No. 20-401

In the
Supreme Court of the United States

DEVAN PIERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

The government does not and cannot deny that the appellate courts are in open and acknowledged conflict about how the plain error standard should be applied in constructive amendment cases. Instead, it attempts to describe the split as narrow and of no practical consequence. In fact, there are few questions more material to a plain error analysis than whether and to what extent a defendant must show prejudice, and just how "plain" the error must be.

There is no better illustration of that than this case. Had Pierson been convicted in the Fourth Circuit, the government's constructive amendment would have been "error *per se*," requiring reversal "even when not preserved by objection." *United States v. Floresca*, 38 F.3d 706, 714 (4th Cir. 1994). And in several other circuits, his conviction would have been far more likely to be reversed. Here, however, even though the Seventh Circuit affirmatively held that a constructive indictment had occurred, it denied relief because its plain error standard—which it readily acknowledged is more "demanding" than standards employed by other circuits—imposes such a "high bar" that Pierson could not secure any relief for that constitutional error. App.18, 24, 26-27.

It is thus little surprise that the government spends much of its opposition trying to change the subject, pressing various alternative grounds for affirmance that the Seventh Circuit either rejected or did not reach. Of course, this Court is a court of review, not of first review. In all events, the government's alternative arguments are meritless. The court below has already determined that the

government presented evidence of a separate, uncharged firearm, allowing the jury to convict on that separate, uncharged conduct. *See* App.18. That is, by definition, a constructive amendment error under *Stirone v. United States*, 361 U.S. 212 (1960). Thus, the first prong of plain error review is satisfied. And the fourth prong is easily satisfied when, as here, a plain constitutional error has affected a defendant's substantial rights. Indeed, it is hard to see how a constitutional error that this Court has deemed *per se* reversible in the ordinary course could be deemed *not* to have affected the fairness or integrity of judicial proceedings. Accordingly, this case presents an excellent vehicle to resolve the open and acknowledged circuit split over how the plain error test applies to constructive amendments.

I. The Decision Below Squarely Conflicts With The Decisions Of Several Other Circuits.

The decision below holds that defendants cannot obtain relief from a constructive amendment error under plain error review unless they can both (1) affirmatively prove that they "probably would have been acquitted" absent the error; and (2) point to past precedent that squarely addresses the precise factual circumstances of the case at hand. App.20-24; *accord United States v. Laut*, 790 F.App'x 45, 48 (7th Cir. 2019). Each of those holdings directly conflicts with the holdings of other circuits.

1. Courts around the country have consistently and repeatedly recognized that the circuits are split over what test to apply when determining whether a constructive amendment affected a defendant's substantial rights. While the government attempts to

minimize that clear circuit split, the Seventh Circuit below and many of the authorities the government itself cites explicitly acknowledged it. *See, e.g.*, App.24-26 (identifying three categories of approaches, while noting that circuits disagree even within those categories); *United States v. Brandao*, 539 F.3d 44, 57-60 (1st Cir. 2008) (identifying four separate approaches). And by the Seventh Circuit's own estimate, it applies the most "demanding" standard of all. App.24.

The government attempts to cast the differences as "narrow[]" and "lack[ing] practical significance." BIO.11. But those claims are belied by the cases. Both the Second and Fourth Circuits have squarely held that a constructive amendment is always *per se* prejudicial. *See United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001); *Floresca*, 38 F.3d at 714. While the Third Circuit has rejected that rule, it places the burden on the government to rebut a presumption of prejudice. *United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002). The Seventh Circuit, by contrast, requires the defendant to prove prejudice—an approach that it has explicitly acknowledged conflicts with *Thomas*, *Floresca*, and *Syme*, among others. *See* App.25-27.

Despite the government's contentions, moreover, even the circuits that require defendants to establish prejudice do not apply the same standard. For example, the government claims that the Tenth Circuit aligns with the Seventh Circuit based on language from *Miller* saying that a "defendant must show a 'reasonable probability that, but for the error claimed, the result of the proceeding would have been

different.'" BIO.11 (quoting *United States v. Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018)). But *in the very next sentence* in *Miller*, the Tenth Circuit clarified that "[a] reasonable probability ... should not be confused with[ ] a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." 891 F.3d at 1237. Quoting this clarifying language, the court below acknowledged that the Tenth Circuit's approach *conflicted* with the Seventh Circuit's approach because the former "demand[s] less of a showing" of prejudice from a defendant. App.26.

The other cases the government cites similarly reflect a deepening circuit split, with several circuits subjecting defendants to a far less demanding burden. *See, e.g.*, *United States v. Madden*, 733 F.3d 1314, 1323 (11th Cir. 2013) (finding prejudice whenever a court "cannot say 'with certainty' that with the constructive amendment, [the defendant] was convicted solely on the charge made in the indictment"). In short, the circuit split is clear, it is acknowledged, and it is in need of resolution.

