IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Docket No. 93-5517

UNITED STATES OF AMERICA,

Appellee,

vs.

PETER HELLER,

Appellant.

Criminal Action (NJDC Crim. No. 93-00065)

On Appeal from a Judgment of Conviction in the United States District Court for the District of New Jersey.

Sat Below: The Honorable Nicholas H. Politan, U.S.D.J., and a Jury

---

REPLY BRIEF AND SUPPLEMENTAL APPENDIX ON BEHALF OF APPELLANT

LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN
A Professional Corporation
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-8700
Attorneys for Defendant-
Appellant Peter Heller

On the Brief:

GERALD KROVATIN
RONALD D. COLEMAN

TABLE OF CONTENTS

A. A finding of a constructive amendment is not based on whether the jury convicted the defendant on the "gist" of the crimes charged in the indictment, but rather on whether, as here, the jury may have convicted the defendant on facts other than those charged in the indictment.

Confronted with a classic case of constructive amendment of an indictment, the government retreats to the position that the Constitution only requires that a conviction be based "on the 'gist' of the crimes charged." [Govt.'s Brief at 14.] But this argument, rendering, as it would, the entire jurisprudence of constructive amendment a nullity, must be rejected.

The government cites two cases for its "gist" argument. The first is Stirone v. United States, 361 U.S. 212, 215-216 (1960), a case which, in fact, stands so squarely for the opposite principle that the government's citation in this context is inscrutable. In Stirone, the Supreme Court rejected the district court's holding that "[a] sufficient foundation for introduction of both kinds of proof" -- as to both the interference with shipments of sand (specified in the indictment) and of steel (not specified) -- "was laid in the indictment." Id. at 214. The Supreme Court held that it was error to permit the jury to convict Stirone based on his alleged interference with steel shipments, "even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." Id. at 216 (emphasis added).

The government insists that, "In contrast [to Stirone], the crime charge[d] in Heller's indictment and the crime proven at trial is one and the same - the fraudulent receipt of benefits . . ." [Govt.'s Brief at 19.] Despite the government's unique reading of Stirone, it is not seriously debatable that in Stirone, as well as in United States v. Beeler, 587 F.2d 340 (6th Cir. 1978) and United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1990), no new "crime" categories were added. As the quote above and a simple reading of Stirone make clear, the concern of the Supreme Court was: which acts proven at trial were the basis for a given conviction pursuant to a given indictment?[2]

The same question is at stake here: Can consideration of Peter Heller's alleged wrongful receipt of benefits from 1985, and alleged false statements beginning in 1985, be the basis of a conviction in an indictment which charges, "For the period from March 1986 through 1989 . . ." (charging paragraph of Counts 1,2, and 3) [4a-7a.] This goes beyond what the government refers to

---

2 The government apparently gets its "gist" language from an inapposite use in United States v. DeCavalcante, 440 F.2d 1264, 1272 (3rd Cir. 1971). There, the Court explained the "gist" of conspiracy under 18 U.S.C. §371. But in analyzing whether the indictment fairly charged the crime for which the defendant was convicted, this Court held that the only question in DeCavalcante was whether an essential legal element of the crime had been charged. In contrast here, the jury may have convicted Peter Heller on a set of uncharged facts which themselves could have amounted to the generic (but not the specific) crime charged.

as "proving uncharged facts at trial that are related to an element of the offense but do not change the element." [Govt.'s Brief at 17.] Rather, it is introducing uncharged acts which themselves could have been the sole basis of conviction, as in Stirone, which make the amendment. See also, United States v. Lawton, 995 F.2d 290, 294 (D.C. Cir. 1993) (distinct possibility that jury may have convicted for conduct not charged in indictment mandated reversal.)

Without explanation, the government now argues that proof of Heller's alleged false statements beginning in 1985 are proof of "essential parts of the scheme" charged in the indictment. [Govt.'s Brief at 18.] This ignores the fact that the indictment charged a completely different scheme from the one the government proved at trial.

