No. 05-884

In the Supreme Court of the United States

PAUL WEINER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the jury's verdict that petitioner entered into an agreement to commit an unlawful act.

2. Whether the government sufficiently represented that the proceeds to be laundered derived from an illegal health care fraud.

3. Whether the court of appeals erred in rejecting petitioner's claim that he was entrapped as a matter of law.

4. Whether the court of appeals erred in rejecting petitioner's claim that his conviction for conspiracy to launder money, in the absence of an overt act and under the specific factual circumstances of this case, violates the Due Process Clause.

5. Whether the district court's rulings that narrowed the time frame of the conspiracy constituted a constructive amendment or variance of the indictment requiring reversal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not published in the Federal Reporter but is reprinted in 152 Fed. Appx. 38.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2005. The petition for a writ of certiorari was filed on January 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to launder money, in violation of 18 U.S.C. 1956(h). He was sentenced to two

years of probation, which included a special condition of three months of home confinement; a $10,000 fine; and a mandatory special assessment of $100. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner was the President and CEO of General Credit Corporation (General Credit), a check cashing company that provided a valuable, illegal service—filing false Currency Transaction Reports (CTRs) that enabled its customers to hide their receipt of large amounts of cash.[1] The Federal Bureau of Investigation (FBI) began an undercover investigation of General Credit in the summer of 2002. Gov't C.A. Br. 2-3.

The FBI used a confidential informant (CI) with a prior business relationship with General Credit. That individual contacted General Credit claiming that he was working as a check broker who cashed checks for others for a fee. On three separate occasions, the CI brought to General Credit bundles of checks drawn on accounts in the names of two different companies controlled by the FBI. General Credit agreed to cash the checks. The day after the CI's first delivery of checks, FBI Special Agent John Riggi, posing as a mobster named John Russo, called Irwin Zellermaier, General Credit's Chairman and former CEO who still handled day-to-day operations at the company. Riggi, posing as Russo, identi-

[1] Financial institutions like General Credit are required to file a CTR with the Treasury Department for each cash transaction in excess of $10,000 on a single day. On the form, the financial institution must identify, in detail, both the customer who physically conducted the transaction and also the person on whose behalf the transaction was conducted. 31 C.F.R. 103.28. The Treasury Department sends this information to various law enforcement agencies such as the Financial Crimes Enforcement Network and the Federal Bureau of Investigation (FBI) for use in, among other things, criminal investigations. See C.A. App. A119-A122.

fied himself as the true owner of the various checks that the CI had presented the previous day. C.A. App. A201-A202. General Credit nevertheless filed false CTRs for these transactions, identifying the CI as the person on whose behalf the transaction was conducted, and making no mention of "Russo," the "true" owner of the checks. *Id.* at A216-A217, A232-A234.

After the third delivery of checks, General Credit provided the CI with some of the cash proceeds of these checks, but approximately $108,000 remained unaccounted for. C.A. App. A242-A256. Russo made a series of urgent calls to Zellermaier, demanding the balance, but Zellermaier responded with a variety of excuses.

On December 18, 2002, Russo and Special Agent Vincent Presutti, posing as Russo's cousin and an organized crime boss, made an unscheduled visit to General Credit's headquarters. C.A. App. A258-A259. Petitioner, Zellermaier, and the two undercover agents had a lengthy meeting in which they discussed both the missing $108,000 from the prior transactions, and business they would conduct in the future. *Id.* at A261. A recording of that entire meeting was played for the jury.

At the outset of the meeting, Russo asked petitioner whether he "kn[e]w what's going on here," and petitioner confirmed that he did. C.A. App. A1184-A1185. Petitioner and Zellermaier jointly began to explain that the CI had bounced approximately $130,000 worth of checks over the last several months, separate and apart from the checks belonging to Russo. *Id.* at A1184. Petitioner displayed great familiarity with both the bounced checks and the Russo checks. *Id.* at A1184-A1185.

In the course of that conversation, Russo spoke explicitly about the criminal origin of his checks, explaining "I've been dealing with these Russian guys over the

years—the stocks, the bull * * * —you know how it works * * * The no fault auto, the scam— * * * They need the cash to make the * * * scam work." C.A. App. A1186-A1187. Later in the conversation, Russo spoke again about what he called the "the healthcare scam" and the "[n]o fault, auto bull* * * scams." *Id.* at A1195. Petitioner expressed no surprise at this information.

