

No. 21-243

In the
Supreme Court of the United States

JAMES WARNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Table of Authorities	ii
Reply Brief for Petitioner.	1
I. Instruction 15 Was Plain Error.. . . .	2
A. Instruction 15 Added Multiple Bribery Charges To The Indictment In Violation Of The Fifth Amendment Grand Jury Clause . .	2
B. The Lower Court Decision Not Finding Plain Error Was Flawed	5
C. Instruction 15 Was Plain Error Because It Broadened The Allegations Of Petitioner’s Indictment	6
II. Instruction 15 Was A Serious Error Affecting Petitioner’s Substantial Rights	9
Conclusion	10

TABLE OF AUTHORITIES

CASES

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	7
<i>Stirone v. United States</i> , 361 U.S. 212 (1960)	<i>passim</i>
<i>United States v. Brandao</i> , 539 F.3d 44 (1 st Cir. 2008)	2, 5
<i>United States v. Floresca</i> , 38 F.3d 706 (4 th Cir. 1994)	3, 4, 5, 7, 9
<i>United States v. Madden</i> , 733 F.3d 1314 (11 th Cir. 2013) <i>cert. denied</i> , 136 S.Ct. 1532 (2016)	4, 5, 7, 8, 9
<i>United States v. McKee</i> , 506 F.3d 225 (3 rd Cir. 2007)	8
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	4, 9
<i>United States v. Syme</i> , 276 F.3d 131 (3 rd Cir.2002) <i>cert. denied</i> , 537 U.S. 1050 (2002)	4, 5, 7, 8, 9
<i>United States v. Thomas</i> , 274 F.3d 655 (2 nd Cir. 2001)	<i>passim</i>

STATUTES

18 U.S.C. § 666(a)(1)(B)	3, 6
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18 U.S.C. § 666(a)(2)	2, 3, 6
18 U.S.C. § 1512(b)(1)	7
18 U.S.C. § 1512(b)(3)	7

REPLY BRIEF FOR PETITIONER

In *Stirone v. United States*, where the defendant was tried on an indictment for violating the Hobbs Act by interference with the movement of supplies and materials in interstate commerce to construct a steel plant, this Court held it was fatal error for the prosecutor to introduce evidence and the court to charge the jury, over the defendant's objections, that guilt could rest on evidence that the finished plant produced steel it shipped in interstate commerce. 361 U.S. 212, 218-219 (1960). This Court held the jury instruction error was fatal because it violated the defendant's "substantial right which cannot be taken away with or without court amendment", a right to be tried on a charge made by the grand jury. *Id.*

The same result should follow here, on plain error review of the Petitioner's claim, that the trial court constructively amended his indictment by Instruction 15 that added substantive criminal offenses not passed on by the grand jury. "Plainly and simply, 'a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.'" *Id.*

The government urges this Court to ignore the important distinction made by lower courts based on *Stirone*, (Resp. Br. 7), between circumstances like those of this case, presenting constructive amendments that add allegations of criminal offenses not made by the grand jury, *United States v. Thomas*, 274 F.3d 655, 671 (2nd Cir, 2001), and cases presenting claims of amendments by factual variances, "that apply the standard prejudice evaluation to constructive amendment claims on plain error review and do not

presume prejudice.” *United States v. Brandao*, 539 F.3d 44, 60 (1st Cir. 2008) (collecting cases). That division frames the reasons why this Court should grant this Petition.

I. INSTRUCTION 15 WAS PLAIN ERROR.

A. Instruction 15 Added Multiple Bribery Charges To The Indictment In Violation Of The Fifth Amendment Grand Jury Clause.

Contrary to the government’s descriptions of Jury Instruction 15 as a mere “preliminary page that offered a general summary” of the charges, (Resp. Br. 5), or “a plain-language factual summary,” (Resp. Br. 8), Instruction 15 paraphrased 18 U.S.C. § 666(a)(2), to advise the jury that Petitioner “is charged in Counts One, Five and Seven with conspiracy to commit the crime of federal program theft or federal program bribery.” (App. 36: Court’s Instruction No. 15: Counts One, Five and Seven - Conspiracy Charges). Instruction 15 added charges not made by the grand jury by repeating the language of the 18 U.S.C. § 666(a)(2) bribery statute for each count. The trial court read and gave the jury a copy of Instruction 15 to use in its deliberations. The instruction advised the jury that the bribery offenses on which it was to deliberate included the uncharged allegation that Petitioner conspired with a private contractor who would “corruptly give, offer, agree to give thousands of dollars to James Warner with the intent to influence or reward James Warner in connection with a business, transaction or series of transactions.” *Id.* It repeated that erroneous instruction for each count. Although the jury was separately instructed on the elements of federal

program bribery committed by solicitation of a bribe in violation of 18 U.S.C. § 666(a)(1)(B), the substantive offense charged in Count Nine, (App. 55), Instruction 15 told the jury in unmistakable terms that it was also to consider the additional, separate bribery offense in violation of § 666(a)(2) as an object of each of three conspiracy counts in its deliberations.

