BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-665

EDWIN PRITCHETT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

EDWARD R. MARTIN, JR.
United States Attorney

CHRISELLEN R. KOLB
ARIEL LIEBERMAN
MICHAEL DAL LAGO
* KATELYN B. BENTON
D.C. Bar #1020272
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Katelyn.Benton2@usdoj.gov
(202) 252-6829

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II. Whether Pritchett can establish that the trial court plainly erred by constructively amending the indictment, where the trial court's jury instructions and the evidence presented to the jury did not permit conviction for an offense beyond the scope of the grand jury's indictment and where, in any event, Pritchett cannot show that reversal of his conviction for attempted possession with intent to distribute a controlled substance is necessary to prevent a manifest injustice given the lack of any surprise to the defense and the strength of the government's evidence.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 12-CM-427

EDWIN PRITCHETT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on August 3, 2022, appellant Edwin Pritchett was charged with unlawful distribution of a controlled substance (cocaine) while armed, in violation of D.C. Code §§ 48-904.01(a)(1), § 22-4502; unlawful possession with intent to distribute a controlled substance (cocaine) while armed (PWID), in violation of D.C. Code § 48-904.01(a)(1); two counts of possession of a firearm during a crime of violence or dangerous offense (PFCOV), in violation of D.C. Code § 22-

4504(b); unlawful possession of a firearm (prior conviction) (FIP), in violation of D.C. Code § 22-4503(a)(1); carrying a pistol without a license, in violation of D.C. Code § 22-4504(a)(2); possession of a large capacity ammunition feeding device, in violation of D.C. Code § 7-2506.01(b); possession of an unregistered firearm, in violation of D.C. Code § 7-2502.01(a); unlawful possession of ammunition, in violation of D.C. Code § 7-2506.01(a)(3); and unlawful possession of drug paraphernalia, in violation of D.C. Code § 48-1103(a) (Record on Appeal (R.) 106-08 (Indictment); R. 12-13 (Docket)).[1]

On March 25, 2024, the government dismissed the distribution charge (Count 1), the two counts of PFCOV (Counts 2 and 4), and the possession of a large capacity feeding device charge (Count 7) (3/25/24 Tr. 6-7, 10). The government also indicated that it would proceed on the charge of attempted PWID-cocaine, the lesser-included offense of PWID-cocaine (Count 3) (3/25/24 Tr. 6). At trial, the government proceeded on the charges of attempted PWID-cocaine, FIP, carrying a pistol without a

[1] All citations to the Record (R.) refer to the PDF page number.

license, possession of an unregistered firearm, unlawful possession of ammunition, and possession of drug paraphernalia (*id.* at 7-8).

On April 15, 2024, a jury trial began before the Honorable Marisa Demeo (4/15/24 Tr. 3). On April 23, 2024, the jury convicted Pritchett on all charges (4/23/24 Tr. 30-31). On June 28, 2024, the trial court sentenced Pritchett to 12 months of incarceration, followed by one year of supervised probation (4/23/24 Tr. 12-14; R. at 339 (Judgment and Commitment Order)). Pritchett timely appealed (R. 342 (Notice p. 1)).

The Trial

The Government's Evidence

On November 1, 2020, Pritchett was caught in a buy-bust operation with a loaded and unlicensed firearm, approximately 33 grams of a white or tan powdery substance believed to be cocaine, nearly $700 of U.S. currency (including pre-recorded funds), and a digital scale (4/17/24 Tr. 84, 90, 106, 132, 141, 143; 4/22/24 Tr. 32).

An undercover officer with the Metropolitan Police Department (MPD) met with a go-between for the purpose of buying drugs (4/22/24 Tr. 49-50). The undercover officer gave the go-between pre-recorded funds, and she then got in the dark-colored SUV that Pritchett was

driving (4/17/24 Tr. 84, 90; 4/22/24 Tr. 51-52, 94). Pritchett drove the vehicle around the block while undercover officers followed (*id*. at 51-52, 62). The go-between left Pritchett's vehicle and walked back to the undercover officer (4/22/24 Tr. 62). The arrest team then stopped Pritchett, who was standing in the 6100 block of Dix Street NE (4/22/24 Tr. 57).

