

20-7082

Docket number

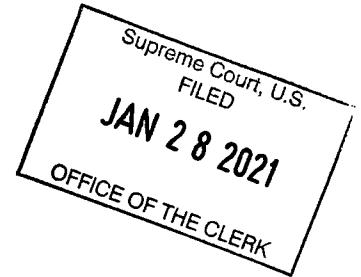
ORIGINAL

Supreme Court of the United States

Edward Bishop
Petitioner,

vs

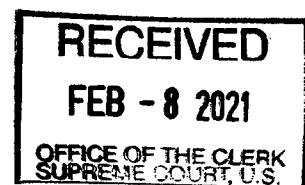
United States of America,
Respondent.



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

Petition for Certiorari

Edward Bishop
Federal Inmate Number 17070-029
FCI
PO Box 1000
Milan MI 48160



Question Presented

1. Whether Trial Counsel's performance was deficient and whether any errors were prejudicial?
2. Is an indictment defective in a 924(c) prosecution if it does not charge or specify a drug trafficking offense as the statute and constitution require?
3. Whether a constructive amendment occurred between the indictment and verdict form and whether Bishop was convicted of an offense not charged in the indictment and an offense 924(c) doesn't criminalize?
4. Whether Bishop is in custody in violation of the constitution?
5. Whether the court provision to the jury of the indictment and verdict form specifying that the jury should convict based only on the actions alleged in the indictment and whether the verdict form should match the indictment?
6. Whether the Seventh Circuit failed to follow the standard for COA applied by the Supreme Court and whether the Seventh Circuit should have granted Bishop COA?
7. Is the phrase "drug trafficking crime" in the indictment and in 18 USC Sec 924(c) so vague that the indictment fails to state an offense and the statute is void for vagueness?

8. Under 18 USC Sec 924(c) what constitutes a drug trafficking crime?

Parties

- 1.Petitioner, Edward Bishop
2. Respondent, United States of America.

Table of Contents

Questions presented	page 2
Parties	page 4
Table of Contents	page 5
Table of Authorities	page 6
Citation to opinions below	page 8
Jurisdiction	page 8
Constitutional and Statutory provisions	page 9
Statement of the case	page 10
Reasons for granting the writ	page 13
Conclusion	page 23

Table of Authorities

Cases	Page
Slack v. McDaniel, 529 U.S. 473, 483-84 (2000)	13
Miller-El v. Cockrell, 537 U.S. 322,327 (2003)	14
Barefoot v. Estelle, 463 U.S. 880, 893 (1983)	14
Bishop v. United States, U.S.Dist, LEXIS 17918 (7th Cir. 2020)	14
Strickland v. Washington, 466, 684-86 (1984)	15
Vinyard v. United States, 804 F.3d 1218, 1225 (7th Cir. 2015)	15
Thomas v. Harrelson, 942 F.2d 1520, 1531 (11th Cir. 1991)	16
Hinton v. Alabama, 571 U.S. 263 (2014)	16
Hamling v. United States, 418 U.S. 87, 117 (1974)	17
Russell v. United States, 369 U.S. 749, 763 (1962)	18
United States v. Brown, U.S. Dist. LEXIS 12934 (7th Cir. 2019)	18
United States v. Davis, 139 S.Ct 2319 (2019)	19
United States v. Combs, 369 F.3d 925, 930-33 (6th Cir. 2004)	20
United States v. Doody, 600 F.3d 752 (7th Cir. 2010)	21
United States v. Savoires, 430 F.3d 376, 380-81 (6th Cir. 2005)	21
United States v. Kuehue, 547 F.3d 667, 683 (6th Cir. 2008)	22
United States v. Miller, 471 U.S. 130 (1985)	22
Stirone v. United States, 361 U.S. 212, 216-17 (1960)	22

Schmuck v. United States, 489 U.S. 705, 717 (1989)	22
Cole v. Arkansas, 333 U.S. 196, 201 (1948)	22

N. King, Non-Capital Habeas Case After Appellate Review An
Empirical Analysis, 24 Fed Sentencing Reporter 308,309 (2012)

Citations Below

The opinion of the United States Court of Appeals for the Seventh Circuit denying the Petitioner's request for a Certificate of Appealability was decided on September 11, 2020 (case 20-1321) and is unpublished.

Jurisdiction

The judgment and opinion of the Court of Appeals sought to be reviewed was entered September 11, 2020. On October 9, 2020 the 7th Circuit extended petitioner's time to file his petition for rehearing to and including October 8, 2020 and accepted his petition for rehearing as timely filed. On December 9, 2020 the 7th Circuit denied the petition for rehearing. No extension of time to file this petition for writ of certiorari was sought. Petitioner seeks to invoke this Court's certiorari jurisdiction under 28 USC § 1254 by filing this petition by first class mail within 90 days of the December 9, 2020 judgment of the Seventh Circuit and on or before March 7, 2019.

