No. 02-1185

In the Supreme Court of the United States

BRADFORD LEE BUTLER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the superseding indictment related back to the original indictment and so was timely.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 297 F.3d 505.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. A petition for rehearing was denied on November 13, 2002 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on February 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement, petitioner entered a conditional plea of guilty to Count 2 of the superseding indictment, which charged him with tax evasion, in violation of 26 U.S.C. 7201, with respect to employment taxes due for the quarter ending December 31, 1991. Pet. App. 2a, 6a. Petitioner reserved the right to

appeal from the district court's denial of his motion to dismiss the superseding indictment. *Id.* at 5a n.2. Petitioner was sentenced to 12 months' incarceration and ordered to pay restitution in an amount to be determined. *Id.* at 6a, 22a. The court of appeals affirmed the district court's judgment, except as to the amount of restitution, which it fixed at $17,652. *Id.* at 2a, 22a, 25a.

1. Petitioner and his business partner, Kriston Kent Manning, established and operated a business known as National Consumer Research (NCR), which collected consumer data for sale to consumer products companies. Pet. App. 3a. Petitioner also created shell corporations known as Data Central and Fulfillment Services Corporation (FSC). *Id.* at 19a; C.A. App. 185, 736. In the offense conduct to which he pleaded guilty, petitioner represented to the Internal Revenue Service that FSC leased its employees to NCR. NCR paid Data Central, and later FSC, sufficient funds to cover only the net amount of the checks that were paid the employees. The employment taxes withheld from the employees' wages were not paid over to the IRS, but were expended by and for petitioner. Petitioner also failed to file the required federal employment tax returns. Pet. App. 3a; C.A. App. 185.

2. On January 29, 1998, a federal grand jury in the Southern District of Ohio indicted petitioner on one count of conspiracy to impede or obstruct the IRS in ascertaining and collecting employment taxes, in violation of 18 U.S.C. 371, and five counts of employment tax evasion, in violation of 26 U.S.C. 7201.[1] Pet.

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[1] Manning was charged in the indictment with one count of conspiracy, 18 U.S.C. 371, and 12 counts of employment tax evasion, 26 U.S.C. 7201. Manning has fled the United States and remains a fugitive.

App. 3a; C.A. App. 16-27. On February 26, 1998, the same grand jury returned a superseding indictment. Pet. App. 3a; C.A. App. 28-39. The superseding indictment supplemented or replaced some references to "Data Central" with references to "FSC." That change reflected the fact that, in August 1991, Fulfillment Services Corporation replaced Data Central as the purported lessor in the tax evasion scheme. C.A. App. 31. The only change made to Count 2 replaced the single reference to "Data Central" with one to "Fulfillment Services Corporation." Pet. App. 9a.

On June 4, petitioner moved to dismiss the indictment for the government's breach of an alleged agreement not to prosecute; on the same day, he also moved to dismiss the indictment for lack of sufficient evidence to continue the prosecution; and, on July 29, he moved again to dismiss the indictment for unjustifiable delay in commencing prosecution. The July 29 motion argued that petitioner had been prejudiced by the government's delay in obtaining an indictment, but did not refer to the statute of limitations. C.A. App. 84-92. On September 15, the district court denied petitioner's motions to dismiss. Petitioner then entered a conditional plea of guilty to Count 2 of the superseding indictment, which charged him with willfully attempting to evade employment taxes due for the quarter ending December 31, 1991, in violation of 26 U.S.C. 7201. Pet. App. 4a-5a; C.A. App. 128-133. He reserved his right to appeal the denial of the motion to dismiss for breach of an agreement. C.A. App. 133.

3. On appeal, petitioner argued for the first time that the six-year statute of limitations period for prosecuting the tax evasion offense charged in Count 2 had run. The government argued that it had not because the original indictment was timely and the superseding

indictment related back to the original indictment. Petitioner maintained that the superseding indictment was untimely because it "impermissibly broaden[ed]" that count of the original indictment. Pet. C.A. Br. 36-38; Pet. C.A. Reply Br. 1-4. As relevant here, the court of appeals affirmed. It held that the statute of limitations began running, "at the very earliest, [on] January 31, 1992, * * * the date of the last affirmative act of evasion." Pet. App. 7a-8a. Thus, the original indictment was returned within the six years of the offense. The court further determined that:

> the only change to Count 2 between the original indictment and the superseding indictment was the substitution of FSC for another company, Data Central. This substitution simply constitutes "underlying detail"—both companies were alleged to have performed the same role in the tax evasion. Thus, [petitioner] clearly had notice of the charges against him in the first indictment.

Id. at 9a. Noting that circuit precedent provides that "a superseding indictment relates back to the date of the original indictment if it 'does not broaden the charges set forth' in the original indictment," *id.* at 8a (quoting *United States* v. *Garcia*, 268 F.3d 407, 411 (6th Cir. 2001), cert. denied, 535 U.S. 1089 (2002)), the court held that the superseding indictment here related back to the original indictment and was timely. *Id.* at 9a.