MPD officers recovered the pre-marked funds inside Pritchett's pocket (4/17/24 Tr. 90). Inside the center console of the dark SUV Pritchett was driving, police found a firearm along with a D.C. driver's license and a credit card, both bearing Pritchett's name (4/17/24 Tr. 116-20; 137-38). The police also recovered a digital scale from inside the vehicle (*id*. at 143). The firearm was not registered to Pritchett, and he did not have a concealed-carry permit in the District of Columbia (4/16/24 Tr. 152-56).

MPD Senior Officer Scott Brown with the Violent Crimes Suppression Division was qualified as an expert in: (1) the methods of using and purchasing narcotics and controlled substances in Washington, D.C.; (2) the methods for producing, packaging, selling, and transferring narcotics and controlled substances in Washington, D.C.; (3)

the manner in which narcotics and controlled substances are sold at the street level in Washington, D.C.; (4) the common packaging of narcotics and controlled substances in Washington, D.C.; and (5) the manner in which firearms are used in trafficking narcotics in Washington, D.C. (4/22/24 Tr. 76-79). Officer Brown opined that the 33 grams of a white rock-like substance recovered from Pritchett, and admitted as Government's Exhibit 1 (4/17/24 Tr. 84, 102; 4/22/24 Tr. 32), was consistent with cocaine (4/22/24 Tr. 80-82).[2] Officer Brown also testified that cocaine and crack cocaine are controlled substances in D.C. (*id.* at 80). Officer Brown opined that the approximate street value of 33 grams of cocaine was $1,600 to $1,800 (*id.* at 84). To sell 33 grams of cocaine on the street, Officer Brown explained, a dealer would break it down into smaller units with the use of a digital scale (*id.* at 86-87). Additionally, because the quality of cocaine can vary, in Officer Brown's experience, a cocaine user would not buy 33 grams of cocaine at once; if the quality was

[2] The government also called MPD Detective Scott Brown, who shares the same name as the government's expert Officer Scott Brown, but each have different badge numbers. Detective Brown testified that, based on his training and experience, the substance recovered from Pritchett was consistent with crack cocaine (4/17/24 Tr. 84-89; 102-03).

poor, the user would have "basically waste[d]" money (*id*. at 88). Officer Brown concluded that, in his experience, the presence of a controlled substance, money, a digital scale, and a firearm together are indicia of drug distribution (*id*.).

Officer Brown also testified as to his experience with buy-bust operations (4/22/24 Tr. 90-93). Officer Brown testified that, in his experience, a person who was arrested with pre-recorded MPD buy money was involved in a drug transaction with an undercover officer (*id*. at 93-94).

The recovered firearm and magazine were swabbed for DNA (4/22/24 Tr. 25-27). An expert in forensic DNA analysis concluded that a DNA profile obtained from the magazine contained a mixture of three individuals with at least one male contributor (*id*. at 120).[3] She further determined that the mixture profile recovered here was at least 220 septillion times more likely to be observed if it originated from Pritchett and two unknown unrelated individuals than if the DNA originated from three unknown unrelated individuals (*id*.).

[3] The DNA obtained from the firearm was "below the limit of detection, therefore, the same was not processed further" (4/22/24 Tr. 120).

The defense did not present any witnesses.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in permitting the government to reopen its case to admit the previously agreed-to stipulation concerning Pritchett's knowledge of his prior felony conviction as required to establish guilt on the FIP charge. Pritchett was not surprised by the evidence and had an opportunity to respond. Moreover, because the government rested while the jury was on break, the jury was unaware that the government had reopened its case and there was no disruption in the presentation of evidence. Nor did the trial court's willingness to consider the stipulation undermine the adversary process. Rather, allowing the prosecutor to correct an inadvertent mistake on an uncontested issue advanced the overall interests of justice.

