

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KASHEEN SAMUELS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari from the
United States Court of Appeals for the
Second Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Second Circuit err in failing to find that Kasheen Samuels' Fifth Amendment rights to an indictment by a Grand Jury and due process and his Sixth Amendment right to effective assistance of counsel were not violated when the District Court expanded the language of the indictment in response to a jury question raised during deliberations?

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PETITION FOR WRIT OF CERTIORARI

Kasheen Samuels petitions the Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion and judgment is attached as Appendix 1.

JURISDICTION

The judgment and opinion of the Second Circuit was entered on January 17, 2024. *See Appendix 1.* This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the right to an indictment by a grand jury as set forth in the United States Constitution Amendment V and the right to effective assistance of counsel as set forth in the United States Constitution Amendment VI, as applied to the charged offenses of 18 U.S.C. § 1951(b) and 18 U.S.C. § 924(j). The text of each of these provisions is contained in Appendix 2.

STATEMENT OF THE CASE

On or about October 18, 2019, Superseding Indictment Number S2 18 Cr. 306 (ER) against the Petitioner, Kasheen Samuels, was filed in the Southern District of New York. Mr. Samuels was charged with the following: Conspiracy to Commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951 (Count One); Attempted Hobbs Act Robbery, in violation of 18 U.S.C. § 1951 and 2 (Count Two); Possession of a Firearm in Furtherance of a Crime of Violence, in violation of 18 U.S.C. § 924 (C)(1)(A)(i) and 2 (Count Three); Conspiracy to Commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951 (Count Four); Hobbs Act Robbery, in violation of 18 U.S.C. § 1951 and 2 (Count Five); Aiding and Abetting a Robbery Resulting in Death, in violation of 18 U.S.C. § 924(j)(1) and 2 (Count Six); and Conspiracy to Distribute and Possess With Intent to Distribute Narcotics, in violation of 18 U.S.C. § 846 and 841(b)(1)(A) (Count Seven). A copy of the Superseding Indictment is attached as Appendix 3.

Trial commenced on July 26, 2021 and concluded on August 7, 2021, when a jury found Mr. Samuels guilty on Counts One, Four, Five, Six, and Seven, and not guilty on Counts Two and Three. The Superseding Indictment consisted of three separate and distinct criminal episodes: (1) a 2016 conspiracy and attempt to commit Hobbs Act Robbery and possession of a firearm in furtherance of same; (2) a 2017 Hobbs Act Robbery that resulted in the murder of Andrew Torres and possession of a firearm in furtherance of same; and (3) a conspiracy to distribute narcotics in New York and Vermont from approximately 2015 to 2018.

The constructive amendment issue at hand involves the 2017 robbery.

According to a cooperating witness, John Mingo, in June 2017, Samuels, Mingo, and Martin Martinez planned the robbery of Justin Garcia. Justin Garcia was targeted because he was believed to have expensive jewelry and money he obtained through credit card scams. On June 14, 2017, Garcia was located at the Sheridan Motel, according to Martinez, who enlisted a female acquaintance to accompany Garcia to the motel and report Garcia's location. After waiting in the parking lot to be told which room Garcia was in, Samuels eventually left to attend a court appearance. When Garcia exited the motel, Mingo and Martinez followed him to the McDonald's drive-thru on Longwood Avenue, where they eventually approached him on foot and began shooting at his vehicle. As they began shooting, Garcia pulled out of the drive-thru and drove away.

Approximately one week later, Samuels, Mingo, and Martinez targeted Garcia again. According to Mingo, Martinez's girlfriend, Cynthia Rivera, befriended Garcia on social media and made plans to meet him to set up the robbery by texting Martinez their location. First, they attempted to rob Garcia at a grocery store in the Bronx, but they were unsuccessful. Later that night, Rivera texted Martinez to inform him that Garcia took her to the Loop Inn Motel in New Jersey.

Mingo and Martinez drove to New Jersey alone for the robbery because Samuels refused to accompany them. However, according to Mingo, Samuels supplied them with the guns for the robbery. When they arrived at the motel, they identified which room Garcia was in. As they prepared to kick the door down to commit the robbery, they heard an individual getting ready to exit the room. When the door

opened, Martinez immediately fired his gun and shot Andrew Torres, who was later pronounced dead by law enforcement. They then ran into the room, Martinez shot Garcia twice and they took approximately \$700 and jewelry. Rivera and her friend were also present in the motel room and immediately left after the robbery with Mingo and Martinez and went to Samuels' apartment in the Bronx because, according to Mingo, Samuels instructed them to bring the jewelry and gun to his apartment. Later that day, they went to a pawn shop to sell the jewelry.