Constitutional and Statutory Provisions involved

Fifth Amendment, No person shall be held to answer a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.

Sixth Amendment, To be informed of the nature and cause of the accusation; and to have the Assistance of Counsel for his defence.

18 U.S.C.S 924(c)(1)(A), 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 in 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 crime of violence or drug trafficking crime.

Statement of the Case

Petitioner Edward Bishop was charged with discharging a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States in violation of 18 USC § 924(c) (indictment [doc 1]). A white female, latter identified as Marilyn, had a gunshot wound to her left forearm. (trial transcript p.116). She was on the ground near a Cooper Tire/ Smith Tire shop in Warsaw Indiana (trial trans. Pp 114-115) A blue Pontiac was near her (trial trans. P117) The window in the driver's side door was broken (trial trans. P119) Officer Sam Weaver left the tire shop and went to the Warsaw Walmart parking lot where he found broken automobile glass and a spent silver bullet casing. (trial transcript p125). A Walmart surveillance video Exhibit 4 (trial transcript 128) A blue Pontiac was parked in the lot. (trial trans 140) A red Dodge Intrepid was located right next to the Pontiac. The vehicles were taken to the Warsaw police department. Detective Ticknor recovered a shell casing for a Hornaday Lugar 9-milimeter bullet from the windshield. (trial trans. P147) The search of the console of the red car revealed coins, a pen, receipts, a digital scale, plastic baggies, and a magazine for a Taurus handgun with gold 9-millimeter bullets in it (trial trans. 151) The content of the baggie was tested for ecstasy on the day of the

search (trial trans. p154)

Marilyn consented to the search of her phone and provided the police with her phone password. (trial trans. 191) The phone contains 116 text messages between Edward and Marilyn (trial trans. P204). The oldest is dated 4/14/2017 and the lasr one is dated 5/13/2017. (trial trans 204)

Message 108 says, "I'll give u a blunt of moon rock roo so u can try that out." (trial trans. P 209)

Message 63 says, "Can u get pain pills." Message 62 replies , " No I got xpills."(trial trans 210)

Line 33 reads,"Yea I got it how many u need I got all types of [gas emojicon] (trial trans. 210)

Line 16 reads, "So 425 right for warlock." (trial transcript 211)

Line 9 reads, "Yea I need the address to the Wal-Mart n I gotta get gas to bro." (trial transcript 211)

Petitioner Edward Bishop was indicted by a grad jury for used and discharged of a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States in violation of 18 U.S.C.S 924(c) (indictment [Doc.11]).

Bishop proceeded to trial, the district court instructed the jury as : "The indictment charges Edward Bishop with using a firearm during and relation to a drug trafficking crime. For you to find the defendant

guilty of this charge, the government must prove it say both but it should be all of the following elements beyond a reasonable doubt: First, that Mr. Bishop committed the crime of possession of marijuana with the intent to distribute in violation of section 21, United States code section 841 (a)(1)" (trial transcript page 261). Following the jury instructions the trial court instructed the verdict form to the jury as: " use and discharge of a firearm in furtherance of a drug trafficking crime" (trial transcript page 281). The jury found Edward Bishop guilty of use and discharge of a firearm in furtherance of a drug trafficking crime (trial transcript page 294, verdict form [Doc.66]). The district court for the Northern District of Indiana sentenced Bishop to 120 months of imprisonment, followed by two years of supervised release. The United States Court of Appeals for the Seventh Circuit affirmed Bishop's conviction.

United States v Bishop 910 F3d 335 (7th Cir2018) The Supreme Court of the United States denied petition for writ of certiorari. Bishop filed a 2255 motion in the district court, the district court denied Bishop's 2255 motion. Bishop filed an Rule 59(e) motion and asked for COA the district court denied the motion.

Bishop filed for COA in the Seventh Circuit Court of Appeals COA was denied. On October 9, 2020 the 7th Circuit extended petitioner's time

to file his petition for rehearing to and including October 8, 2020 and accepted his petition for rehearing as timely filed. On December 9, 2020 the 7th Circuit denied the petition for rehearing. No extension of time to file this petition for writ of certiorari was sought. Petitioner seeks to invoke this Court's certiorari jurisdiction under 28 USC § 1254 by filing this petition by first class mail within 90 days of the December 9, 2020 judgment of the Seventh Circuit and on or before March 7, 2019.