Pritchett cannot establish that the trial court plainly erred by instructing the jury as to the elements of the lesser-included, attempted PWID-cocaine charge. At trial, Pritchett did not preserve a constructive-amendment claim. The trial court did not err in explaining to the jury that, in an attempted-PWID case, the government need not prove the precise chemical compound or that the defendant knew the specific

chemical compound in his possession. Rather, the court properly instructed the jury that the government needs to establish only that the defendant believed he possessed some type of controlled substance. Nor can Pritchett show that these instructions permitted the jury to convict on grounds not presented to the grand jury. The evidence presented to the grand jury and the evidence at trial related exclusively to cocaine. There is no credible argument that the jury convicted Pritchett of any other controlled substance. Finally, Pritchett cannot establish any manifest injustice given the strength of the government's evidence.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion in Allowing the Government to Reopen Its Case to Present a Stipulation.

Pritchett argues that the trial court abused its discretion by permitting the government to reopen its case to present a stipulation regarding his prior felony conviction. This claim is meritless.

A. Additional Background

The government and Pritchett signed a stipulation prior to trial concerning Pritchett's prior felony conviction (4/15/24 Tr. 135-36; 4/22/24

Tr. 146). Before trial began, the trial court indicated that it would instruct the jury immediately after the stipulation was read to the jury (4/15/24 at 135-36).

On the second day of testimony, the government indicated to the court, in the presence of the jury, that the government had no further witnesses (4/22/24 Tr. 132). The trial court then asked the parties to get on headsets to explain further (*id.*). While on the headsets, the government explained that there were nine witnesses in the hallway who were prepared to testify concerning DNA evidence, but this testimony was no longer needed (*id.*). The government then requested a "brief pass" to confirm that it had no additional witnesses (*id.* at 133). The court granted the government's request and released the jury on a "short break" (*id.* at 134).

While the jury was on the "short break," the court confirmed that the government had no additional witnesses (4/22/24 Tr. 135). The court told the government that, when the "jury comes back in, the Government will announce that it's resting" (*id.* at 136). Pritchett then moved for judgment of acquittal on all charges (*id.*). Pritchett challenged the narcotics charges on various grounds and, with respect to the gun-related

charges, Pritchett argued that the government did not prove possession – constructive or otherwise – as he was two car lengths away from the vehicle when the firearm was found (*id*. at 139). Pritchett did not contend that the government failed to prove his status as a felon for purposes of the FIP charge (*id*.).

The court then directed the government to respond to Pritchett's arguments and asked the government to also address what evidence it presented concerning Pritchett's prior conviction and his knowledge thereof (4/22/24 Tr. 139-40). The government noted that the parties had stipulated that Pritchett was previously convicted of a crime punishable by more than one year and that Pritchett knew of the qualifying prior conviction (*id.* at 142). The government apologized for the confusion and indicated that it intended to enter the stipulation before resting in front of the jury (*id*.). Over Pritchett's objection, the court permitted the government to "present the stipulation before it rests in front of the jury" (*id.* at 147).

B. Standard of Review and Applicable Legal Principles

Whether to allow a party to reopen its case is a matter within the sound discretion of the trial court. *Rambert v. United States*, 602 A.2d 1117, 1119-20 (D.C. 1992) (citation omitted). Accordingly, a trial court's decision to permit the prosecution to reopen its case will not be reversed on appeal unless the defendant was prejudiced as a result. *Rambert*, 602 A.2d at 1119. In evaluating whether a defendant has been prejudiced by the reopening of the government's case, this Court considers three relevant factors: (1) whether the evidence introduced after the government reopened its case surprised the defendant; (2) whether the defendant had an adequate opportunity to respond to that evidence; and (3) whether the delayed presentation of the evidence rendered it more detrimental to the defendant than it otherwise would have been. *Matter of E.R.E.*, 523 A.2d 998, 1000 (D.C. 1987). *See also Shelton v. United States,* 983 A.2d 979, 987 (D.C. 2009) (In determining whether the trial court abused its discretion in permitting a party to reopen its case after the close of evidence, this Court considers "(1) the timeliness of the motion, (2) the nature of the evidence, including its relevance, and (3) prejudice to the opposing party.")(cleaned up).