Count Five of the Superseding Indictment, charging the 2017 robbery, and Count Six, charging murder through the use of a firearm in furtherance of the robbery, state that Mr. Samuels did aid and abet those crimes as follows: Count Five – “did aid and abet the same, to wit, SAMUELS provided firearms for a gunpoint robbery at a motel in Middlesex County, New Jersey (the “Motel”), of Victim-2”; and Count Six – “did aid and abet the same, to wit, SAMUELS provided firearms for the gunpoint robbery of Victim-2 at the motel, and in the course of that robbery one of the robbers shot and killed Torres.”

At trial, Samuels challenged the credibility of the cooperating witnesses, including Mingo in particular. Mr. Samuels, who was not present during the robbery and murder, disputed the fact that he provided the firearms for the robbery. Indeed, closing arguments on behalf of Mr. Samuels focused on this specific aspect of the case as part of his defense against being an accomplice to the 2017 robbery and murder.

During deliberations, the jury presented the following questions to the Court¹:

¹ Although the transcript does not reflect when the note was first read to the parties outside the presence of the jury, it is clear from the record that the note was

(1) Do we need to conclude specifically that the defendant aided and abetted the robbery in Count Five by providing the gun?; (2) Could other means of aiding and abetting be considered?; and (3) Is inclusion in the conspiracy/planning considered aiding and abetting? Over the objection of the Defense and despite the explicit language of the indictment, which was noted in the jury instructions, the District Court instructed the jury that they did not need to conclude specifically that the defendant aided and abetted the robbery by providing the gun. Rather, the District Court instructed the jury that Samuels could have aided and abetted the robbery by any means. Shortly thereafter, the jury returned with its verdict.

REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve the conflict amongst the Circuit Courts on how to interpret a "to wit" clause of an indictment to avoid the violation of a defendant's Fifth Amendment rights to an indictment by a Grand Jury and due process and Sixth Amendment right to effective assistance of counsel.

The Fifth Amendment provides, in pertinent part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." *U.S. Const. amend. V.* The Supreme Court has "identified two constitutional requirements for an indictment: 'first, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge

concerning the Robbery charge in Count Five and the murder charge in Count Six, which cross references the robbery charge in Count Five.

against which he must defend, and second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). “The right to indictment thus simultaneously protects a defendant’s ability to prepare his defense and safeguards him from facing double jeopardy for a single crime.” *United States v. Bastian*, 770 F.3d 212, 217 (2d Cir. 2014) (citing *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006)). Accordingly, the Supreme Court has ruled that a constructive amendment of an indictment is a “fatal error,” warranting reversal of a conviction. *Stirone v. United States*, 361 U.S. 212, 219 (1960) (Supreme Court found the indictment had been constructively amended where the trial court’s instruction erroneously permitted the jury to convict on a violation of the Hobbs Act based on interference with a type of commerce that had not been charged by the grand jury).

“A constructive amendment of an indictment occurs when the presentation of evidence and the jury instructions modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury.” *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir. 1994) (citations omitted). “Constructive amendments of the indictment are per se violations of the fifth amendment that require reversal even without a showing of prejudice to the defendant.” *Ibid.* (citations omitted). The Second Circuit has “consistently permitted significant flexibility in proof, provided that the defendant was given notice of the ‘core of

criminality' to be proven at trial." *Ibid.* (citations omitted); *see also United States v. Agarwal*, 726 F.3d 235, 259-261 (2d Cir. 2013) (conviction of one count of indictment based on facts outside the "to wit" clause was not constructive amendment because the indictment as a whole had served notice of every means of theft referenced by the prosecution at trial); *United States v. D'Amelio*, 683 F.3d 412 (2d Cir. 2012) (allegations in indictment and the proofs and jury instructions substantially corresponded where "to wit" clause in indictment for attempted enticement of minor referenced use of computer and internet, yet trial evidence and instructions also included use of telephone in addition to internet).

Despite the flexibility in proof provided by the Second Circuit, there are circumstances where the deviation in the instructions render it uncertain if the jury convicted the defendant on the same charge for which the grand jury indicted the defendant. *See e.g. United States v. Mollica*, 849 F.2d 723, 730 (2d Cir. 1987) (constructive amendment of indictment found where it unclear based on the government arguments and jury instructions that the jury convicted the defendant on the same tax fraud conspiracy charge in the indictment as opposed to a money laundering conspiracy); *United States v. Wozniak*, 126 F.3d 105, 111 (2d Cir. 1997) (constructive amendment of indictment found where defendant was indicted for conspiracy to distribute cocaine and methamphetamine and court erroneously instructed jury they could convict regardless of which illegal substance they found was involved, including the uncharged drug of marijuana, failing to notify the defendant of the core of criminality to be proven at trial). In *Wozniak*, the Court noted

that the defendant might have chosen a different trial strategy had he known the government would seek a conviction based on marijuana evidence, rather than evidence of the narcotics specified in the indictment. 126 F.3d at 110.