The indictment charged that Heller's receipt of benefits after March 1986 was unlawful because he failed to report his return to work in September 1985. Heller's allegedly false statements in March 1985 were not an "essential part" of that scheme. In fact, the "scheme" charged in the indictment assumed that Heller's receipt of benefits before September 1985 was lawful. The government proved at trial a second, different "scheme" - that Heller was never entitled to benefits because he concealed his employment in his initial March 1985 interview. The two

theories of prosecution are inconsistent. They are not, as the government would now have it, "essential parts" of a generic scheme to "fraudulently receive [SSA] benefits."

In a recent case, the Fifth Circuit rejected a government argument which was remarkably similar to the government's argument here. In United States v. Doucet, 994 F.2d 169 (5th Cir. 1993), the government changed its theory during trial and urged the jury to convict the defendant on a broader definition of a "machine gun" than that originally charged. The government pointed to the judge's straightforward charge describing the elements of the offense and argued that the defendant "could only be convicted for possessing an unregistered machine gun," id. at 172, much as the government here flatly maintains that Mr. Heller could "only" have been convicted for fraudulent receipt of benefits.

The Fifth Circuit reversed, holding that the prosecutor blatantly invited the jury to convict under the more expansive definition which "differed materially from what the original indictment called on the jury to do and seriously undercut the defense that [the defendant] had prepared in response to the indictment." Id. at 173. Here, too, the government now tries to reconcile two materially different theories of its case by describing them as merely component parts of a larger whole. Here

too, the government's arguments flies in the face of the reality below.

In a related vein, the government also argues that the facts do not matter here since 18 U.S.C. §641 only requires proof that $100 or more was lost. Thus "the amount of the loss over $100 was relevant only at sentencing." [Govt.'s Brief at 18, n.8.] This approach was rejected in United States v. Chandler, 858 F.2d 254 (5th Cir. 1988), where a bank clerk was indicted for embezzling over $20,000 and making false entries in bank records. The trial court permitted the jury to convict the defendant if it found that she had taken smaller sums totalling $500 over a shorter period of time - facts which the defendant had more or less admitted. The Court of Appeals reversed the conviction, based on the trial court's erroneous instructions:

> ...because they permitted the jury to convict Chandler on her admission regarding other false entries instead of on proof of the $25,565.80 entry charged in the indictment to be false. This constitutes an unconstitutional constructive amendment of the indictment which requires reversal.
>
> * * *
>
> Chandler's written statement admitting that she had made false entries at other times, even if analyzed in the light least favorable to her, clearly relates to <u>different criminal episodes than the August 15, 1985 $25,565.80 false entry specified in the indictment.</u> A conviction based on this specific indictment based on Chandler's

> admission of other wrong acts, in the words of this court, relies upon a "set of facts distinctly different from that set forth in the indictment.

Id. at 256-7 (emphasis added). Nowhere in Chandler was there any hint that since $500 was "included" in $25,565.80, it made no difference exactly how much was stolen. Here, too, the court below allowed the indictment to be constructively amended by letting the government prove dates and amounts which were different from the core of the accusation against Peter Heller. The government's argument that the jury rejected defendant's defense to the second, uncharged theory of prosecution, or that they were "inclusive" theories, obscures the constitutional defect. Here, as in Chandler, the constructive amendment of the indictment requires reversal.

B. The trial court acknowledged that there was a variance from the indictment, and the record indicates that the variance was prejudicial to Peter Heller, warranting reversal.

In arguing that there was not even a variance here, let alone an amendment [Govt's Brief at 20], the government conveniently ignores the trial court's finding to that effect: "There is no question - I think the record is clear there was a variance between the Indictment and the proofs." [189a.]

Obviously, to admit there was a variance is too dangerous a concession for the government to make because it would be inconsistent with its argument that the

indictment and the proofs bespeak the same seamless web of fraud. Nevertheless, the government feels compelled to argue in the alternative that appellant suffered no prejudice, even if this Court accepts the trial court's finding that there was a variance.

The government claims that appellant had notice of the broadened basis of criminal liability when it provided the defense with its list of trial exhibits, including Heller's first application for benefits. The government claims this constitutes "knowledge" under the standard of United States v. Adams, 759 F.2d 1099, 1109 (3rd Cir.), cert. denied, 474 U.S. 906 (1985). That contention is in error.