Petitioner filed a petition for rehearing, with suggestion for rehearing en banc, which was denied. In that petition, he suggested for the first time that the superseding indictment did not relate back because it had "substantially amended" the charge, even if it had not broadened it. C.A. Pet. for Reh'g 4-6.

ARGUMENT

Petitioner argues that the Sixth Circuit's standard for determining whether a superseding indictment relates back to the original indictment conflicts with the standard of eight other circuits. That claim lacks merit and does not warrant further review. First, not only did petitioner not present his current argument until his suggestion for rehearing en banc, he urged the court of appeals to apply the standard he now attacks. Second, there is no split among the circuits, as the variations in phrasing on which petitioner relies have not led to disparate outcomes. Third, the court of appeals correctly applied the established standard to this case.

1. Petitioner failed to present to the court of appeals the argument he now presses, and the court did not pass upon the question.[2] Petitioner's opening brief in the court of appeals stated simply that the statute of limitations began to run on December 31, 1991, and that more than six years had passed before the indictment was filed. Pet. C.A. Br. 36-38. The United States responded that the relevant date was January 31, 1992,

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[2] Petitioner also did not suggest at any time to the district court that the statute of limitations had run in this case, and did not reserve the right to appeal on that ground in his conditional guilty plea. The claim is therefore foreclosed by his plea, or, at most, is reviewable for plain error under Federal Rule of Criminal Procedure 52(b). Because the Sixth Circuit is one of the few federal appellate courts to hold that the statute of limitations may be freely raised for the first time on appeal, see *United States* v. *Crossley*, 224 F.3d 847, 857-858 (6th Cir. 2000) (discussing circuit precedent), the United States did not argue before the court of appeals that petitioner's failure to raise the issue in the district court, or to reserve the issue in his plea, constituted a forfeiture or waiver.

and that the superseding indictment related back to the original indictment. Resp. C.A. Br. 21-23. In his reply brief, petitioner said (correctly) that in *United States* v. *Smith*, 197 F.3d 225, 229 (1999), the Sixth Circuit endorsed the reasoning of *United States* v. *Grady*, 544 F.2d 598 (2d Cir. 1976), that a superseding indictment relates back unless it "impermissibly broadens" the original indictment. Pet. C.A. Reply Br. 1. Petitioner then said (incorrectly) that the facts of this case involved impermissible broadening. He did not distinguish between substantial amendment and impermissible broadening, nor did he advise the court of appeals that in his view it adhered to a minority standard.

The court of appeals then held that the substitution of FSC for Data Central in Count 2 constituted "underlying detail," since the two companies were alleged to have performed the same role in the tax evasion scheme; that petitioner "clearly had notice of the charges against him in the first indictment"; and that the "superseding indictment relate[d] back to the original indictment." Pet. App. 9a. Only in his petition for rehearing did petitioner argue that there was a relevant difference between broadening an indictment and amending it, and that this case involved the latter and not the former. C.A. Pet. for Reh'g 5-6 & n.6.

For that reason, the court of appeals never held that the relation-back doctrine applies where an indictment is not materially broadened but is substantially amended. The appellate panel had no occasion to consider that question, and it had no opportunity to consider whether this case involves such facts. Had petitioner presented his claim to the court of appeals in a timely fashion, the panel might well have made clear (as explained below) that there are no significant

differences among the standards applied by the circuits. For that reason, this Court should follow its well-established practice of denying review to claims that were neither pressed nor passed upon below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. Petitioner errs in claiming that the relation-back standard applied by the court of appeals in this case is substantively different from the law of eight other circuits. Pet. 5-7. As the Second Circuit explained in the leading case of *Grady*, which pioneered the "broaden" or "amend" language, the key question is whether the defendant had fair notice from the original indictment of the charges against him. See 544 F.2d at 601 (identifying "timely notice * * * within the statutory time frame" as the underlying policy of statutes of limitations). Changes in small and insubstantial details do not deprive a defendant of fair notice. *Id.* at 603 ("[W]e find that the superseding and superseded indictments were in all respects substantially the same, and the defendants were placed fully upon notice of the crimes with which they were charged in the superseding indictment by virtue of the superseded indictment."). The principle that fair notice is the touchstone of relation-back analysis appears expressly in almost all the cases that petitioner cites (Pet. 5) in attempting to show a split among the circuits.[3]

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[3] See *United States* v. *O'Bryant*, 998 F.2d 21, 24 (1st Cir. 1993) (quoting *Grady*, *supra*, and citing *United States* v. *Lash*, 937 F.2d 1077 (6th Cir. 1991)); *United States* v. *Zvi*, 168 F.3d 49, 55 (2d Cir. 1999) (citing *Grady*); *United States* v. *Schmick*, 904 F.2d 936, 940 (5th Cir. 1990) (quoting *Grady*); *United States* v. *Ross*, 77 F.3d 1525, 1537 (7th Cir. 1996) (citing, *inter alia*, *Lash*); *United States* v.

