

NO. 17-6477

**IN THE
SUPREME COURT OF THE UNITED STATES**

HAROLD DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The United States agreed with Mr. Davis that it was unsettled as to whether Section 1591(c) was a different offense from Section 1591(a) at the time of Mr. Davis' trial and conviction. (See Br. Opp'n, at 9 (citing Pet., at 27¹).) The United States' main contention in opposition to Mr. Davis' Petition is that since Congress amended the statute in issue in May 2015,² the question presented in the Petition is of limited and diminishing importance such that this Court should not extend discretionary review. Id. at 10-12.

To support this argument, the United States first asserts that Mr. Davis has not identified any disagreement in the circuits since the statute was amended either on what an indictment must charge under Section 1591 or on what the government must prove for a conviction under Section 1591. (See Br. Opp'n, at 11-12.) In the first instance, a circuit split is not the only vehicle under which this Court exercises its judicial discretion to grant certiorari review, although it is the main reason Mr. Davis cited for certiorari review. See S. Ct. R. 10(a).

Perhaps more importantly, however, the non-amended pre-2015 statute continues to impact the lower courts. In February of this year, the Sixth Circuit itself faced another constructive amendment challenge to an indictment under the pre-amendment 2015 statute. See United States v. Curry, No. 16-2366, 2018 U.S. App. LEXIS 2862 (6th Cir. Feb. 6, 2018). In Curry, the

¹ Mr. Davis averred that the caselaw addressing the correct culpable mental standard under 18 U.S.C. § 1591(c) remained an unsettled issue in his Petition for Certiorari. (See Pet., at 27.)

² Recall the amendment codified the Second Circuit's decision in United States v. Robinson, 702 F.3d 22, 22 (2d Cir. 2012), making it clear that that the government had three ways of satisfying its burden of proof with respect to the defendant's awareness of the victim's age by proving any of the following beyond a reasonable doubt: (1) the defendant knew that the victim was under eighteen, (2) the defendant recklessly disregarded the fact that the victim was under eighteen, or (3) the defendant had a reasonable opportunity to observe the victim.

indictment contained two separate counts, one with the lower “reasonable opportunity to observe” mens rea, and one with the higher “reckless disregard” mens rea. The jury was instructed on the standard requiring the government to prove that the defendant knew or recklessly disregarded the fact that the victims were under age eighteen, but not the strict liability “reasonable opportunity to observe” standard. Curry, 2018 U.S. App. LEXIS 2862, at *12-13. The Curry panel held that the government’s decision to forego Section 1591(c)’s lower mens rea standard and prove a higher mens rea to the jury, and to agree to jury instructions to that effect, did not constitute an amendment or variance to his indictment. Id. at *14-15. Relevant to this case is that in coming to this conclusion, the Curry panel noted that it would have been somewhat more problematic if the situation had been reversed, and the indictment required knowledge or reckless disregard of the victims’ ages, but the jury was instructed that a reasonable opportunity to observe the victims was sufficient. Id. at *15 n.1 (citing United States v. Lockhart, 844 F.3d 501, 515-16 n.3 (5th Cir. 2016)).

That is precisely what happened in Mr. Davis’ case. Yet, his appellate panel did not find this problematic. Of course, Mr. Davis’ panel consisted of three different judges from those comprising Mr. Curry’s panel. Compare United States v. Davis, 711 F. App’x 254, 255 (6th Cir. 2017),³ with Curry, 2018 U.S. App. LEXIS 2862, at *1. The differing viewpoints in these two cases alone, however, illustrate how the issue continues to divide learned jurists, even within the same circuit. It is indicative of why this Court’s intervention remains necessary.

³ Undersigned counsel noted that, for the majority of the citations to Mr. Davis’ case, there is a typographical error in the citation throughout the Petition for Certiorari, which was only available via the electronic report of the case at the time. The correct electronic report citation is: United States v. Davis, No. 17-5010, 2017 U.S. App. LEXIS 19462 (6th Cir. Oct. 3, 2017). Counsel respectfully apologizes for any inconvenience or confusion this may have caused the parties or the Court.

Curry contains another holding that provides a nice segue into another problem with the United States’ contention that this issue is not significant enough for this Court’s attention because the statute at issue has been amended. That argument avoids the larger issue of whether an indictment is sufficient if it simply lists the subsection of a statute, setting forth no language from that subsection itself, thereby giving no indication of the offense to be punished.