C. Discussion

The trial judge's decision to permit the prosecution to reopen its case to present the stipulation was not an abuse of discretion. The additional evidence here was a previously agreed-to stipulation, and the government had not yet rested its case in the presence of the jury. Pritchett cannot claim surprise given that he agreed to the stipulation before the trial began. In fact, on the first day of jury selection, Pritchett told the court that the parties "are going to reach a stipulation" concerning the prior conviction elements of the FIP charge (4/15/24 at 135-36). Before trial began on the following business day, the court circulated the proposed instruction to be read after the stipulation was entered into evidence (4/17/24 Tr. at 6). Moreover, Pritchett had ample opportunity to respond to the stipulation as it was reviewed and agreed-to before opening statements. Finally, the sequencing of the evidence presented to the jury was not altered. The government did not formally rest until after the stipulation had been presented (4/22/2024 Tr. 147).

"A criminal trial is not a 'game'," *Morris v. Slappy*, 461 U.S. 1 ,15 (1983), but instead is "a search for truth." *United States v. Lewis*, 486 A.2d 729, 736 (D.C. 1985). This Court has previously upheld a trial

court's discretionary decision to reopen the government's case to present evidence on a discrete issue. *See Matter of E.R.E.*, 523 A.2d 998, 1000 (D.C. 1987) (affirming trial court's decision to permit reopening of case-in-chief where government sought to introduce evidence of correct date of alleged offense to rebut motion for judgment of acquittal). Indeed, courts have permitted the government to reopen its case to remedy a failure to introduce a stipulation or other evidence concerning a defendant's prior conviction. *See, e.g., United States v. Trant*, 924 F.3d 83, 90 (3rd Cir. 2019) (no abuse of discretion in permitting government to reopen its case to introduce stipulation as to defendant's prior felony conviction); *United States v. Floyd*, 153 F. App'x 236, 237–38 (4th Cir. 2005) (no abuse of discretion in allowing government to reopen case where parties stipulated to prior felony and the interstate travel of the guns before the trial); *People v. Damon*, 157 N.Y.S.3d 643, 646-47 (N.Y. App. Div. 2021) (no error in granting the People's application to reopen their case after the parties had rested "to submit a special information alleging that defendant was previously convicted of criminal mischief in the fourth degree in order to show that such conviction rendered the home or business exception provided in Penal Law § 265.03(3) inapplicable").

Pritchett argues instead that the trial court abused its discretion by "inject[ing] itself into the proceedings" to "bail out" the government. Brief for Appellant ("Br.") at 23-28. However, Pritchett ignores that the court had a duty to ensure that each element of the charged offenses was proved. At that point in the trial, there was no evidence concerning Pritchett's prior conviction or his knowledge thereof. *See* Super. Ct. Crim. R. 29 ("The court may on its own consider whether the evidence is insufficient to sustain a conviction."). Indeed, courts often raise sufficiency concerns, sua sponte, often to the benefit of the defense. *See, e.g., Covington v. United States*, 278 A.3d 90, 94 (D.C. 2022) (dismissing malicious disfigurement charge after court raised concerns about sufficiency sua sponte); *Johnson v. District of Columbia*, 230 A.2d 483 (D.C. 1967) (appellate court reversed vagrancy conviction after reviewing sufficiency of evidence sua sponte).

Pritchett relies (at 24) on *Matter of E.R.E.*, 523 A.2d 998 (D.C. 1987), noting that there the prosecution "asked" to reopen its case. In *Matter of E.R.E.*, the defendant raised an issue concerning the date of the crime in its motion for judgment of acquittal. 523 A.2d at 998-99. Here, Pritchett failed to raise the deficiency concerning his prior conviction.

Instead, the trial court reasonably inquired about the evidence establishing Pritchett's prior conviction to satisfy the FIP charge. Only at this point did the prosecution request to reopen in order to present the stipulation to the jury before it formally rested (4/22/24 Tr. 142) ("The Government makes an apology to the Court and Defense counsel and does intend to present the stipulation to the jury before formally resting"). Thus, as in *Matter of E.R.E.*, the request for relief originated with the prosecution. The fact that the trial court identified a gap in the prosecution's evidence that Pritchett himself failed to raise hardly shows that "the trial court jettisoned its role as a neutral arbiter of the case, and sided with the prosecution to help it cure a fatal evidentiary gap," as Pritchett now argues (at 20). "A trial should be a solemn exercise in a search for truth, not a game of 'gotcha.'" *Trant*, 924 F.3d at 91. Accordingly, the trial court did not abuse its discretion in assessing whether the government had met its burden on all the elements of the crimes charged and allowing the government to introduce an inadvertently omitted stipulation.