In Adams, the defendant claimed that there was a variance because the drug charges against him did not include a marijuana charge, but the evidence at trial included proof of his involvement with that drug. This Court held that because the defendant was provided with pretrial materials indicating that evidence of marijuana distribution would be included, there was adequate notice to the defendant.

Here, however, the government's inclusion on its exhibit list of the defendant's initial SAA application and a chart showing receipt of greater total benefits than the amounts charged in the indictment gave defendant no clue that he would have to defend a totally different case

at trial. At no time until opening statements did the government tell defendant of its new theory that he was never entitled to benefits because he "lied" in his original SSA application. At no time before trial did the government tell defendant it was abandoning the charging language of the indictment that his unreported return to work in September 1985 made his receipt of benefits after March 1986 unlawful. There was simply no pretrial notice to appellant of this material change in the basic theory of the government's case.

Likewise, the fact that the defense referred to Lorraine Butts in its opening argument proves nothing about notice of the variance. In fact, the government's attempt to use this as proof of notice is particularly cynical. The "notice" to the defense was provided no earlier than the government's opening statement. [1a-3a-sup[3].] Immediately at the end of the government's opening, defense counsel asked for a sidebar conference and moved for dismissal of the indictment based on the variance. [4a-3a-sup.] When his motion was denied, defendant had no choice but to refer to Lorraine Butts and the circumstances surrounding his initial application in his counsel's opening statement.

---

[3] References are to the attached supplemental appendix.

The government also contends it cannot understand how this turn of events prejudiciously highlighted Diane Kochanski's "expert" testimony. [Govt.'s Brief at 24.] However, it simply was not within the scope of Kochanski's expertise to opine that defense exhibits were "phony" and that defendant was not a truthful person based on nothing more than a review of his file.[4] Also, Kochanski's written analysis of Social Security payments, to which the government points as proof that the defense was on notice of her eventual testimony, does not in any way suggest (i) that she would be admitted as an expert or, more importantly, (ii) that she would testify that no benefits ever should have been paid to the Heller family.

As to the testimony of Lorraine Butts, the government's assertion [Govt.'s Brief at 25] that the defense "could see from the face of the indictment alone" that her testimony would be relevant misses the point. What is crucial - and what is left unaddressed by the government's brief - is why Lorraine Butts was not part of the

---

4 Despite the government's claim that Mr. Heller's social security file was admitted as a business record under Fed. R. Evid. 803(6), the fact is that the court below admitted it under the government records exception of 803(8)(c). [190a.]

government's case in chief, considering its new theory.[5] In short, the substantial and obvious variance found by the court below was prejudicial to the defense.

---

[5] The government's claim that Butts "flatly contradicted" Heller cannot be ignored. It is simply false. Butts could only recall that she recognized her handwriting and something about renal failure, and swore, unsurprisingly and self-servingly, that she "never" failed to write relevant employment on an application. However, she had no recollection of the defendant himself, certainly did not testify that Mr. Heller testified falsely and, in fact, testified extensively on her attempts to avoid coming to court altogether. [168a-171a.]

POINT II

THE GOVERNMENT'S FAILURE TO NOTIFY THE DEFENSE THAT IT WOULD USE DIANE KOCHANSKI'S SUMMARIES AS EXPERT REPORTS VIOLATED FED. R. CRIM. P. 16 AS AMENDED.

The government's brief addresses the new amendment to Rule 16 and takes the position that the existence of the amendment ends the discussion. On the contrary, the cases suggest that the right to pretrial discovery of witnesses would apply to any pending case In Turner v. United States, 410 F.2d 837 (5th Cir. 1969), the Court of Appeals for the Fifth Circuit explained that "changes in statute law relating only to procedure or remedy are usually held immediately applicable to pending cases, including those on appeal from a lower court," unless the wording of the statute or the legislative history suggest otherwise. Id. at 842, citing Hallowell v. Commons, 239 U.S. 506 (1916), Bowles v. Strickland, 151 F.2d 992 (10th Cir. 1951), and Dargell v. Henderson, 200 F.2d 564 (Em. App. 1952). See also, United States v. Papworth, 156 F. Supp. 842, 852 (N.D. Tex. 1957) (statutes regarding admissibility of evidence apply retroactively). Thus the Court should consider the amended Rule 16 in evaluating this appeal.