As stated, the Curry indictment contained two separate counts, one with the language of the lower, strict liability “reasonable opportunity to observe” mens rea, one with the higher “reckless disregard” mens rea. Note that, unlike Mr. Davis’ indictment, the charge containing the mens rea of “reasonable opportunity to observe,” and its accompanying lower burden of proof, stated it verbatim as an element that the government must prove. Curry, 2018 U.S. App. LEXIS 2862, at *14. But, the Curry indictment failed to include a citation to the correct subsection of the statute, Section 1591(c). The Curry panel held that an error in statutory citation is not sufficient to render an indictment invalid. Id. Because the proper mens rea was explicitly stated as an element, the panel found no prejudice to the defendant. Id. Yet, the Curry panel still found that an indictment exactly like Mr. Davis’ indictment would be more problematic. It can be presumed that part of the reason for this was that no court has said that an indictment is sufficient if it simply lists a subsection of a statute with no corresponding language contained in the charge. This is yet another reason to grant certiorari. This Court could use Mr. Davis’ case to address a larger question and explain that simply stating a statute subsection, with absolutely no accompanying language from the statute contained in the charging language of the indictment, is insufficient to place a defendant on notice of the charges against him.

The government’s ensuing arguments included an averment that the district court held it to the burden of the higher mens rea standard because the jury was instructed that it was required to

find that Mr. Davis knew or recklessly disregarded the victim's age before it could find him guilty. (Br. Opp'n, at 12-13.) Consequently, the government argues that the indictment was not constructively amended because the grand jury charged what the petit jury found based on sufficient evidence. Id.

But, the jury instructions provided to the petit jury provided in relevant part as follows:

The second element of the offense that the Government must prove beyond a reasonable doubt is that "D.B." was under the age of 18 and the defendant knew or recklessly disregarded that fact.

If you find that the defendant had a reasonable opportunity to observe "D.B.," the Government is not required to prove that the defendant knew that "D.B." was under the age of 18.

Davis, 711 F. App'x at 257. As can be seen, the instructions contained no indication that the jury must find that Mr. Davis knew or recklessly disregarded the victim's age before he could be found guilty. Instead, the instructions indicate that it would be enough to meet that burden if the jury merely found that Mr. Davis had a reasonable opportunity to observe the victim. The two mens rea standards were essentially merged -- i.e., reckless disregard equated with reasonable opportunity to observe -- for purposes of what the Government had to prove. This was sufficient under Sixth Circuit precedent. See United States v. Jackson, 622 F. App'x 526, 528 (6th Cir. 2015) (equating the two in attempting to explain that in a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person, the Government need not prove that the defendant knew that the person had not attained the age of 18 years, but reckless disregard of the victims' age was sufficient to obtain a conviction).

The government next made an argument akin to a lesser-included-offense. The government first noted that the actual subsection of the statute, 18 U.S.C. § 1591(c), was listed at the top of the indictment, and reasonable opportunity to observe is the only mens rea in Section

1591(c). (Br. Opp’n, at 13.) The government then concluded that because the indictment included an allegation that encompassed the element of the greater mens rea (i.e., reckless disregard for the victim’s age), the particular charge necessarily encompassed the lesser reasonable-observation theory. Id. There is no citation to caselaw here in the government’s brief, though Jackson would support this proposition. But, if the strict liability mens rea of reasonable opportunity to observe were a “lesser included” of the “reckless disregard” for the victims age mens rea, there would have been no reason in 2015 for Congress to clarify that in a “prosecution under § 1591, the government may satisfy its burden of proof with respect to the defendant’s awareness of the victim’s age by proving any of the following beyond a reasonable doubt: (1) the defendant knew that the victim was under eighteen, (2) the defendant recklessly disregarded the fact that the victim was under eighteen, or (3) the defendant had a reasonable opportunity to observe the victim.” See H.R. Rep. No. 114-7, at 6 (2015) (quoting Robinson, 702 F.3d at 34) (emphasis in original).