II. The Trial Court Did Not Commit Error, Let Alone Plain Error, By Permitting the Prosecution to Proceed on the Lesser-Included Attempt-PWID Offense.

Pritchett argues that the trial court violated his Fifth Amendment right to be indicted by a grand jury of the crime for which he is to be tried by permitting the prosecution to proceed on attempted possession with intent to distribute cocaine, the lesser-included offense of possession with intent to distribute cocaine (Br. at 29-44). Pritchett's claim fails.

A. Additional Background

Count Three of the indictment charged that, while armed with a firearm, Pritchett "possess[ed] with intent to distribute a quantity of cocaine a schedule II narcotic controlled substance" in violation of D.C. Code §§ 48-904.01(a)(1), 22-4502 (R. 107 (Indictment)). The government later amended Count Three to charge attempted possession with intent to distribute (3/25/24 Tr. 10). In the jury instructions, the trial court said:

> The law makes cocaine a controlled substance. In order to decide whether the material was cocaine you may consider all evidence that may help you, including exhibits, expert and non[-]expert testimony.

4/22/24 Tr. 199-200.

The trial court further instructed:

> The Government is not required to prove that the defendant knew the precise type of controlled substance that he possessed. The Government must prove beyond a reasonable doubt, however, that the defendant knew that he possessed some type of controlled substance.

4/22/24 Tr. 200. Pritchett did not object to this instruction on the ground that it constructively amended the indictment.

B. Standard of Review and Applicable Legal Principles.

The Grand Jury Clause of the Fifth Amendment requires the government to secure an indictment from a grand jury before trying a defendant for a felony. *See Stirone v. United States*, 361 U.S. 212, 215 (1960). The indictment requirement serves three basic functions: (1) it puts the defendant on notice of the charges against him so that he may prepare a defense; (2) it protects against future jeopardy for the same crime; and (3) it prevents the government or court from altering the charges to fit the proof based on facts not presented to or found by the grand jury. *See Scutchings v. United States*, 509 A.2d 634, 636 (D.C. 1986).

Once a grand jury returns an indictment, that charging document cannot be amended except through further action by the grand jury. *See*

Scutchings, 509 A.2d at 636. Thus, the court cannot "broaden[]" the charge by either literally or constructively amending the charging terms of the indictment to permit the defendant to be convicted of a different offense or a new theory of an offense not charged by the grand jury. *Stirone*, 361 U.S. at 215-19; *Wooley v. United States*, 697 A.2d 777, 780-81 (D.C. 1997); *see Scutchings*, 509 A.2d at 636-37.

However, as this Court has explained, "a defendant's Fifth Amendment right to indictment by a grand jury will not be violated, regardless of whether the indictment is narrowed before, during, or after trial, as long as the narrowed indictment is not prejudicial to the defendant, *i.e.*, as long as it alleges the essential elements of the charged offense, sufficiently informs the defendant of the charges which he must defend, enables him to plead it to bar further prosecutions for the same offense, and does not broaden the charges against the defendant." *Williams v. United States*, 641 A.2d 479, 482 (D.C. 1994) (internal quotation marks, quotation, and citations omitted); *see also Coreas v. United States*, 585 A.2d 1376, 1380 (D.C. 1991) (new indictment not required when defendant subsequently charged with a lesser-included offense), *cert. denied*, 502 U.S. 855 (1991).

Where, as here, the defendant claims for the first time on appeal that the trial court constructively amended an indictment, this Court reviews that unpreserved claim for plain error. *Tann v. United States*, 127 A.3d 400, 452 (D.C. 2015); *Smith v. United States*, 801 A.2d 958, 959 (D.C. 2002) ("plain error review applies to claims of deprivation of the Fifth Amendment right to indictment by a grand jury where the claim has not been preserved in the trial court.").[4] To establish plain error, Pritchett must show (1) an error, (2) that was obvious or readily apparent, (3) that affected his substantial rights, and (4) that seriously affected the "fairness, integrity, or public reputation of judicial proceedings." *Buskey v. United States*, 148 A.3d 1193, 1204 (D.C. 2016).