The addition of uncharged bribery allegations as part of the instructions that directed the jury's deliberations on each of those counts was error. *United States v. Floresca*, 38 F.3d 706, 711 (4th Cir, 1994). The error is plain because there is no way to discern whether the jury returned its guilty verdicts on either the allegation in the indictment of conspiring to solicit bribes or conspiracy by contractors to offer bribes as instructed by the court. But more fundamentally, the error here is one that violates the Fifth Amendment Grand Jury Clause. There is no way to determine whether the grand jury would have charged the Petitioner with the conspiracy offenses as instructed by the court. ("But neither this Court nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete.") *Stirone*, 361 U.S. at 217.

Four circuits have followed the rule in *Stirone* on plain error review, and have agreed with the rule in *Stirone* that the addition of charges to an indictment by a court without formal amendment "destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment returned by a

grand jury.” *Id.* Those courts have held, following *United States v. Olano*, 507 U.S. 725 (1993), that the addition of criminal offense allegations by the trial court, without formal amendment, is (1) error (2) that is plain, (3) affects the accused’s substantial rights, and is (4) *per se* error, or presumptive error that “affects the fairness, integrity, and public reputation of federal proceeding in a manner most serious.” *Floresca*, 38 F.3d at 714 (prosecution of a defendant for an “infamous crime” for which he was never indicted by a grand jury,” is an error that “can be corrected *regardless* of [its] effect on the outcome ...”); *Thomas*, 274 F.3d at 670 (“Our rule that a constructive amendment is *per se* prejudicial is grounded in the recognition that ‘[t]he very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.”); *United States v. Syme*, 276 F.3d 131,154 (3rd Cir. 2002) *cert. denied*, 537 U.S. 1050 (2002) (“Like denial of the right of allocution, a constructive amendment also violates a basic right of criminal defendants, the grand jury guarantee of the Fifth Amendment.”); and, *United States v. Madden*, 733 F.3d 1314 (11th Cir. 2013) *cert. denied*, 136 S.Ct. 1532 (2016) (“the error affected Madden’s substantial rights.”)

Instruction 15 was a constructive amendment and error because it deprived the Petitioner of his “substantial right to be tried only on charges presented in an indictment returned by a grand jury.” *Syme*, 276 F.3d at 149. The error was plain, substantial and “can be corrected *regardless* of [its] effect on the outcome.”

Floresca, 38 F.3d at 713, citing *Olano*, 507 U.S. 725, (including emphasis supplied).

While the government argues that the lower court properly treated the trial court's erroneous jury instruction as only a factual "variance", "deviation" or "divergence" from charges for which the accused was on trial, (Resp. Br. 8), its position is squarely contrary to the outcomes in *Floresca*, *Thomas*, *Syme* and *Madden* that found constructive amendments by comparing jury instructions, or sentence findings in *Thomas*, to the allegations of the indictments in those cases. The government's position, however, follows *Brandao*, *supra*, and opinions cited there that apply "the standard prejudice analysis to constructive amendment claims on plain error review." 539 F.3d at 60. The government response, thereby, illustrates the conflict among circuits this Court should resolve by granting this Petition.

B. The Lower Court Decision Not Finding Plain Error Was Flawed.

Contrary to the government's repeated contention that the court of appeals did not rely on the plain error standard to reject Petitioner's constructive amendment claim, (Resp. Br 7, 11, 13), the court identified the issue presented as one requiring application of the plain error standard – "[w]hen, as here, a defendant raises claims of constructive amendment and erroneous jury instructions for the first time on appeal, we review them for plain error." (Pet. App. 10) It reached its conclusion, however, by relying on a standard prejudice/risk analysis to conclude there was no error, rather than by a comparison of Instruction 15 to the

allegations of the indictment as required by *Stirone*, 361 U.S. at 217-219. (Pet. App. 11).

C. Instruction 15 Was Plain Error Because It Broadened The Allegations Of Petitioner's Indictment.

The government complaint that Petitioner only takes issue with a “factbound” determination by the lower court, (Resp. Br. 10), ignores the unmistakable fact that the trial court broadened three conspiracy charges by erroneously instructing the jury to find Petitioner's guilt based on an alternative allegation of conspiracy, not charged by the grand jury. The government also ignores the holding in *Stirone*, that an accused is afforded a substantial right to be tried only on “offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.” *Stirone, Id.* at 216.