Moreover, other Circuit Courts have found that the “to wit” clause of an indictment is not merely illustrative, and a constructive amendment of the indictment, rather than a mere variance, can occur when a jury instruction broadens the charges in violation of precepts set forth in *Stirone*, *supra*. Those Circuit Courts do not provide the same “significant flexibility in proof” that the Second Circuit provides. For instance, the Fifth Circuit found a violation of the defendant’s Fifth Amendment right to a grand jury indictment under such circumstances. *See United States v. Nunez*, 180 F.3d 227 (5th Cir. 1999). In *Nunez*, the defendant was indicted for resisting arrest of a border patrol agent by force through the use of a dangerous weapon, “that is, a fully loaded .40 caliber Beretta semi-automatic pistol.” 180 F.3d at 230. However, at trial, the jury was provided a second instruction on the resisting arrest offense that it could find the defendant guilty of “forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with a federal officer” without any mention of the use of a dangerous weapon. *Ibid.* Thus, the defendant was able to be convicted of “resisting arrest by *any* means, for which he was not indicted.” *Id.* at 232. “There is a substantial factual difference between resisting arrest using a firearm and doing so without using a firearm.” *Ibid.* “While both charges stem from the same incident, the difference between using and not using a firearm is great enough that it allowed Nunez to be convicted of a crime for which he had not been indicted.” *Ibid.*

In overturning the conviction, the Fifth Circuit reasoned as follows: “The government chose to indict Nunez for resistance by means of assault with a dangerous weapon, and it is not permitted to shift its theory of the case to a separate, independent criminal offense without obtaining a separate indictment.” *Id.* at 233. “[A]llowing the jury to convict Nunez of forcibly resisting without the use of a dangerous weapon is a conviction ‘of an offense not charged in the indictment.’” *Id.* at 233-34 (citing *Stirone*, 361 U.S. at 213).

The Sixth Circuit has also found a constructive amendment of an indictment based on the trial process and the instructions to the jury at trial. *See United States v. Belcher*, 92 F.4th 643 (6th Cir. 2024). The Sixth Circuit found that a constructive amendment of an indictment implicates additional constitutional rights beyond the Fifth Amendment right to indictment by a grand jury, noting as follows:

Constructive amendments, however, infect the entirety of a criminal case. Not only does the amendment obliterate a defendant's grand jury rights, but, in moving the goalposts, it also raises notice and due process concerns while limiting a defendant's ability to prepare for trial. Every step in the life cycle of a criminal case—from the grand jury's finding of probable cause to the issuing of an indictment, a defendant's trial preparation and execution, the reading of jury instructions, and sentencing—is impacted by a constructive amendment. And because the entirety of the process is disrupted, this court has found constructive amendments to be *per se* prejudicial.

Id. at 650 (citing *United States v. Kuehne*, 547 F.3d 667, 683 (6th Cir. 2008)).

The settled rule according to the Seventh Circuit “is that an indictment may not be ‘amended except by resubmission to the grand jury.’” *United States v. Leichtnam*, 948 F.2d 370, 376 (7th Cir. 1991). As such, the “to wit” clause included in an indictment “become[s] an essential element of the charge.” *Id.* at 377-78 (citing

United States v. Weissman, 899 F.2d 1111 (11th Cir. 1990); *United States v. Keller*, 916 F.2d 628, 632-36 (11th Cir. 1990)); *see also United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994). Thus, when the defendant was indicted for using or carrying a firearm, to wit a specific Mossberg rifle, it was improper to introduce other handguns at trial and instruct the jury that it could convict the defendant for knowingly using or carrying any firearm, resulting in the conviction being overturned. *Id.* at 380-81. The “to wit” clause “was not merely surplusage.” *Id.* at 379. The government could have drawn up the indictment more broadly but instead elected to provide a specific description of the firearm, making it an essential part of the charge. *Ibid.*

In a case that involved a jury question similar to the one asked in the deliberations for Mr. Samuels, the Eighth Circuit has also held that instructing the jury that it was not limited to the arm injury explicitly mentioned in the indictment of an assault case constructively amended the indictment. *United States v. Lasley*, 917 F.3d 661, 664 (8th Cir. 2019). The instruction and consequential constructive amendment of the indictment was found to be prejudicial to the defendant because his defense strategy was admitting he caused an eye injury not charged in the indictment and that he did not cause the arm injury that was mentioned in the indictment. *Id.* at 665. Thus, a reversal of the conviction was warranted due to both Fifth and Sixth Amendment concerns. *Id.* at 664-65.