[4] In the alternative, this Court can find that Pritchett waived his claim that the jury instructions constructively amended the indictment. Before the trial court read the jury instructions to the jury, the parties discussed the instructions with the court and had an opportunity to shape and edit them. Pritchett did not raise the constructive amendment argument despite having an opportunity to do so. When asked if he had any objections to the jury instructions, Pritchett's counsel replied, "No, Your Honor" (4/22/2024 Tr. 158). This Court should not entertain this claim. This Court has "repeatedly held that a defendant may not take one position at trial and a contrary position on appeal." *Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993). *See also Parker v. United States*, 745 A.2d 933, 938 (D.C. 2000) (defendant waived claim that the trial court should have defined term for jury by not requesting any such instruction).

Appellant's burden to establish plain error is "formidable." *Comford v. United States*, 947 A.2d 1181, 1189 (D.C. 2008) (citation omitted).

C. Analysis

Pritchett argues (at 32-33) that the trial court constructively amended the indictment by instructing the jury that the government need not prove that defendant "knew the precise type of controlled substance that he possessed," and must only prove that the defendant "knew that he possessed some type of controlled substance." Relying primarily on *Stirone v. United States*, 361 U.S. 212 (1960), and its progeny, Pritchett claims that he was convicted of an offense different from the one that the grand jury considered. Pritchett's claim is without merit.

In *Stirone*, the indictment alleged interference with interstate commerce through the import of sand into Pennsylvania, but evidence at trial also showed interference with interstate commerce through the export of steel from Pennsylvania. 361 U.S. at 213-14. The Supreme Court held that by permitting the jury to consider both fact patterns in reaching its verdict, the trial court broadened Stirone's liability beyond the grand jury's charge and thus constructively amended the indictment.

Id. at 219. This Court followed *Stirone* in the controlled-substance context, finding that an indictment for possession with intent to distribute heroin was constructively amended when the evidence at trial concerned possession with intent to distribute cocaine. *Wooley v. United States*, 697 A.2d 777 (D.C. 1997). This Court found that the evidence and instructions "broaden[ed] the possible bases for conviction" by allowing a conviction for possessing a "categorically different" controlled substance that the grand jury "never heard about" and never charged. *Id.* at 784.

This case is nothing like *Stirone* or *Wooley*. Here, the government charged Pritchett with the lesser-included offense of attempted PWID. Because attempted possession with intent to distribute a controlled substance is a lesser-included offense of possession with intent to distribute, *Washington v. United States*, 965 A.2d 35, 43 (D.C. 2009), the trial court's jury instructions narrowed the indictment, unlike in *Stirone* and *Wooley*.

Moreover, "[i]t is undisputed that in order to prove the completed crime of illegal possession of a specified controlled substance, the government must prove that the substance possessed was, in fact, the controlled substance in question." *Seeney v. United States*, 563 A.2d 1081,

1083 (D.C. 1989) (citations omitted). "However, there is no such requirement when the charge is an attempt." *Id.* Thus, Pritchett is wrong to suggest (at 25) that the trial court "erroneously treat[ed] the fact that an 'attempt' was charged as though this 'attempt' charge *reduced* the government's burden to prove that Pritchett possessed *cocaine*."[5] Indeed,

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[5] Numerous federal Courts of Appeals have similarly concluded that there is no stricter *mens rea* requirement for attempted drug crimes than there is for the completed offenses. As the Seventh Circuit explained, a defendant "need not have known the specific drug type or quantity to be found guilty of conspiring or attempting to violate [the federal CSA]." *United States v. Gougis*, 432 F.3d 735, 745 (7th Cir. 2005); *see also, e.g.*, *United States v. Colston*, 4 F.4th 1179, 1188 (11th Cir. 2021) (rejecting defendant's argument that prosecution must prove that she specifically knew she possessed cocaine holding "the defendant must knowingly possess, and intend to distribute a controlled substance, but need not know which substance it is"); *United States v. McKenzie*, 421 F. App'x 28, 32 (2d Cir. 2011) (rejecting defendant's argument that he could not be convicted of attempted PWID cocaine "because he was unaware that [the] shipment contained cocaine" on the ground that "it is irrelevant whether the defendant had actual knowledge of the type or quantity of drug involved so long as he directly participated in the drug transaction"); *United States v. Sua*, 307 F.3d 1150, 1154-55 (9th Cir. 2003) (rejecting defendant's argument that trial court erred by not instructing the jury "that [the] defendants must have known the drug type" in case where defendants were convicted of attempted PWID cocaine and methamphetamine; explaining that "the government need only show that the defendant knew that he imported or possessed *some* controlled substance") (citation omitted); *United States v. Woods*, 210 F.3d 70, 77 (1st Cir. 2000) (finding evidence sufficient to support conviction for attempted PWID cocaine because "the government need only prove that the defendant had knowledge that he was dealing with a controlled