Based upon this lesser-included type argument, the government avers in a starred footnote that because the grand jury indicted Mr. Davis under the heightened mens rea standard of acting knowingly or with reckless disregard, even had the jury convicted him on the strict liability standard of having a reasonable opportunity to observe, that would amount, at most, to a variance from the indictment, as opposed to a constructive amendment. (See Br. Opp’n, at 14 n.*.) It is not surprising that the government would want to characterize what occurred as a variance from the indictment because variances are not per se prejudicial, while constructive amendments are. See, e.g., United States v. Budd, 496 F.3d 517, 521(6th Cir. 2007). Generally, a variance occurs when the charging terms of the indictment are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. Id. (quotations and citation omitted). In contrast, a constructive amendment results when the terms of an indictment are in effect altered by

the presentation of evidence and jury instructions that modify essential elements of the offense charged so much that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment. See United States v. Smith, 320 F.3d 647, 656 (6th Cir. 2003). Mr. Davis continues to aver that a constructive amendment is what occurred in his case.

The analysis can be problematic in the Sixth Circuit in particular. The Sixth Circuit has stated that the difference between a constructive amendment and a variance is “sketchy.” Budd, 496 F.3d at 521. The Circuit has found that if a variance infringes too strongly upon a defendant’s Sixth Amendment right to be informed of the nature and cause of the accusation, the variance is considered a constructive amendment -- in effect, it becomes a constructive amendment. Id. Thus, the difference is a matter of degree in the Sixth Circuit. According to this Court’s caselaw, however, that cannot be correct. Instead, the difference is in kind, not degree.

For instance, in Stirone v. United States, 361 U.S. 212 (1960), this Court’s seminal case on constructive amendments, the grand jury indicted the defendant under the Hobbs Act for interfering with interstate commerce in sand, but the trial court permitted the government to argue that the defendant interfered with interstate commerce in steel, too, and the defendant was convicted. Id. at 213-14. This Court reversed the defendant’s conviction, noting that “[a]lthough the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.” Id. at 217.

Stirone reveals two distinguishing features of a constructive amendment. First, a constructive amendment involves not just a “variation between pleading and proof, id., but also an irregularity in the jury instructions. See id. at 219 (“[W]e cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel

mill had been interfered with. Yet because of the court’s admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner.”). Second, a constructive amendment is not amenable to harmless-error analysis. Id. 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.”)

Stirone alluded to variances, making clear that a variance results when there is a “variation between pleading and proof,” see id., but the jury instructions properly mirror the language of the indictment, see id. at 215, 217-18 (explaining Berger v. United States, 295 U.S. 78 (1935)). In Berger, the irregularity came when the prosecution introduced proof of a second conspiracy in addition to the one charged. 295 U.S. at 79-81. The Court questioned whether the variance “affect[ed] the substantial rights” of the defendant, id. at 82, and concluded that it did not, id. at 83-84. Berger confirms that a variance has nothing to do with the defendant’s Fifth Amendment grand jury right: the Court never mentioned the concept. Instead, a variance issue turns on whether the defendant (1) has sufficient notice of the allegations to mount a defense, and (2) will be protected against double jeopardy. Id. at 82. These lesser concerns require reversal only if the defendant shows prejudice to a substantial right. Id.

These cases demonstrate that distinguishing a constructive amendment from a variance requires review of the jury instructions. When the jury instructions mirror the indictment and the defendant claims only that the proof at trial diverged from the indictment, he can complain only of a variance and must show prejudice. But, when the jury instructions do not mirror the indictment -- as was true in Mr. Davis’ case -- the defendant’s claim is properly categorized as a “constructive amendment.”

Mr. Davis is alleging that his indictment mentioned only two possible theories of liability: (1) he knew that the victim was under eighteen; or (2) he recklessly disregarded the fact that the victim was under eighteen. At trial the government and the district court's instructions relied upon a third theory of liability, i.e., a reasonable opportunity to observe the victim, which amounts to strict liability. This is a constructive amendment.

The government attempts to avoid this Court's precedent and convince the Court that this was merely a prejudicial variance. In the end, the government wishes to dismiss any irregularity in the case by reasoning that the evidence or proof presented to the grand jury would have been the same whether the indictment charged "reasonable opportunity to observe" or not because that element was encompassed by the "reckless disregard" mens rea. But, it does not appear from the indictment that the grand jury ever decided that Mr. Davis should stand trial for having a reasonable opportunity to observe the victim and nevertheless engaging in sex trafficking of a minor. As this Court said in United States v. Russell,

To allow . . . the court[] to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. . . . This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form.

