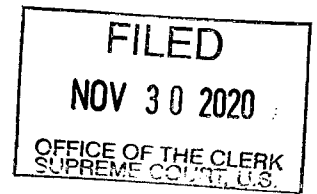


IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

20-6713



DANIELLE JONES, PETITIONER

v

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

IS THERE AN ACKNOWLEDGED CONFLICT AMONG THE SISTER CIRCUITS AS TO WHETHER SECTION 924(c) CRIMINALIZES TWO SEPARATE OFFENSES (1) "CARRY OR USE" A FIREARM DURING AND RELATION TO A DRUG TRAFFICKING OR CRIME OF VIOLENCE AND (2) POSSESSING A FIREARM "IN FURTHERANCE OF" SUCH A CRIME: AND WHETHER BOTH ELEMENTS MUST BE EXPLICITLY CHARGED BY THE GRAND JURY TO SERVE PROTECTION OF THE FIFTH AMENDMENT; AVOIDING POST-GRAND JURY DECISIONS AND CROSS-MATCHING "POSSESSION" WITH "USE" OF THE GUN?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

✓ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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The opinion of the court of appeals, unpublished opinion 20-6580 (see appendix A)

JURISDICTION

The judgement of the court of appeals was entered on July 13, 2020. Petitioner filed petition for hearing en banc. Rehearing or en banc hearing was denied on August 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of title 18 of the United States Code provides, in pertinent part:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such a crime of violence or drug trafficking crime--

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Section 2(a) of that title provides: Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle.

STATEMENT

The decision below implicates an acknowledged conflict among the circuits concerning distinctive review for structural errors in the indictment process, and charging decisions on section 924(c). This Circuit conflict subjects defendants to disparate standards of proof and punishment based on the happenstance of where prosecution occurs, and effectiveness of counsel to object or challenge significant errors in trial court. The indictment process is one of the most crucial formalities bringing forth a charge in federal courts and shall not be undermined. Courts have recognized two types of erroneous divergences; variances and amendments. In *Gaither v United States*, 413 F 2d 1061, 1071, 134 U.S App. D.C 154 (D.C Cir 1969) An amendment of the indictment occurs when the charging terms of the indictment are altered either literally or in effect, by the prosecutor or the court after the grand jury has last passed upon them. Prospectively the flat rule requires dismissal of the indictment not found by 12 grand jurors. This is an issue that frequently arises in U.S Courts. However circuit courts oversee this structural error reviewing simply as plain error which is harmless.

This error goes beyond plain error when the amendment involves the Court literally altering the charging terms of the indictment. This undercuts the constitutional requirements of the Grand Jury Clause, fails to give the defendant fair notice of the charges to prepare a defense, and avoid double jeopardy. *Weaver v Massachusetts* 137 S. Ct 1899 (S. Ct 2017) describes three ways structural error can occur; 1) If right of issue is not designed to protect defendant from erroneous conviction but protects some other issue. 2) If effects of error are too hard to measure 3) If the error always results in fundamental unfairness. While some circuits now reject *Russell and Stirone* requiring automatic reversal, *United States v DuBo*, 186 F 3d 1177 (9th Cir 1999) and *United States v Prentiss* 256 F 3d 971, 981-85 (10th Cir 2001) has set precedent; failure to recite an essential element of the charged offense is not a minor technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment. This Courts review is warranted.

1. The government presented evidence at trial of a weapon which was seized from petitioners vehicle shortly after a robbery. This was a weapon that was not fired, and evidence shows was not the weapon used in a crime of violence (doc 261 pg 11 of 124 @ line 15-17). Petitioners "cohort" also testified at trial stating that the Petitioner never had any knowledge of a weapon.
2. At approximately 9pm a call was reported of a robbery at a Dollar General Store. Deputy Draper stopped Petitioner 10 mins after the call, heading in the direction of the robbery. After stopping the vehicle, one occupant of the vehicle ran and was apprehended shortly after. On video camera surveillance footage, the officer states "Im not even sure if this is the right vechile" Later at trial the same officer goes on to say "...they look like they were lost"

Petitioner was originally charged with one count 1951; armed robbery. The government stated to Petitioner that he did not believe he could convict on a 924(c) due to the evidence and the weapon recovered not being used in the robbery. A plea was offered. Petitioner was adamant of her innocence and refused any plea offer. The plea was for time served, if admitted guilt of perjury.

Because the Petitioner refused to cooperate, the government pursued a superseding indictment adding a unindicted co-conspirator which was selectively un-prosecuted and a charge of 924(c). On the 924(c) charge, an element of possession was omitted. The Grand Jury charged not finding element of possession.