(continued . . .)

the fact that Pritchett was not charged with the completed offense in this case distinguishes *Wooley*, upon which Pritchett primarily relies, because the defendant in *Wooley* was charged with the completed offense which *did* require the government to prove the specific identity of the controlled substance.

Furthermore, the trial court's jury instruction did not constructively amend the indictment because there is no concern that the petit jury considered a constellation of facts different from the evidence before the grand jury. "A constructive amendment of the indictment occurs if, and only if, the prosecution relies at trial on a complex of facts distinctly different from that which the grand jury set forth in the indictment." *Carter v. United States*, 826 A.2d 300, 306 (D.C. 2003). The facts presented at trial and the facts presented to the grand jury focused on Pritchett's involvement in a buy-bust operation on November 1, 2020, where Pritchett was found to be in possession of 33 grams of a white or tan powdery substance believed to be cocaine (4/17/24 Tr. at 84). The

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substance, not that he had knowledge of the specific controlled substance").

indictment informed Pritchett in August 2022 (19 months before trial) that the government would proceed on the theory that he possessed a tan or white powdery substance, believed to be cocaine, with the intent to distribute it. At trial, the government's drug expert testified that, based on his training and experience, the recovered substance was consistent with cocaine.[6] No other controlled substance was discussed at trial. Moreover, the jury instructions defined cocaine – and no other drug – as a controlled substance (4/22/24 Tr. 200). Because the jury and the grand jury considered the same constellation of facts, there was no constructive amendment. For this reason, this case differs markedly from *Wooley*, 697 A.2d at 784 (where the government conceded that "[t]he fact that the grand jury indicted for controlled substance/heroin, therefore, suggests that the grand jury was not presented with controlled substance/cocaine"), and *Scutchings*, 509 A.2d at 634 (where the grand jury charged the defendant with obstructing justice by threatening a

[6] The government did not present evidence from a forensic drug expert. For this reason, the government proceeded on an attempt theory. *See Thompson*, 678 A.2d at 27.

husband, while the evidence at trial showed that the defendant had tried to bribe the wife).

Pritchett's reliance (at 27) on *Digsby v. United States*, 981 A.2d 598 (D.C. 2009), is misplaced. *Digsby* addressed a wholly different issue: whether the government could meet its burden to show that a Confrontation Clause error arising from the improper admission of a DEA-7 form identifying the substance as heroin was harmless beyond a reasonable doubt. *Digsby*, 981 A.2d at 600. The government conceded the error but, for the first time at oral argument, argued that the court should enter judgment on the lesser-included offense of attempted possession of an unidentified controlled substance. *Digsby*, 981 A.2d at 609-10. The Court rejected the government's argument. The Court was persuaded that "the erroneous admission of the DEA-7 would not be harmless beyond a reasonable doubt with respect to this supposed lesser-included offense involving an unidentified controlled substance." *Id*. In dicta, the Court also endorsed *Wooley* and expressed concern that allowing entry of judgment on this lesser-included offense "undercuts the indictment clause." *Id.* at 610. Because this discussion was not necessary to the resolution of the harmless-error claim, and the argument was not fully

developed, having been raised for the first time at oral argument, the Court should eschew any reliance on *Digsby* here. *Id.* at 609.

