this argument were accepted, it would naturally follow that a co-conspirator liability instruction would sometimes need to be limited so that the only unlawful enterprise which could serve as the basis for liability would be one to commit a charged offense (Appendix C at 83-89). Reversal would only be required if a general instruction was given, and there was evidence of an uncharged offense which could have erroneously served as the underlying "unlawful enterprise" for the purpose of co-conspirator liability. In my case, for example, there was clearly evidence from which the jury could have found an agreement to purchase marijuana. There was also evidence which,

if believed, supported a finding of an agreement to commit an armed robbery. The parties disputed what the actual agreement was, and that was for the jury to decide. But given the language of the conspiracy instruction, there is a possibility that the jury found me liable for Christian's actions based upon the drug deal.

Acceptance of my argument ~~was~~ would also prevent appellate courts from looking solely to a defendant's in any undarged offenses when determining whether or not the evidence was sufficient to hold him/her liable for a co-conspirator's actions.

Lower courts have dealt with my issue in different ways. Some have allowed complicity in undarged crimes as a basis to hold a defendant liable for a co-conspirator's actions. Others have not.

Part A: How the Issue Has Been Addressed in Georgia

Georgia's co-conspirator liability doctrine is a judicial interpretation of its party to a crime law. *Scott v. State*, 229 Ga. 541, 192 S.E.2d 367 (1972); *Ford v. State*, 163 Ga.App. 745, 296 S.E.2d 85 (1982). The Georgia Supreme Court has repeatedly held that co-conspirator liability need not be pled in the indictment.⁴ However, in most of these cases, the only unlawful enterprise shown by the evidence is one to commit a charged offense, so any variance is not that meaningful. Quite distinct are cases like mine, in which the evidence shows multiple unlawful objectives (one of which is uncharged), and is conflicted as to which crimes the defendant intended to commit. A good example is *Mister v. State*,

⁴ e.g. *Edge v. State*, 275 Ga. 311, 313(b), 567 S.E.2d 1 (2002) (relied on by the same court in my case. See Appendix A at 7)

supra. In that case, like in mine, the defense theory was that the defendant only intended to sell drugs to the victims, and not to assault them, which his accomplices did, apparently pursuant to a decision to rob them. Whether or not Mister knew of this plan was the main disputed issue at trial.⁵

Mister raised a similar argument to mine. He argued that unless it was limited to the indicted offenses, the co-conspirator liability instruction could allow conviction based upon the drug deal. The Georgia Supreme Court decided that it would not be error for the jury to decide that the unlawful enterprise contemplated

⁵ Mister was not indicted with any drug offenses, and in fact he was not charged with an attempted or completed armed robbery either. Mister, supra at 303 n. 1. However, the robbery plan which the state sought to prove did include a plan to commit the charged assault. Mister, supra at 304.

by the instruction was a drug deal. Mister, supra at 307-308 (5)(b). They would of course then be free to find him liable for all the actions of his co-conspirators done in furtherance of that unindicted enterprise.⁶

The Mister decision is clearly questionable, as it allows a defendant to be convicted even if he/she does not intend to commit any part of any charged offense. To allow conviction on such a basis is to modify the allegations of intent in the indictment. Furthermore, Mister went to trial thinking he was not facing any drug charges. His defense was completely dependant on that fact. He recieved no notice that his commission (or attempted commission) of a drug offense would be a possible

⁶ A careful read of the Mister case reveals that the jury asked if it could do just that. Mister, supra at 308 (6).

basis for liability. In summary, that decision neglected his constitutional rights, and the decision in my case does the same because it relies on that reasoning. Appendix A at 8; DeJonge v. Oregon, supra; Cole v. Arkansas, supra; Strone v. U.S., supra.

As a final note before I move on, Mister is not the only Georgia case allowing criminal liability for a co-conspirator's actions to be based on the defendant's complicity in an unindicted crime.⁷

Part B: How the Issue Has Been Addressed in the Federal Appellate Courts

Georgia's co-conspirator liability doctrine seems to have been imported from Pinkerton v. United States, 328 U.S. 640, 646-648

⁷ The problem often arises in a sufficiency of the evidence context. e.g. Ford v. State, supra (Evidence of a conspiracy to commit the unindicted offense of fleeing and eluding provided the basis to hold the defendant liable for aggravated assault.)

(1948). The circuits have disagreed over whether or not Pinkerton liability is appropriate when no conspiracy is charged in the indictment. Some have held that it is. See *U.S. v. Zackery*, 494 F.3d 644, 647 (8th Cir. 2006). The Ninth that it is not, since it would broaden the indictment to include the undicted crime of conspiracy. *U.S. v. Nakai*, 413 F.3d 1019, 1023 (9th Cir. 2005); *U.S. v. Taylor*, 617 Fed. Appx. 671 (3) (9th Cir. 2015). A dissenting judge in the Eighth Circuit agreed and pointed out that two additional circuits have implicitly adopted that view. *U.S. v. Zackery*, *supra* at 651 (Shepherd, J. Dissenting).

The Ninth Circuit and the dissenting judge in Zackery also point out that Pinkerton type co-conspirator liability is much broader than aiding and abetting liability. While an aiding

and abetting theory is implicit in any indictment, a Pinkerton theory is not when no conspiracy is charged. *Id.*

Surely this reasoning applies with greater force when the offense which is the object of the uncharged conspiracy is not alleged in the indictment in any way. It cannot reasonably be argued that such a theory of co-conspirator liability is implicit in an indictment for an offense which resulted from that uncharged criminal objective. A theory like that broadens the possible bases for conviction beyond that presented by the grand jury. *DeTonge v. Oregon*, *supra*; *Cole v. Arkansas*, *supra*; *Stirone v. U.S.*, *supra*.