A couple months prior to trial the government added the language of possession to the indictment, claiming this was just a minor oversight. Counsel objected to this post grand jury changing decision.

During the jury instructions the court states, "Now of course we have charged Ms. Jones-- and we have proven Ms. Jones aided and abetted..." (doc 261 pg 14 of 124), Ultimately there was a verdict of guilty and the petitioner was sentenced to 124 months.

3. The Court of appeals Affirmed, rejecting arguments of erroneous jury instructions, prosecutorial misconduct, and conviction in violation of precedent in *Rosemond v United States* 134 S. Ct 1240). There was lack of sufficient evidence to convict on either prong of 924(c).

The jurors convicted the petitioner on a general verdict. The use or carry and possession of a weapon used in a crime of violence. The jurors had not been required to specify under which theory they convicted.

The court rejected Petitioners supplemental brief arguing significant claims which counsel failed to assert, such as defective indictment, abuse of discretion in denying motion to suppress, use of fabricated evidence and a search warrant which was not filed in court and many other non frivolous claims. Re-submitting these arguments to the appeals court, again they were denied in petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

There is an acknowledged conflict among the circuit courts on whether Section 924(c) criminalizes two separate offenses; "carry and use" and "possession", and whether these two elements must be alleged separate and explicitly in the indictment to properly state an offense and avoid a fundamental structural error. Outstanding misconception and confusion lies to the narrow distinction of plain error and structural error or constructive amendments and those which are judicial amendments or post grand jury decisions.

SEVEN CIRCUITS HAVE DECLINED TO DECIDE WHETHER SECTION 924(c) SETS FORTH TWO SEPARATE OFFENSES

The First Circuit in *United States v Mojica-Baeza* 229 F. 3d 292 (2nd Cir 2000) does not review the particular elements within the 924(c) subsection but cites some cases for the proposition that omission of an element from an indictment is never harmless error. The First Circuit goes on to review categories of error which shall be fundamental structural errors but does not decide here whether the indictment was defective or inadequate for its failure to do more than refer to the "use of a firearm".

The District of Columbia, United States of America v Brown 449 F. 3d 154 (D.C Circuit 2006); requires inference of an element of intent in strict liability criminal statutes. The Eighth Circuit in United States of America v Allen 357 F. 3d. 745 (8th Cir 2004); facts that support aggravators on 924(c) charges must be authorized by the indicted offense and not based on post grand jury decisions. Other Circuits have yet to make decisions as to the separate prongs on the 924(c) section, but have made decisions on omission of elements of a crime or charges which broadens the grand jury indictment. United States v Foley 73 F. 3d 484 (2nd Cir 1996); A failure of the indictment to charge an offense may be treated as a jurisdictional defect, and appellate court must notice such a flaw. When one element of an offense is implicit in the statute, rather than explicitly, the indictment fails to allege an offense. United States v Spinner III 180 F. 3d 514 (3rd Cir 1999); An indictment, to be sufficient, had to contain all the elements of a crime. United States v Bernard 120 F. 3d 706 (7th Cir 1997); charges which broaden or alter any material element must be re-submitted to the grand jury. United States v DuBo 186 F 3d 1177 (9th Cir 1999); Complete failure to recite an essential element of the charged offense is not a minor technical flaw subject to harmless error analysis, but a fatal flaw required dismissal of the indictment.

FOUR CIRCUITS HAVE ACKNOWLEDGED AND DECIDED THAT THE STATUE 924(c) CRIMINALIZES TWO SEPARATE OFFENSES AND MUST NOT CROSS MATCH POSSESSION WITH USE?

In United States v Cooper 714 F.3d 873 (5th Cir 2013) 18 U.S.C.S 924(c)(1)(A) proscribes two different types of conduct: the use or carrying of a firearm and in relation to any crime of violence or drug trafficking crime and the possession of a firearm in furtherance of any such crime. In this case the Fifth Circuit uses a deferential standard of review finding that when charged offense conduct in a defendants indictment were ambiguous, any such ambiguity was cured by the captions. However the indictment must include all elements of the charged offense, describe with particularity, and specific enough to protect the defendant against subsequent prosecution for the same offense. United States v Combs 369 F. 3d 925 (6th Cir 2004); 924(c) criminalizes two separate offenses and they were confused in the trial, jury instructions, and conviction; cross matching "possession" with "use" of the gun. It was an impermissible amendment of the indictment constituting per se prejudice.