2. The government fares no better with its attempt to deny the clear split on what makes a constructive amendment a "plain" error. BIO.14. The Fourth Circuit has explicitly held that, "under *Stirone*, constructive amendments of a federal indictment are error *per se*, and, under *Olano*, must be corrected on appeal even when not preserved by objection." *Floresca*, 38 F.3d at 714. While *Floresca* left unanswered the question of whether there ever could be an occasion where a court might refuse to overturn a conviction in a constructive amendment case based

on the fourth prong of the plain error test, it made no such reservation concerning the second prong—*i.e.*, whether an error is "plain." *Id.* at 712.

To the contrary, *Floresca* made clear that "it is utterly meaningless to posit that any rational grand jury *could* or *would* have indicted ... because it is plain that th[e] grand jury *did not*, and, absent waiver, a constitutional verdict cannot be had on an unindicted offense." *Id.* The government fails to explain how that approach can possibly be reconciled with the Seventh Circuit's demand that a defendant show that the specific facts of a case "lend themselves to clear application of [the] circuit's precedent" just to prove that an error was "plain." App.23. The government's attempts to recast decisions of the Tenth and D.C. Circuits likewise fail. *Compare* BIO.15, *with Miller*, 891 F.3d at 1235 (noting error was plain simply because "it is settled law in this circuit, as elsewhere, that ... if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars"), *and United States v. Lawton*, 995 F.2d 290, 294 (D.C. Cir. 1993) (explaining that error was plain simply because instructions "clearly outlined a substantially broader field of potential criminality" than the indictment).

That a constructive amendment is constitutional error *per se* has been clear since at least this Court's decision in *Stirone*. *See Stirone*, 361 U.S. 212. And courts like the Fourth, Tenth, and D.C. Circuits recognize that there is no need to conduct a quasi-habeas/qualified-immunity analysis to determine whether such an error is "plain." The Seventh Circuit

and others do not, and demand a higher showing. This Court should resolve that circuit split.

3. Unable to deny the division among the circuits, the government tries to minimize its practical importance. But the difference between requiring a defendant to prove prejudice and requiring no prejudice showing at all is obvious. So too is the difference between making prejudice the defendant's burden to prove versus the government's burden to disprove. Indeed, this Court has often granted certiorari to resolve issues concerning who bears what burden of proof in criminal cases. *See, e.g.*, *Nelson v. Colorado*, 137 S.Ct. 1249 (2017); *Parke v. Raley*, 506 U.S. 20 (1992); *Martin v. Ohio*, 480 U.S. 228 (1987); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The government does not seriously suggest that there is no practical difference between requiring a defendant to prove prejudice and treating an error as *per se* prejudicial. Instead, it claims that the Second and Fourth Circuits "appear to apply a more demanding standard than the Seventh Circuit for finding constructive amendments in the first place." BIO.13. That claim is hard to reconcile with the fact that no defendant in the Seventh Circuit has obtained relief under the Seventh Circuit's self-described more "demanding" approach in more than two decades. *See* App.27. That makes the Seventh Circuit an outlier even among circuits that *do* conduct a prejudice analysis, which reinforces that the Seventh Circuit was correct to describe its approach as the most "demanding" in the nation. *See, e.g.*, *Miller*, 891 F.3d at 1231-38 (granting relief on plain error); *Madden*, 733 F.3d at 1319-23 (same); *United States v. Choy*, 309

F.3d 602, 607-08 (9th Cir. 2002) (same); *United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001) (same); *United States v. Gregg*, 47 F.App'x 1, 3 (D.C. Cir. 2002) (same). In all events, if the circuits really are in disagreement over what is required to prove a constructive amendment, then that just reinforces the need for this Court's review.

Finally, the government claims that this "circuit conflict has existed for decades … and this Court has repeatedly denied petitions for writs of certiorari raising these and similar conflicts." BIO.14. But all but two of the petitions the government cites were filed well over a decade ago, at a time when the government was arguing that the split was likely to resolve itself. *See, e.g.*, Br. in Opp'n, *Phillips v. United States*, No. 06-1602, 2007 WL 2315226, at *12-14 (U.S. Aug. 13, 2007). In the past 13 years, not only has that prediction proven incorrect, but several more circuits—including the Seventh Circuit, whose decision below resolved an intra-circuit split on the issue—have now weighed in and, in doing so, deepened the circuit split. *See, e.g.*, App. 24-26; *Miller*, 891 F.3d 1220; *Madden*, 733 F.3d 1314; *United States v. Gavin*, 583 F.3d 542 (8th Cir. 2009). Meanwhile, the Second, Third, and Fourth Circuits have reaffirmed their rules even as other circuits have rejected them. *See, e.g.*, *United States v. Pryor*, 474 F.App'x 831, 833-34, n.5 (2d Cir 2012); *United States v. McKee*, 506 F.3d 225, 229-32, n.3 (3d Cir. 2007); *United States v. Randall*, 171 F.3d 195, 210 (4th Cir 1999); *see also United States v. Medley*, 972 F.3d 399, 406-10, n.4 (4th Cir. 2020).