Reasons for granting the writ

To obtain a COA under 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a defendant that includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). A prisoner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed

further". *Miller-El v. Cockrell*, 537 U.S. 322,327 (2003); *Barefoot v. Estelle*, 463 U.S. 880,893 (1983). A COA will issue only if reasonable jurists could debate : 1. whether the petition states a valid claim of the denial of a constitutional right; 2. whether the court's procedural ruling was correct. The COA standard is not high Bishop must only show that reasonable jurists could debate the district court's resolution or that the issues are adequate to deserve encouragement to proceed further In *United States v Griffith* 867 F3d 1265 (D.C. Cir 2017) the D.C. Circuit held that a general description of all electronic devices in an apartment was an impermissible general search. In *United States v Galpin* 720 F3d 436, 445 (2nd Cir 2013) the 2nd Circuit condemned descriptions broader than the description supported by specific probable cause. The Seventh Circuit in the present case held that the warrant authorizing the search of every file in Bishops phone did not violate the particularity requirement of the Fourth Amendment. 910 F3d 335 (7th Cir 2019). The writ should be granted to resolve the conflict.

In *Bishop v. United States*, U.S. Dist. LEXIS 17918 (7th Cir. 2020), The district court stated: 1. The court agreed that his trial and appellate counsel didn't raise those issues, but the court decided that his attorneys weren't unconstitutionally ineffective because the

indictment wasn't defective, the jury instructions were proper, and there was sufficient evidence of each required element of the crime;

2. The indictment wasn't defective. It contained each of the required elements and notified Mr. Bishop of what the government intended to prove. The indictment identified the date and location of the conduct, laid out the elements, and identified the statute under which Mr. Bishop was charged. Mr. Bishop contends that the indictment should specify what type of drug trafficking offense he committed, but the Seventh Circuit Court of Appeals hasn't gone that far; Mr. Bishop argues that the conviction must be vacated because the district court constructively amended his indictment. The court didn't constructively amend Mr. Bishop's indictment. A grand jury indicted Mr. Bishop for a violation of 18 U.S.C.S 924(c), and a jury returned a verdict of guilty on that count.

The Sixth Amendment provides that in all criminal prosecution, "The accused shall enjoy the right to have the Assistance of counsel for his defense".

Strickland v. Washington, 466 U.S. 668, 684-86 (1984). Trial Counsel knew that count one lacked of specificity, the indictment did not notify Bishop which predicate drug trafficking offense the government alleged he use a fireanm during and in relation to.

Trial Counsel failed to sought for a bill of particulars, and failed to file motion to dismiss the indictment for failing to adequately apprise Bishop of the nature of the charges against him. Furthermore trial counsel did not object to the district courts jury instructions which put the jury on notice of the drug trafficking offense which Bishop had no notice of nor did trial counsel object to the instructions to the verdict form which language differed from the indictment and misstated the law. Bishop's Strickland claim rests on instructional error. The jury instructions on the 924(c) count to the verdict form differed from the indictment and misstated the law the first part of the Strickland _ standard has been met. There is no conceivable strategic reason for a defense lawyer to forgo a challenge to a prejudicial jury instruction a mistake of law is deficient performance.

Vineyard v. United States, 804 F.3d 1218, 1225(7th Cir. 2015); Thomas v. Harrelson, 942 F.2d 1520, 1531 (11th Cir.1991); Hinton v. Alabama, 571 U.S. 263 (2014).

And because the instructions at issue here concerned the jury to find Bishop's guilty of an offense that is not criminalized by 924(c) nor that is not charged in the indictment prejudice Bishop the

second part of the Strickland standard has been met.

Under the Fifth Amendment, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury".

The Sixth Amendment further guarantees a defendant the right, "To be informed of the nature and cause of the accusation against him" In order to satisfy these rights, an indictment must fulfill three distinct functions: First, the indictment must state all of the elements of the crime charged; second, it must adequately apprise the defendant of the nature of the charges so that he may prepare a defense; and -third, it must allow the defendant to plead the judgment as a bar to any future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87,117 (1974)

Specifically, count one charges: On or about may 13, 2017,in the Northern District of Indiana, Edward Bishop defendant herein, knowingly used and discharged a firearm during and in relation to a drug trafficking crime of which he may be prosecuted in a court of the united States, In violation of Title 18, United States Code, Section 924(c) (indictment [Doc 1]). "An indictment that tracks the statutory language can nonetheless be considered deficient if it does not provide enough factual particulars to sufficiently apprise the defendant of what he must be prepared to

meet". *Russell v. United States*, 369 U.S. 749, 763 (1962); *Russell*, 369 U.S. at 765 ("Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as well inform the accused of the specific offense, coming under the general description, with which he is charged") Here, count one of the indictment provides barely any factual particulars as to how Bishop committed this offense or what the offense actually was. Other than the general allegation that bishop violated 924(c), the only facts specific to this offense are that it occurred on or about May 13, 2017, and that It took place in the Northern District of Indiana. Beyond that, it is unclear which of the numerous possible drug trafficking crimes he is alleged to have committed. These details failed to adequately apprise Bishop of the charges against him. Count one is deficient and also is drafted too broadly in this respect violates Bishop's Fifth and Sixth Amendment Constitutional rights to an indictment by a grand jury and notice of the charges against him. Count one failed to notify the accused of the gravamen of the alleged offense and is ambiguous and could referrer to any criminal acts. In *United States v. Brown*, U.S. Dist. LEXIS 12934 (7th Cir. 2019), The court held: The indictment tracks the language of the statute, 18 U.S.C.S. 924(c),

provides the date of the offense, identifies the charged weapon, identifies the narcotics, these elements plainly satisfy the statutory and constitutional requirements of an indictment as required in the Seventh Circuit. Bishop's indictment fails to meet the standard requirements as the court held in Browns case.