Even if this Court were to consider *Digsby*'s comments about the role of the grand jury, however, its analysis rests on a faulty premise. *Digsby* emphasized the concurring opinion in *Wooley*, which stated: "The analytical problem in this case arises because the indictment descended to particulars, and specified a particular factual way in which the crime had been committed, even if the grand jury could have charged in more general terms." 981 A.2d at 910 (citing *Wooley*, 697 A.2d at 787 n.3 (Farrell, J., concurring). Other courts have correctly rejected this analysis. For example, in *United States v. Gray*, 94 F.4th 1267 (11th Cir. 2024), the defendant argued that the fact that the indictment refers to "a Schedule II controlled substance, to wit: 50 grams or more of methamphetamine" means that "the government charged him not with knowing possession of any controlled substance, but with knowing possession of methamphetamine in particular—or at least with knowing that he possessed a controlled substance on the Schedule II list" and that the district court constructively amended the indictment "by instructing the jury that the government need only show knowledge of any controlled

substance." *Id.* at 1270-71. The Eleventh Circuit squarely rejected that claim. *Id.* Similarly, in *United States v. Cole*, 843 F. App'x 886, 888 (9th Cir. 2021), the defendant pointed out "that the indictment charged her with knowingly importing and conspiring to import methamphetamine, specifically, rather than a controlled substance, generally" and argued "that the government locked itself into having to prove her knowledge of the drug type and quantity." *Id.* at 888. The Ninth Circuit also rejected this claim: "But constructive amendments occur when the defendant is charged with one crime but, in effect, is tried for another crime. That did not happen here, and at any rate the indictment was not constructively amended because knowledge of drug type and quantity was not essential to the conviction. *Id.* (cleaned up).

Finally, even if Pritchett could show plain and obvious error, he cannot otherwise satisfy plain-error review. Pritchett argues (at 43) that the jury note inquiring why the drug was not tested shows the importance of the trial court's jury instruction. However, Pritchett cannot establish that the jury instruction affected his substantial rights with

respect to the drug charge as no other drug was ever discussed at trial.[7] Pritchett was found in possession of the 33 grams of the white or tan substance, a digital scale, MPD pre-marked funds, and $667 in U.S. currency (4/17/24 Tr. 84, 90, 106, 132, 141, 143; 4/22/24 Tr. 32). A drug expert opined that the white or tan substance was consistent with cocaine, and the combination of the amount, the scale, and the firearm, were consistent with distribution (4/22/24 Tr. 88). The evidence left no reasonable doubt that Pritchett was engaged in anything but attempted possession of cocaine with intent to distribute.

Finally, Pritchett cannot establish that the claimed error seriously undermined the fairness, integrity, or reputation of the judicial proceedings. Instead, this case fits neatly within the long line of precedents in which this Court has affirmed convictions when the evidence at trial established a criminal offense, the defendant had sufficient notice to prepare a defense to that charge, and the jury was properly instructed on that offense's elements. *See, e.g.*, *Tann*, 127 A.3d at 451-53; *Portillo v. United States*, 62 A.3d 1243, 1259-60 (D.C. 2013);

[7] One stray reference from a witness to a package labeled "Medicated Mikey" was stricken from the record (4/17/24 Tr. 94).

Smith v. United States, 801 A.2d 958, 961-62 (D.C. 2002) ("even if we assume that the evidence and instruction plainly amended the language of the indictment, there is no risk that the fairness, integrity or public reputation of judicial proceedings will be affected where the indictment included a citation that encompassed both subsections of the aggravated assault statute, and the evidence amply supported appellant's conviction of aggravated assault"); *Woodall v. United States*, 683 A.2d 1258, 1264-65 (D.C. 1996).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

EDWARD R. MARTIN, JR.
United States Attorney

CHRISELLEN R. KOLB
ARIEL LIEBERMAN
MICHAEL DAL LAGO
Assistant United States Attorneys

__/s/_____
KATELYN B. BENTON
D.C. Bar #1020272
Assistant United States Attorney
601 D Street, NW, Room 6.232

Washington, D.C. 20530
Katelyn.Benton2@usdoj.gov
(202) 252-6829

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Timothy Cone, Esq., on this 28th day of February, 2025.

__/s/_____
KATELYN B. BENTON
Assistant United States Attorney