

EV 07-0041-CR 3 Y/H USA v Moreno-Cruz
Judge Richard L. Young

Signed on 06/03/09

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

USA,)	
)	
Plaintiff,)	NO. 3:07-cr-00041-RLY-WGH-3
)	
MANUEL SANTIAGO MORENO-CRUZ,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.) 3:07-cr-41-RLY-WGH-03
)
MANUEL S. MORENO-CRUZ, *et al.*)
Defendants.)

**ENTRY ON THE GOVERNMENT’S MOTION TO CORRECT SCRIVENER’S ERROR
IN THE INDICTMENT BY INTERLINEATION**

The United States of America (the “Government”) moves to correct a scrivener’s error in the Superseding¹ Indictment. Defendant, Manuel S. Moreno-Cruz (“Defendant”), objects on grounds that such an “amendment” violates his Fifth Amendment right to be charged by a grand jury. For the reasons set forth below, the court **DENIES** the Government’s motion and **ORDERS** it to file a Second Superseding Indictment.

I. Background

Count I of the Superseding Indictment reads:

Beginning on a date unknown to the [G]rand [J]ury, continuing up to and through January 24, 2008, in the Southern District of Indiana, and elsewhere, [named Defendants] herein, did knowingly conspire together and with diverse other persons known and unknown to the Grand Jury, to possess with intent to distribute 5 kilograms or more of cocaine, a Schedule II Narcotic Substance, in violation of Title 21, United States Code, Section 841(a)(1). [Overt Acts omitted].

In the present motion, the Government seeks to insert the phrase “of a mixture or

¹ In the Government’s motion, it cites to the original Indictment, filed on December 18, 2007. However, a Superseding Indictment was filed by the Government on February 20, 2008. Given that more recent filing, the court presumes that the Government wishes to correct the error in the Superseding Indictment, and not the original Indictment.

substance containing a detectable amount of cocaine” following the phrase “to possess with the intent to distribute 5 kilograms or more”

Count II of the Superseding Indictment reads:

On or about November 8, 2007 through November 9, 2007, in the Southern District of Indiana, and elsewhere, [named Defendants] herein, did knowingly possess with the intent to distribute 500 grams and more of cocaine, a Schedule II, Non-Narcotic² Substance, in violation of Title 21, United States Code, Section 841(a)(1).

In Count II, the Government seeks to insert the phrase “5 kilograms or more of a mixture or substance containing a detectable amount of cocaine” following the phrase “knowingly possess with the intent to distribute”

II. Discussion

As a general proposition, an indictment may not be amended except as to matters of form or surplusage. *United States v. Cusmano*, 659 F.2d 714, 717 (6th Cir. 1981); *see also United States v. Trennell*, 290 F.2d 881, 888 (7th Cir. 2002) (“[I]t is not a material amendment [of the indictment] when the court’s description of the indictment alters the terms of the indictment in an insignificant manner.”); *United States v. Leichtnam*, 948 F.2d 370, 376 (7th Cir. 1991) (“An indictment may be modified . . . to correct for a typographical or clerical error or a misnomer.”).

The issue raised by the Defendant is whether the Government’s request to add the phrase “of a mixture or substance containing a detectable amount of cocaine” in Counts I and II of the Superseding Indictment is tantamount to a constructive amendment of the Superseding Indictment. “An indictment that is constructively amended . . . violates the Constitution because the Fifth Amendment requires an indictment of a grand jury to guarantee that the allegations in

² Count I alleges that cocaine is a Schedule II Narcotic Substance. The court presumes that in Count II, the Government intended to use the same classification.

the indictment and the proof at trial match in order to insure that the defendant is not subject to a second prosecution, and to give the defendant reasonable notice so that he may prepare a defense.” *Trennell*, 290 F.3d at 888 (internal quotations and citations omitted).

“A constructive amendment to an indictment occurs when either the government . . . the court. . . or both, broadens the possible bases for conviction beyond those presented by the grand jury.” *Id.* (7th Cir. 2002) (internal quotations and citations omitted). An example of an impermissible broadening of the charges is *Stirone v. United States*, 361 U.S. 212 (1960). In that case, the defendant was charged in an indictment with unlawfully interfering with interstate commerce in violation of the Hobbs Act by obstructing interstate shipments of sand by extortion. *Id.* at 213-14. At trial, the Government’s proof went beyond that allegation to include evidence that the defendant had also obstructed steel shipments. *Id.* at 214. Moreover, the jury was instructed that its verdict could rest on proof that the defendant had obstructed shipments of either sand or

steel. *Id.* The defendant’s conviction was overturned by the Supreme Court on grounds that “a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.” *Id.* at 217.

On the other hand, an indictment is not impermissibly broadened “if all that has happened is that the evidence or the charges submitted to the trial jury wind up being simply a more limited version of the charges of the indictment.” *Leichtnam*, 948 F.2d at 376. An example of this is *Trennell, supra*. In that case, the defendant was indicted for conspiring to possess with the intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841 and 846. 290 F.3d at 883. The indictment did not specify the quantity of cocaine and cocaine base involved in the conspiracy; rather, it referred only to wholesale quantities. *Id.* At trial, the Government’s bill of particulars, jury instructions, and verdict form all referred to specific quantities of cocaine and cocaine base. *Id.* at 884.

On appeal, the defendant argued that the trial court constructively amended the indictment to include specific drug quantities, and that by allowing the jury to find the amounts of drugs involved, he was subjected to a longer sentence upon conviction. *Id.* at 888-89. In affirming the trial court, the Seventh Circuit reasoned:

A variance between the broad allegations of an indictment and the narrower proof at trial is acceptable so long as the offense proved was fully contained within the indictment. Because the proof at trial was fully contained in the indictment, and the jury instructions were narrower than the indictment, *Trennell*’s claim that the indictment was constructively amended fails.

Id. at 888-89 (internal quotations and citations omitted).

In the present case, the Defendant is charged in Count I with conspiring with the other Defendants to possess with the intent to distribute 5 kilograms or more of cocaine. The Government seeks to amend the charge from “5 kilograms or more of cocaine” to “5 kilograms or more of a mixture or substance containing a detectable amount of cocaine.” In addition, in Count II, the Government seeks to amend the charge from possession with the intent to deliver “500 grams and more of cocaine,” to possession with the intent to distribute “5 kilograms or more of a mixture or substance containing a detectable amount of cocaine.” The Government’s request to add the phrase “of a mixture or substance containing a detectable amount of cocaine” in Counts I and II, and its request to increase the amount of cocaine (or a detectable amount) charged in Count II from 500 grams to 5 kilograms, are not the type of errors that amount to a mere scrivener’s error. The Government’s proposed changes do not narrow the scope of the Superseding Indictment; rather, they impermissibly broaden the scope of the Superseding Indictment by subjecting the Defendant to possible conviction (and, if convicted, a longer prison term) for a much smaller quantity – a “detectable amount” – of cocaine. The Government’s request therefore constitutes a constructive amendment the Superseding Indictment. Accordingly, the court finds the Government’s Motion to Correct Scrivener’s Error must be **DENIED**.

III. Conclusion

For the reasons explained above, the Government’s Motion to Correct Scrivener’s Error (Docket # 181) must be **DENIED**. The Government is hereby **ORDERED** to file a

Second Superseding Indictment on or before June 22, 2009. The trial date of June 29, 2009, stands.

SO ORDERED this 3rd day of June 2009.

s/ *Richard L. Young*
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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