In United States v. Davis, 139 S.Ct 2319 (2019), In dissent, Justice Kavanaugh, joined by Justices Thomas, Alita, and The Chief Justice, explained that:

"924(c) does not require examination of old conduct underlying a prior conviction. Section 924(c) operates entirely in the present. In a 924(c) prosecution, there are ordinarily two charged crimes: the underlying crime and the 924(c) offense.

Here for example the defendants were charged with conspiracy to commit robbery and with the 924(c) offense. The defendants conduct during the underlying crime is part of the 924(c) offense. The "conduct charged" in the 924(c) offense is in front of the jury (if the case goes to trial) or accepted by the defendant in the plea agreement (if the defendant pleads guilty). The indictment must allege specific offense conduct, and that conduct must be proved with real-world facts in order to obtain a conviction. See 204 L.Ed.2d 788}.

As mentioned Bishop was indicted on a one count indictment, "used

and discharged a firearm during and in relation to a drug trafficking crime" (indictment [Doc.1].

A jury found Bishop guilty of, "use and discharging of a firearm in furtherance of a drug trafficking crime" (trial transcript page 294, verdict form [Doc.66]). 18 U.S.C.S 924(c) reads: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or b any other provision of law, any person who, during and in 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 crime of violence or drug trafficking crime.

The Sixth Circuit held that U.S.C.S 924(c) criminalizes two separate and distinct offenses:

- "1. using or carrying a firearm during and in relation to a drug trafficking crime, and
2. possessing a firearm in furtherance of a drug trafficking crime".

United States v. Combs, 369 F.3d 925, 930-33 (6th Cir. 2004). In

United States v. Doody, 600 F.3d 752 (7th Cir. 2010), The Seventh Circuit held: "The mandatory minimum applies to a defendant "who, during and relation to any drug trafficking crime, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" 18 U.S.C.S 924(c)(1)(A). The repetition of the subject "who" in this parallel construction makes clear that "during and in relation to" applies only to those defendants accused of using or carrying a firearm. For those who are charged with possessing a firearm, the only limit is that the possession be "in furtherance of". A jury found Bishop guilty of an offense which is different from the crime for which he was indicted by the grand jury and an offense that is not criminalized by 924(c). Count 1 of the indictment was constructively amended by the district court and permitted the jury to find him guilty of an "non-existent crime". In United States v. Savoires, 430 F.3d 376, 380-81 (6th Cir. 2005),

The Sixth Circuit held: the jury found Savoires guilty of an "offense possession of a firearm during and in relation to a drug trafficking crime that is not criminalized by 924(c)". A constructive amendment occurs when the instructions and verdict form "modify essential elements" of the offense charged such that there is a substantial likelihood

that the defendant may have been convicted of an offense other than the one charged in the indictment. *United States v. Kuehue*, 547 F.3d 667,683 (6th Cir. 2008). When a constructive amendment to an indictment is alleged the United States Supreme Court has held that the issue is "whether the defendant was convicted of an offense not charged in the indictment" and that "broadening the possible bases for conviction from that which appeared in the indictment" is fatal to a conviction. *United States v. Miller*, 471 U.S. 130 (1985); *Stirone v. United States*, 361 U.S. 212, 216-17 (1960). ("It is ancient doctrine of both the common law and of our constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him"). *Schmuck v. United States*, 489 U.S. 705, 717 (1989). ("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made"). *Cole v. Arkansas*, 333 U.S. 196,201 (1948). Bishop has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims. Bishop's constitutional rights were clearly violated and he is innocent of the crime which he was convicted. The Court of Appeals should have granted Bishop a COA

to allow review of the district court's conclusion that the AEDPA standard was not met, because Bishop has made "a substantial showing of the denial of a constitutional right" 2253(c) (2). For all these reasons the district court's decision was certainly "debatable". The Court of Appeal's resolution of the case in an unreasoned order denying a COA compounded the error. This case instead should have gone to a merits panel of the Seventh Circuit for closer review.

Conclusion

For the foregoing reasons This court should grant certiorari.

Respectfully Submitted,

Edward Bishop

A handwritten signature in black ink that reads "Edward Bishop". The signature is cursive and fluid, with "Edward" on the top line and "Bishop" on the bottom line.