POINT III

THE GOVERNMENT'S IMPROPER CROSS-EXAMINATION OF THE DEFENDANT ON HIS FAILURE TO CALL LORRAINE BUTTS AS A DEFENSE WITNESS WAS PREJUDICIAL AND UNFAIR.

The government cavalierly dismisses, without analysis or authority, the extensive precedent cited in defendant's brief on the reversible error caused by the government's cross-examination of the defendant about a missing witness, implying that the witness's testimony would be unfavorable. Despite the government's insistence to the contrary, the requirement that the missing witness be uniquely available to the defense (which was not rejected by this Court in United States v. Keller, 512 F.2d 182, 186 (3d Cir. 1975)) is not put to rest by the existence of a defense subpoena for Lorraine Butts. As the Court of Appeals for the Fifth Circuit wrote in McClanahan v. United States, 230 F.2d 919 (5th Cir. 1956):

> It has been well said that "the availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, upon other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case.

Id. at 926, quoted in United States v. Arendale, 444 F.2d 1260, 1266 (5th Cir. 1971) (citation omitted; emphasis added).

In Arendale, the "missing witness" was "the wife of the man who provided the only testimony against two of the accused and who had pleaded guilty and was hoping for leniency in his sentence . . . " Id. The prosecutor, who did not call the witness on his case, nonetheless told the jury in two instances that the defense could have called the witness if he disbelieved the prosecution's proofs. Id. at 1266-7. The Court of Appeals held that the prosecution's repeated persistence in the face of possible prejudice required reversal. "Where the possibility of prejudice existed, the government should have been particularly circumspect, instead of the opposite. We cannot sanction the improprieties." Id. at 1269, quoting Kitchell v. United States, 354 F.2d 715, 719 (1st Cir. 1966).

Here the government asked appellant if he knew the whereabouts of Lorraine Butts, a government employee who had made manifest her hostility and resistance to the defense. Defense counsel's objection was sustained. The prosecutor reacted, not by being "particularly circumspect," but by asking questions about the defendant's subpoena of her, her vacation and whether he knew that her

testimony would not have corroborated his own. Defense objections were repeatedly sustained.

It is immaterial, contrary to the government's argument, that no mistrial motion was made by the defense. Timely objections were made to each of the questions and each objection was sustained. Nevertheless, the government asked repeated questions in this obviously sensitive and prejudicial area. The Arendale court addressed the same point:

> [Defendant's] counsel initiated the objections to the Government's remarks. If no objection had been made, the remarks complained of might not be subject to review. But here the error was brought to the attention of the Court by objection, and, as to the last improper statement quoted above, the Court on its own initiative quickly rebuked the government. A motion for a mistrial by [defendant's] counsel would have been a hollow gesture, serving at most to preserve error for appeal rather than to call the Court's attention to the objectionable argument. If a motion for a mistrial were a necessity in every case, there would be little need for the plain error rule.

Id. at 1269 (citations omitted; emphasis added). The conviction was reversed there, as it should be here, because of the government's misconduct.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the Court reverse his conviction and grant him a new trial.

Respectfully submitted,

LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN
A Professional Corporation
Attorneys for Appellant
Peter Heller

By: _____
Gerald Krovatin

Dated: December 20, 1993

CERTIFICATION

I hereby certify that Gerald Krovatin, Esq. and I are members of the Bar of this Court.

Ronald D. Coleman

Dated: December 20, 1993

CERTIFICATION OF SERVICE

I hereby certify that I have caused to be served upon Edna B. Axelrod, AUSA, counsel for the government, two copies of the attached reply brief and supplemental appendix on behalf of appellant by Federal Express, on this date.

By: Ronald D. Coleman
Ronald D. Coleman

Dated: December 20, 1993

SUPPLEMENTAL APPENDIX
TO REPLY BRIEF

another program offered by the federal government; that if a person is entitled to disability benefits, he can apply for benefits on behalf of his children as well.

You're going to hear in August of 1985, two months later, the defendant was awarded benefits by the Social Security Administration. He was awarded benefits for himself and for his children.