That is the very reasoning that the Sixth Circuit adopted in *Smith*. 197 F.3d at 229 ("Notice to the defendants of the charges, so that they can adequately prepare their defense, is the touchstone in determining whether a superseding indictment has broadened the original indictment."). If a superseding indictment adds new charges of which the defendant had no fair notice before the running of the statute, the new charges are barred; but as to charges of which the defendant did have fair notice, the superseding indictment relates back and avoids the bar. That the Sixth Circuit refers to the addition of the new charges simply as "broadening," rather than as "broadening or amending," makes no significant difference.

Petitioner suggests that the difference is material because the Sixth Circuit would permit a superseding indictment to relate back if, for example, in a false statements case, one "alleged false statement to a government agency [were] substituted for another," Pet. 8-9, because that would amend but not broaden the indictment. The Sixth Circuit has not so held, however, and if that change truly subjected the defendant to a charge of which he had no prior notice, it would broaden

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Davis, 953 F.2d 1482, 1491 (10th Cir. 1992) (citing *Grady*); *United States* v. *Ratcliff*, 245 F.3d 1246, 1253 (11th Cir. 2001) (citing, *inter alia*, *Smith*, *supra*, and *Grady*); see also *United States* v. *Sears, Roebuck & Co.*, 785 F.2d 777, 779 (9th Cir. 1986) (per curiam) (citing *United States* v. *Friedman*, 649 F.2d 199 (3d Cir. 1981), which in turn cited *Grady*; and stating that "[t]he government from the outset made [the defendant] aware of its concern" about certain conduct). The one case on petitioner's list that does not itself discuss the importance of fair notice nevertheless does not support petitioner's claim of a circuit split. *United States* v. *Oliva*, 46 F.3d 320 (3d Cir. 1995), simply cited *Friedman* as having adopted the rule of *Grady*. *Oliva*, 46 F.3d at 324.

the indictment within the meaning of *Smith*. See 197 F.3d at 229; see also *United States* v. *Garcia*, 268 F.3d 407, 414 (6th Cir. 2001) (explaining that in *Smith* "the defendants had notice at all times of the charges against which they would have to defend themselves"), cert. denied, 535 U.S. 1089 (2002). Accordingly, there is no conflict worthy of this Court's review. Absent a claim that any other court of appeals has resolved a case that is factually similar to this one by ruling for the defendant, petitioner's claim raises only a semantic rather than a substantive issue.

3. In any event, the superseding indictment in this case did not broaden or amend the original indictment under any reasonable standard.

As the court of appeals noted, "the only change to Count 2 between the original indictment and the superseding indictment was the substitution of FSC for another company, Data Central." Pet. App. 9a. In each case, the charge merely alleged that the corporation was a business conducted by the defendant, that it was established in Columbus, Ohio, and that it had business operations there. As the court of appeals held, the corporate name was mere "underlying detail." *Ibid.*

The court also correctly held that the indictment gave defendant sufficient notice of the charge against him. Pet. App. 9a. Count 2 of the original indictment identified both the workers whose withheld employment tax was not paid over—the individuals who performed the business duties and functions of NCR—and the period for which the unpaid tax was due—the fourth quarter of 1991. *Id.* at 29a. Substituting one named corporation for another did not deprive

petitioner of timely, fair notice of the charges against him.[4]

b. Petitioner further states that had the Government proceeded on the original indictment, he "would have been entitled to a judgment of acquittal" on Count 2, because it named Data Central and not FSC, and there were at the relevant time "no Data Central employees as to whom petitioner could have failed to pay taxes." Pet. 12. Petitioner's claim that he would have been entitled to an acquittal is incorrect. The United States could have proved at trial the use of a different named corporation to accomplish the offense conduct of failing to pay employment taxes on those particular employees for that particular quarter, because a non-prejudicial variance between the indictment and the proof is permissible. The variance here would have affected neither petitioner's right to fair notice of the charges against him nor his right to protection from double jeopardy in future cases involving the failure to pay the same taxes. See *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985) (noting that defendant was not "prejudicially surprised at trial," and that the indictment would serve "as a bar to subsequent prosecutions"); *Berger* v. *United States*, 295 U.S. 78, 82 (1935) (same).

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[4] Petitioner's claim that he was deprived of fair notice is further undermined by the original indictment's language in Count 1 charging as an overt act in furtherance of the conspiracy the failure to pay employment taxes for "NCR, Data Central, *or any other related business entity* responsible for so filing on behalf of employees who carried out business duties and functions of NCR." C.A. App. 19 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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