The Ninth Circuit has also interpreted *Stirone* more broadly than the Second Circuit, explaining its interpretation as follows:

[T]he determination of whether a constructive amendment has been effected requires sensitivity to both the jury instructions as a reflection of the indictment, and to the nature of the proof offered at trial. More specifically, when conduct necessary to satisfy an element of the offense is charged in the indictment and the government's proof at trial includes uncharged conduct that would satisfy the same element, we need some way of assuring that the jury convicted the defendant based solely on the conduct actually charged in the indictment. Typically, that assurance will be provided by jury instructions requiring the jury to find the conduct charged in the indictment before it may convict. If the jury instructions do not impose that limitation, however, the defendant's conviction could be based on conduct *not* charged in the indictment. That possibility results in a constructive amendment of the indictment, requiring reversal, because it "destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment." *Stirone*, 361 U.S. at 217.

United States v. Ward, 747 F.3d 1184, 1191 (9th Cir. 2014).

Meanwhile, the "[Tenth Circuit] has likewise held that a constructive amendment occurs when the indictment alleges a violation of the law based on a specific set of facts, but the evidence and instruction then suggest that the jury may find the defendant guilty based on a different, even if related, set of facts." *United States v. Miller*, 891 F.3d 1220, 1234 (10th Cir. 2018). "In short, '[i]t is settled law in this circuit, as elsewhere, that the language employed by the government in its indictments becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars.'" *Id.* at 1235 (quoting *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008)).

Here, the amendment of the "to wit" clause was drastic and violated Mr. Samuels' rights of fair notice and double jeopardy, in addition to his rights to an indictment by a grand jury and to effective assistance of counsel. The indictment

explicitly identifies Mr. Samuels' elicit conduct in the robbery by providing the firearms for same. Clearly, that type of conduct can support a conviction for aiding and abetting a 924(j) violation. *See United States v. Davis*, 491 Fed. App'x 219, 223-24 (2d Cir. 2012). However, Mr. Samuels, who was not present during the robbery and murder, disputed the fact that he provided the firearms for same and argued to the jury that they should not accept the cooperating witness's version that Mr. Samuels provided him with the firearms that he used with the other co-conspirator to commit the robbery/murder. The facts, as presented to the jury, were not materially different from those alleged in the indictment. Rather, the veracity of those factual allegations and Mr. Samuels actual role in the criminal acts were challenged at trial.

Instructing the jury that they can find Mr. Samuels aided and abetted the robbery by any means is not a minor difference of detail from the conduct alleged and identified in the indictment and which was quoted verbatim in the instructions. Knowing of the constructive amendment prior to trial might have changed Mr. Samuels' trial strategy or even his decision to proceed to trial at all. This was not simply altering the precise type of weapon or electronic device used to facilitate a crime. The amendment broadened the core of criminality in a manner that rendered it impossible for Mr. Samuels to be fairly informed of the charge against which he was defending. The jury questions indicate they were uncertain about certain proofs presented by the Government. Yet, shortly after the District Court's responses to the jury questions, the jury came back with its verdict. Given the District Court's instructions, there is no way to know what conduct they relied on to convict Mr.

Samuels. Therefore, the jury received erroneous instructions, resulting in a constructive amendment of the indictment, and Mr. Samuels' conviction must be vacated, in line with the constructive amendment interpretations adopted by a majority of the Circuit Courts.

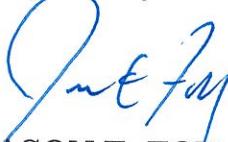
Given the conflict among the Circuit Courts regarding this important issue that raises various constitutional concerns, the Supreme Court should revisit its holding in *Stirone* and provide guidance to the courts on how to instruct juries regarding specific acts alleged as "to wit" clauses in indictments and whether broadening the language of an indictment constitutes a constructive amendment.² Since it appears that the Second Circuit permits too much flexibility in proof of the terms of an indictment to be proven at trial, this Court must establish a clear rule on the boundaries of a constructive amendment of an indictment to properly uphold a criminal defendant's constitutional rights.

² Not only are the Circuit Courts split on how to analyze whether a constructive amendment occurred, they are also split on whether a constructive amendment to an indictment is considered *per se* reversible error under a plain error review. See *United States v. McKee*, 506 F.3d 225, 229 n. 3 (3d Cir. 2007) (constructive amendment found where jury instructions allowed the jury to convict on the basis of conduct that was not charged in indictment). However, since the Petitioner objected to the District Court's response to the jury questions in the instant matter, the standard of review should not be plain error.

CONCLUSION AND PRAYER FOR RELIEF

Given the split in the Circuit Courts regarding how to interpret a “to wit” clause of an indictment and determine whether a constructive amendment has occurred, the intervention of the Supreme Court of the United States is required to establish uniformity on this fundamental issue of constitutional magnitude. Therefore, this Court should grant certiorari to review the Second Circuit’s judgment affirming the District Court’s ruling on the constructive amendment issue and affirming Mr. Samuels’ conviction.

Respectfully submitted,



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