The same reasoning applies in cases like mine, where the evidence ~~shows~~ shows multiple criminal objectives which

could potentially serve as the basis for co-conspirator liability, but one or more are not implied by the indictment in any way. (Appendix C at 83-84). The First Circuit has held a similar situation to result in a fatal variance. *U.S. v. Santa-Manzano*, 842 F.2d 1 (1 Cir. 1988) (Indictment for the crime of conspiracy suggested one object, but the evidence showed an additional object).

Part C: How the Issue Has Been Addressed in Iowa

Iowa has a criminal liability statute which is nearly identical to Georgia's co-conspirator liability doctrine. See Iowa Code § 703.2. Naturally, the type of situation that this petition focuses on can arise under this law as well. The need for a limiting instruction was

appellant in *Smith v. State*, 739 N.W.2d 289, 295 (Iowa 2007). The Iowa Supreme Court reversed a conviction after finding that there was no factual basis for the joint criminal conduct instruction under the allegations of the information, but that there were multiple uncharged offenses which could have erroneously served as the underlying public offense for joint criminal conduct liability. *Smith*, supra at 295 ("a reversal is required if the district court erroneously gives a joint criminal conduct instruction and there is an opportunity for the jury to find the defendant guilty based on anything other than the defendant's own conduct as a principal or aider and abettor of the crime charged.")

The Smith Court first held the evidence to be insufficient to establish joint criminal conduct under the allegations of the information. This is not the argument in my case. But the ~~Iowa~~ Supreme Court still recognized the danger of the jury misapplying the joint criminal conduct instruction by using public offenses which are not alleged in the information.

That view is contrary to the Georgia Supreme Court's rulings in *Mister v. State*, supra, and in my case.

Part D: The Implications of My Issue in Other States

Several additional states have statutes or judicially created forms of criminal liability which are nearly identical to Georgia's Co-conspirator

Liability Doctrine.⁸ Unfortunately, I did not have enough time to conduct much research on the case law of these states (law library time is very limited at my prison).

Courts often face the question of whether or not an agreement to commit a totally uncharged crime can support liability for a charged offense committed by a co-conspirator. Typically, the problem arises in the context of a sufficiency of the evidence challenge. In this context, the constitutional implications are often not even raised or discussed. A good example of what I'm talking

⁸ Tex. Pen. Code § 7.02(b); Illinois Code § 720 ILCS 5/5-2(c); N.J.S.A. § 2C:2-6(b)(4); State v. Dricketts, No. A-3677-13T2 (II) (N.J. Super. App. Div. 2018) (quoting jury instructions with language very similar to Georgia's co-conspirator liability doctrine); Hopkins v. State, 759 N.E.2d 633, 637 (Ind. 2001) (described as "Common Design").

about is *People v. Whittington*, 2014 Ill. App. 130942 (2015).

That case involved a group of girls who set out to fight another girl and to mess with her. One of the girls then set fire to the targeted girl's house. The defendant (who was not the arsonist) went to trial and admitted her involvement in the plan to fight the other girl and to mess with her (Offenses which were not charged in any way). Her defense was that she did not intend the arson. The Illinois Court of Appeals held that she was liable for the arson because it resulted from a common design to commit uncharged offenses.

There are more cases like Whittington, which assume that uncharged offenses can support liability for

a co-conspirator's actions, without addressing the 5th, 6th and 14th Amendment concerns which I now raise.⁹ It is time for this Court to decide this issue.

3. This Petition Presents an Opportunity for This Court to Clarify the Extent to Which Harmless Error Analysis is Appropriate When Jury Instructions Broaden the Indictment

In an abundance of caution, the Georgia Supreme Court reasoned that not only would it not be error if the jury used the marijuana deal as a basis for liability, but that it was also unlikely (Appendix A at 9). It reasoned that this was so because of the other jury instructions on intent, knowledge, the burden of proof, felony murder,

⁹ See e.g. *Traver v. State*, No. 2-02-418-CR (Tex. App. 2004). But See *Traver v. State*, *supra* (Dauphinot J. Dissenting).

and that a co-conspirator's actions must be naturally and necessarily done to further the conspiracy in order for the defendant to be liable. (Appendix A at 8-9; Appendix D at 43; Court's Ex. 3 at 1, 8, 10, and 13 (not in appendix).

The broad language in the conspiracy instruction would allow the jury to impute Christian's knowledge, intent, and actions to me if they found a conspiracy to commit any unlawful act (including a drug deal). (Appendix D at 43). If they found that he attempted to commit an armed robbery on his own, then it would still be possible for them to follow all of the other instructions of the trial court while still using an erroneous theory of co-conspirator liability (one which broadened the indictment).

The Georgia Supreme Court did not hold that this was impossible. They held that it was unlikely (Appendix A at 9). This reasoning conflicts with the unanimous approach of the Federal Appellate Courts that constructive amendment to an indictment is reversible per se. *U.S. v. Floresca*, 38 F.3d 706, 711 n.12 (4 cir. 1994) (compiling cases). The Fourth Circuit has even held it to be a structural error, which requires reversal no matter what. *U.S. v. Floresca*, supra; See also *Arizona v. Fulminante*, 499 U.S. 279, 306-312 (1991) (defining structural error).

Under that approach, it does not matter how likely it is that the jury used the drug deal as a basis to hold

me liable for Christian's actions, it only matters that it is possible.

This Court needs to decide whether or not harmless error analysis is appropriate when jury instructions broaden the possible bases for conviction beyond those presented by the Grand Jury.

Conclusion

Clearly this petition raises important constitutional questions that have broad implications spanning multiple jurisdictions. It is equally clear that these jurisdictions do not all agree with each other. For these reasons this court should grant certiorari and address this issue.

Respectfully Submitted,

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