Contrary to the government's contention, the core facts necessary to evaluate Petitioner's claim are relatively few and straight forward. Petitioner's indictment charged him in three counts with conspiracies to violate the federal program bribery statute by soliciting bribes in violation of 18 U.S.C. § 666(a)(1)(B); and, the court instructed the jury for each of the three conspiracy counts that it should deliberate to determine if Petitioner conspired with private contractors to violate 18 U.S.C. § 666(a)(2) by the contractors offering and paying bribes to Petitioner.

Contrary to the government's contention that Petitioner has failed to identify cases of constructive amendment in similar circumstances, (Resp. Br. 13),

the question of error presented in *Stirone*, is much the same as the one Petitioner presents here on plain error review, whether the defendant “was convicted of an offense not charged in the indictment.” 361 U.S. at 213. The circumstances of Petitioner’s case is also well within the range of cases following *Stirone* and supporting the issue Petitioner has presented, whether a constructive amendment by Instruction 15, adding bribery allegations not made by the grand jury, was plain error. Those cases include *United States v. Floresca*, *supra*; *United States v. Thomas*, *supra*; *United States v. Syme*, *supra*, and *United States v. Madden*, *supra*.

In *Floresca*, the defendant was charged with witness tampering in violation of 18 U.S.C. § 1512(b)(1); but the jury was instructed on elements of witness tampering in violation of 18 U.S.C. § (b)(3) without objection.¹ The court held on appeal en banc that the error was a constructive amendment of the indictment and plain. (“obvious enough to require the district court to correct it.”) *Id.* at 713. *per se. Id.* at 711. (“In *Floresca*’s case it is ‘utterly meaningless’ to posit that any rational grand jury *could* or *would* have indicted the defendant under Paragraph 3, because it is plain that this grand jury *did not*, and absent waiver, a constitutional verdict cannot be had on an unindicted offense.”)(emphasis in the original) *Id.* at 712.

¹ 18 U.S.C. § 1512(b)(1) makes it an offense to “influence, delay, or prevent the testimony of any person in an official proceeding. § 1512(b)(3) makes it an offense to “hinder, delay, or prevent the communication to a law enforcement officer or judge information relating to the commission . . . of a federal offense”

Following this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), holding that any fact increasing the penalty for a charged crime beyond its prescribed statutory maximum other than the fact of a prior conviction must be alleged in the indictment and proved beyond a reasonable doubt, the court in *Thomas, supra* decided en banc that holding the defendant accountable for an enhanced sentence based on a drug quantity not alleged in his indictment was plain error. It "would be inappropriate for a court to speculate as to whether grand jury *might* have returned an indictment in conformity with available evidence, because such an exercise would work the harm the Grand Jury Clause is intended to prevent—a federal prosecution begun by arms of the Government without the consent of fellow citizens." *Thomas*, 274 F.3d at 670.

The Third Circuit has held twice that instructing the jury on offenses not charged by the grand jury is error. In *Syme*, 276 F.3d at 148-156, it held that instructing a jury that the defendant's indictment charged him with using a "theory of fraud" different than alleged in the indictment was error. ("Leaving this error uncorrected would seriously affect the fairness and integrity of the proceeding"). *Id.* at 156. In *United States v. McKee*, the court held that examples of tax evasion described in a jury instruction but not in the indictment were reversible error when not objected to at trial. ("[I]t is nearly impossible for a defendant to demonstrate that his/her conviction was based on particular evidence or a particular theory.") *McKee*, 506 F.3d 225, 232 (3rd Cir. 2007).

In *Madden, supra*, the court held that the district court constructively amended Count 2 of the indictment by instructing the jury that Count 2 alleged that the defendant “knowingly carried a firearm during and in relation to a *drug trafficking offense* or possessed a firearm in furtherance of a drug trafficking crime,” *Id.* at 1318, when the indictment “only charged Madden with possessing a firearm “in furtherance of . . . a drug trafficking crime” and using and carrying a firearm ‘during and in relation to a crime of violence.’” (emphasis in original). The court held the error to which no objection had been made was plain error that affected the defendant’s substantial rights. *Id.* at 1322-1323.

II. INSTRUCTION 15 WAS A SERIOUS ERROR AFFECTING PETITIONER’S SUBSTANTIAL RIGHTS.

A constructive amendment always affects a defendant’s substantial rights. *Stirone*, 361 U.S. at 217 (“Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.”). Because the conviction of a defendant “for an unindicted crime affects the fairness, integrity, and public reputation of federal judicial proceedings in a manner most serious, the error satisfies the final step of the *Olano* analysis. *Floresca*, 38 F.3d at 714; *Thomas*, 274 F.3d at 672 (“the conviction of a defendant for a crime different than the crime charged in the indictment . . . would damage the judicial system’s reputation for fairness.”); *Syme*, 276 F.3d at 155; (“Leaving this error uncorrected would seriously affect the fairness and integrity of the proceeding.”), *Madden*, 733 F.3d at 1323.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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