As for the two cases that come from this past decade, in neither case did the court find that there actually was a constructive amendment. In the first, the First Circuit determined that there was no constructive amendment at all and thus had no occasion to discuss anything about how the plain error standard applies. *See United States v. Weed*, 873 F.3d 68, 74-75 (1st Cir. 2017). That likely explains why the government saw no need even to file a brief in opposition, and this Court did not request one. *See* Waiver, *Weed v. United States*, No. 17-1430 (April 18, 2018). In the second, a recent unpublished decision, the Seventh Circuit did not determine whether a constructive amendment occurred. *Laut*, 790 F.App'x at 48. Here, by contrast, the court below squarely held that the government violated the Grand Jury Clause by constructively amending the indictment. *See* App.18 ("Following *Leichtnam*, we find that the combination of the evidence and jury instructions added up to a constructive amendment of Pierson's indictment."). The only obstacle to redress of that constitutional injury was the Seventh Circuit's particularly "demanding" plain error standard.

II. This Case Presents An Excellent Vehicle For Resolving The Circuit Split.

This case presents an excellent vehicle to resolve the questions presented. The Seventh Circuit resolved this case on plain error alone—after expressly finding a constructive amendment—and its high bar on plain error review was dispositive. *See* App.9. Unable to deny as much, the government advances several alternative grounds for affirmance. *See* BIO.5-7, 16-17. But no court has resolved any of the government's

alternative arguments, and as this Court has often reminded, it is "a court of review, not of first view." *United States v. Haymond*, 139 S.Ct. 2369, 2385 (2019). Accordingly, whether some other grounds that the Seventh Circuit declined to address might form a basis for sustaining petitioner's conviction can be sorted out by the Seventh Circuit in the first instance in the event this Court concludes that the Seventh Circuit applied the wrong legal standard.

The government also argues that this case is a poor vehicle because the Seventh Circuit allegedly erred in determining that there was a constructive amendment in the first place. *See* BIO.5-7. But that argument is just a variation on the Seventh Circuit's view of the "plain" prong, as the government is essentially arguing that there cannot be an error (plain or otherwise) absent prior precedent addressing virtually the same facts. *See* BIO.5-8. The government is wrong on that score, but it is free to make that argument before this Court should it so choose. The mere fact that the government disagrees with that aspect of the decision below is hardly a reason to deny review.

In all events, the government's argument that there was no error was expressly rejected by the Seventh Circuit for good reason: It is belied by the record. App.14-20. As the Seventh Circuit explained, if the government wanted to rely on the other firearm, it could have drafted the indictment broadly, for example alleging a generic "firearm" and not pleading the car gun specifically, App.17, 19. 69. At a minimum, the government could have proposed a jury instruction to clear up the ambiguity it created by

presenting evidence about both guns. App.19. By instead "broadening the possible bases for conviction [on Count 2] from that which appeared in the indictment" without doing anything to guard against that risk, the government allowed the jury to convict based on evidence about an uncharged firearm. *See Miller*, 471 U.S. at 138. That is the definition of a constructive amendment.

The government alternatively suggests that, even if there was a plain error that affected petitioner's substantial rights, he still should not get relief under the fourth prong of the plain error test because the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. BIO.16-17. But as the Tenth Circuit recently observed,

> [W]here a constitutional error has affected the defendants' substantial rights, thus satisfying the third prong of the plain error test, it is ordinarily natural to conclude that the fourth prong is also satisfied and reversal is necessary in the interest of fairness, integrity, and the public reputation of judicial proceedings. Not to reverse to correct the error is to ignore the injury the defendant suffered from the violation of his or her constitutional rights.

Miller, 891 F.3d at 1237 (citation omitted). *United States v. Cotton* did not displace that rule, but rather involved a unique set of "essentially uncontroverted" facts that are simply inapposite here. 535 U.S. 625, 629-34 (2002). Indeed, the argument that a constructive amendment does not affect the fairness or integrity of a judicial proceeding is fundamentally

irreconcilable with *Stirone*'s holding that a constructive amendment is reversible error *per se*, which likely explains why even the Seventh Circuit did not embrace that argument.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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