Ladies and gentlemen, you're going to see the application that the defendant filed on April 5, 1985. It's a sworn statement. He certifies everything in this is true and correct. It is signed by the defendant.

You're going to see other documents that he filed in connection with this application. And in that application you're going to see that he said that he became disabled on July 21, 1984.

Ladies and gentlemen, the defendant is a police officer. He says in that application that he was a police officer for the Port Authority of New York and New Jersey and he was working for them until July of 1984 and he became disabled because of a car accident. He suffered kidney failure. As a result, he couldn't work. But the car accident wasn't related to his job, so he looked to Social Security.

You'll see in that application they ask the defendant: Tell us about your employers. Tell us about your past employers and tell us about your current employers.

What did the defendant say? He said that other than working for Port Authority a few weeks here in February and March, he had no employment and he couldn't work.

Why is that important? Why is that question important? Because Miss Kochanski will tell you that if someone who files for disability benefits is working at the time, they may not be entitled to disability benefits.

So the defendant said in his application he wasn't working. He had no employer. That, ladies and gentlemen, was a lie. Because what the defendant didn't tell Social Security was that in the end of 1984, he was hired by the Union City Board of Education as a consultant and that he started working for them in January of 1985. He got paid by the Union City Board of Ed throughout all of 1985. He didn't tell Social Security that.

You will also see in the application that he filed -- that application informed the defendant that he had an obligation, a responsibility to let Social Security know if he was working and if he ever went to work.

Well, as I have already told you, he didn't tell them about the Union City Board of Ed.

You're going to see various documents submitted into evidence which informed the defendant about his reporting responsibilities and filing applications.

You'll see that he didn't tell them about the Union

City Board of Ed. And he didn't tell them that he continued to work for the Union City Board of Ed throughout all of 1986 and he didn't tell them that he worked for a while at a company called Friedman's Express, a trucking company. And he didn't tell them he was coaching football for the Bayonne Board of Education. He didn't tell Social Security that. All the while he is collecting disability benefits.

Now, in 1987 the Social Security Administration does a medical review of the defendant's case. They want to know how is he feeling, what's he been up to and is he working.

You'll see and hear that in connection with that review, the defendant filled out two reports and filed them with Social Security. The one is dated August 17. It's the Work Activity Report. In that report is a sworn statment signed by the defendant certified to be true and accurate.

In that report they say to the defendant: Tell us what you've been up to. Where have you been working since you became disabled in 1984?

And the defendant puts as of August 17, the very day he signs the form, he's working for a place called CDS Distributors as a sales manager. That is all he puts. He doesn't put Union City Board of Ed. He doesn't put Union City Board of Ed. He doesn't put his coaching job and he doesn't put Friedman's Express.

And the other form he fills out is dated September 1,

MR. KROVATIN: If I may? May we approach the bench?

THE COURT: Sure.

All right. Ladies and gentlemen, we have frequent, what they call conferences at sidebar. You're not to listen to those. They don't concern you. Talk to your neighbor. Don't pay attention. If I catch you paying attention, I'll put this noise on. You don't want to hear that noise.

(The following occurs at sidebar.)

THE COURT: Yes, sir.

MR. KROVATIN: Your Honor, I have an application at this time to dismiss the Indictment based on the substantial variance of the government's opening from the Indictment in this case. Miss Bumb opened on the fact that the government was alleging it to prove that Mr. Heller committed these crimes by defrauding the government out of $55,000 worth of benefits. That is nowhere charged in this Indictment.

Secondly, Miss Bumb argued to this jury that the fraud that is charged in the Indictment consists of the false application in April of 1985. That is not what is charged in this Indictment. The fraud that is alleged here is his alleged return to work later in 1985 without reporting.

THE COURT: I got it. Do you want to get yours?

MS. BUMB: Yes.

THE COURT: Go get yours.

(Pause.)

MR. KROVATIN: If I may direct your attention to Count 1, Paragraph 11 of the Indictment. It reads as follows: "For the period from March 1986 through April 1989, the defendant received disability insurance benefits personally and on behalf of his dependents of approximately $39,000 which neither he nor his dependents were entitled to receive because of defendant's return to employment in 1985."