369 U.S. 749, 770 (1962) (citing Ex Parte Bain, 121 U.S. 1 (1887), and Stirone, 361 U.S. 212).

Finally, the United States avers that certiorari review is not warranted in this case because Mr. Davis has shown no prejudice from the asserted error. (Br. Opp'n, at 16-17.) As explained above, Stirone provides that this argument would only be viable if the amendment to Mr. Davis' indictment were characterized as a variance. The government asserts, however, that Stirone was decided prior to this Court's holding in Chapman v. California, 386 U.S. 18 (1967), which provided that harmless error analysis generally applies to constitutional errors. (Br. Opp'n, at 16.)

The Government then goes on to observe that this Court has never listed constructive amendment to an indictment as a structural error that would be an exception to the Chapman holding. Id.

Unfortunately for the government, every circuit to have addressed whether constructive amendments to the indictment constitute structural error that is per se prejudicial has ruled in accordance with Stirone even after Chapman. See, e.g., United States v. Madden, 733 F.3d 1314, 1320 (11th Cir. 2013) (objected to constructive amendments are reversible error per se); United States v. Celestin, 612 F.3d 14, 24 (1st Cir. 2010) (a constructive amendment is considered per se prejudicial and grounds for reversal of a conviction); United States v. Sells, 447 F.3d 1226, 1237 (10th Cir. 2007) (constructive amendments are reversible per se); United States v. Daraio, 445 F.3d 253, 259-60 (3d Cir. 2006) (constructive amendments are per se reversible under harmless error review); United States v. Bhagat, 436 F.3d 1140, 1145 (9th Cir. 2006) (a constructive amendment warrants per se reversal); United States v. Chambers, 408 F.3d 237, 241 (5th Cir. 2005) (stating that constructive amendments to the indictment are reversible per se); United States v. Stuckey, 220 F.3d 976, 981 (8th Cir. 2000) (a constructive amendment is reversible per se); United States v. Pigeo, 197 F.3d 879, 886 (7th Cir. 1999) (constructive amendments are reversible per se); United States v. Floresca, 38 F.3d 706, 711 (4th Cir. 1994) (a constructive amendment of the indictment constitutes error per se); United States v. Ford, 872 F.2d 1231, 1235 (6th Cir. 1989) (amendments, whether actual or constructive are per se prejudicial and warrant reversal); United States v. Zingaro, 858 F.2d 94, 98 (2d Cir. 1988) (constructive amendment of an indictment is a per se violation of the grand jury clause).

It is true, however, that on the related question of whether defective indictments generally require reversal, many courts have revisited Stirone, in light of Chapman and its progeny. See, e.g., United States v. Allen, 406 F.3d 940, 944 (8th Cir. 2008) (referencing Chapman, and

distinguishing Stirone and Bain, and stating that this Court has not addressed the question of whether constitutional error can be harmless); see also United States v. Robinson, 367 F.3d 278, 285 (5th Cir. 2004); United States v. Higgs, 353 F.3d 281, 304-06 (4th Cir. 2003); United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576, 580 (6th Cir. 2002); United States v. Prentiss, 256 F.3d 971, 981 (10th Cir. 2001); United States v. Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir. 2001). But, should this Court consider the weight of this precedent as a reason to revisit Stirone in the constructive amendment context, it would count in favor of granting certiorari review here, not denying it. This would be an exceedingly important issue for the lower courts given the fact that they all continue to follow Stirone's directive in the context of constructive amendments.

In sum, no grand jury ever concluded that Mr. Davis should stand trial for the more serious strict liability mens rea under Section 1591(c) that the government submitted to the petit jury. This contravenes the Fifth Amendment. Simply because this occurred in the context of an amended statute is not a good reason for this Court to refuse discretionary review, particularly where: (1) it has been shown that the lower courts are still grappling with the statute; and (2) larger, more general sub-issues (such as whether listing the subsection of the statute itself is sufficient or whether harmless error review should apply to a constitutional error of this magnitude) can also be addressed. Mr. Davis thus respectfully continues his request that this Court grant certiorari review.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 4th day of April, 2018.

Respectfully submitted,

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