United States v Lott 310 F 3d 1231 (10th Cir 2002); 924(c) count included two distinct offenses.... A crime denounced in the statute disjunctively may be alleged in an indictment in the conjunctive, and thereafter proven in the disjunctive. Here the Tenth Circuit agrees with other circuits that the firearm enhancement statute must clearly state each essential element of the offense disjunctively in the statute and later proven separately. United States v Timmons 283 F 3d 1246 (11th Cir 2002); The Eleventh Circuit finds that a defendant who is found to "carry" a weapon can also satisfy the element of "use" and in relation to" but the element of "possession" is a separate and distinctive element that must be proved "in furtherance of" such a crime alleged in the statute. The Sixth circuit gives an expansive review on why the section 924(c) criminalizes two separate offenses and acknowledges that other circuits are split in the finding that these elements shall not be confused nor charged interchangeably ;United States v Combs 369 F. 3d 925 (6th Cir 2004).

In Combs the indictment was "literally altered" indicting for the unlawful possession of a firearm and was convicted of a different offense-- unlawful use or carrying of a firearm. Jury instructions facilitated the amendment, first by intermixing elements of both offenses, then providing supplemental explanation aligned with the un-indicted "use" offense, for which Combs was ultimately convicted, instead of the "possession" offense which he was originally indicted. The Court rejected the governments argument that this was a variance in the form of a constructive amendment which resulted in no prejudice due to the fact that the indictment was literally altered and Combs was convicted of an offense that was not subject of his indictment.

THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING AN ISSUE OF
UNQUESTIONABLE IMPORTANCE

The question here is unquestionably important. The government prosecutes an staggering amount of Section 924(c) cases; one of the most common offenses carrying a mandatory minimum sentence. It has been a settled rule that an indictment must allege all essential elements of an offense in an indictment and must not be altered except by re-submitting to the grand jury, 30 LED 849, 121 US 1 EX Parte Bain (S. CT 1887) Although Bain was overruled by United States v Cotton, 122 S CT 1781, 152 LED 2D 860, 535 US 625 (S Ct 2002), Cotton held that omission from a federal indictment of fact held not to vacate an sentence were the accused did not object in trial court. This however does not overrule the declaration of article V of the Amendments of the Constitution or the long standing rule that essential elements must be charged in the indictment. Some circuits will sustain a conviction were a defendants indictment failed to allege all essential elements of section 924(c) but were only convicted on the indicted offense. The questions now standing need be claryfied for the circuit courts; When Section 924(c) fails to allege both the "use or carry" and "possession" does it fail to allege an offense and whether the section criminalizes two separate offenses that must be separately charged and proved beyond a reasonable doubt and must not be intermixed?

THE FOURTH CIRCUIT DECISION IS WRONG

"Use or carry" and "possession" are two separate and distinctive charges of conduct and must be alleged in the indictments citation as essential elements as well as the facts therein. The Fourth Circuit's rule is inconsistent with the opinions of the Supreme Court "Bain" and "Cotton". The petitioner was convicted on an indictment that was literally altered to broaden chances for conviction, objection was made in trial court, and the court of appeals failed to correct such an error despite defendants attempts to assert in pro se supplemental on direct appeal. The Fourth Circuit ignored many errors in this case that were plain and/or structural and the petitioner has been deprived of review; counsel was ineffective failing to assert claims that were more significant. In this case the original indictment did not charge defendant with 924(c). In the superseding indictment, the grand jury charged: "...The defendant did knowingly carry and use a firearm in furtherance of a crime of violence". This fails to allege an offense for the following reasons: 1. "The carry and use" element should be stated "in relation to" not "in furtherance of" 2. The element of possession is omitted. 3. The indictment fails to allege that the crime was committed willfully, thus the intent element is not satisfied.

The second superseding indictment errors are structural for the following reasons: 1. It was literally altered by the court, which was a post grand jury charging decision. (changes were made to state: " The defendant did knowingly possess a firearm in furtherance of a crime of violence... and did use and carry a firearm during and in relation to a crime of violence"). This charging decision has effects beyond measure; it is unknown which rationale the jury convicted, the petitioner did not have fair notice, and her Fifth Amendment rights were violated. The intent element still was not alleged by omitting the term "willfully". Later the jury instructions and verdict form were also altered to accommodate the changes in the indictment. This case is most similar to that of Combs the defendant was convicted of and offense other than the one indicted. The failure for the courts to be in union, not confusing the elements within the section 924(c) is causing severe disparity based on the happenstance of which court a defendant is charged. The petitioner asserts that her Fifth Amendment Right was violated for failure to bring forth charges only by a grand jury and to give fair notice of such charges to prepare for trial. The errors in this case were structural and beyond measure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Donelle Jones

Date: November 27, 2020