Throughout the meeting, petitioner displayed great familiarity with the transactions. In particular, petitioner made clear that he knew that false CTRs had been filed, and explained that many General Credit customers use brokers to keep their names off CTRs. C.A. App. A1206-A1207. Petitioner offered to hold any additional money that came in from the CI for Russo and Presutti, but explained that he could not give them the cash directly because that would require filing a CTR naming them. *Id.* at A1213. When Russo and Presutti expressed concern about such a CTR being filed, petitioner and Zellermaier made various suggestions about how to avoid having their names appear on the CTRs. *Id.* at A1214-A1215.

The conversation then turned to future business. Russo explained that he had received $830,000 in checks over the prior three weeks, and "that could have been yours." C.A. App. A1228. Petitioner responded, "Absolutely." *Ibid.* Petitioner then told Russo and Presutti that he could launder their money and would "hook [them] up" with a broker he knew, whose name could be used on the CTRs. *Id.* at A1228-A1230, A1233. Petitioner explained that the broker he had in mind was "a big broker," who "probably brings in a million dollars a week in checks." *Id.* at A1229. Petitioner and Zellermaier explained that the broker would obtain checks from Russo and various other people and would

come in to cash them, but Russo's name would not appear on the CTRs. *Id.* at A1230. Russo confirmed that he was interested in doing further business once the $108,000 was accounted for. *Id.* at A1231.

The next day, the confidential informant was arrested for lying to the FBI about the checks he had bounced at General Credit, and his cooperation with the FBI was terminated. C.A. App. A265. Although Russo had another recorded phone conversation with Zellermaier about future business, the FBI did not attempt to cash any additional checks at General Credit. *Id.* at A282.

2. A federal grand jury sitting in the Southern District of New York returned a ten-count indictment against petitioner and Zellermaier. Pet. App. 12a-24a. Count one charged both men with conspiring to violate currency transaction reporting requirements, in violation of 18 U.S.C. 371. Count two charged both men with conspiring to launder money, in violation of 18 U.S.C. 1956(h). Counts three through nine charged both men with engaging in false currency transaction reporting, in violation of 31 U.S.C. 5324(a)(1). Count ten charged Zellermaier alone with the substantive offense of money laundering.

a. Before trial, Zellermaier pleaded guilty to Counts one and two of the indictment. At the outset of petitioner's trial, the court granted the government's motion to dismiss Counts four, six, eight, and nine. At the close of the government's case in chief, the court granted petitioner's motion to dismiss Counts one, three, five, and seven. Accordingly, only Count two, charging a conspiracy to launder money, went to the jury.

b. In granting petitioner's motion to dismiss Count one—the conspiracy to file false CTRs—the district

court concluded that the government had failed to prove the existence of a conspiratorial agreement between petitioner and Zellermaier before the December 18, 2002, meeting. That conclusion was fatal to the CTR conspiracy count because that count contained an overt-act requirement, and the court found that the government did not prove an overt act after the December 18 meeting. Count two—the money-laundering conspiracy count—was unaffected by this ruling, because that count does not require proof of an overt act. Because all of the substantive CTR counts related to conduct before the December 18 meeting, the district court dismissed those counts as well. Gov't C.A. Br. 16-18.

In denying petitioner's motion to dismiss Count two, the district court rejected petitioner's claim of entrapment as a matter of law, stating that "I think the notion that [petitioner] entered into these arrangements that he promised to undertake as shown on the December tape, the notion that they were in response to threats is laughable." C.A. App. A474.

c. The jury found petitioner guilty on Count two. The district court sentenced petitioner to two years of probation, to include the special condition of three months of home confinement; a $10,000 fine; and a mandatory special assessment of $100. Gov't C.A. Br. 20.

3. The court of appeals affirmed in a unanimous, unpublished summary order. Pet. App. 1a-9a.

a. The court first held that the evidence was sufficient to support the jury's verdict. Pet. App. 2a-4a. The court noted that petitioner did "not seriously dispute that he offered to launder money for the undercover agents on December 18, 2002; indeed, he virtually admitted as much in his own testimony at trial." *Id.* at 3a. The court rejected petitioner's argument that the gov-

ernment failed to prove a "conspiratorial 'meeting of the minds' between [petitioner] and his co-defendant Zellermaier." *Ibid.* The court explained that the government carried its burden by offering evidence that petitioner and Zellermaier "closely collaborated" to offer money laundering services to the agents at the December 18 meeting, and that the agents' failure to accept the offer did not undo petitioner's agreement with Zellermaier. *Ibid.* The court further concluded that there was sufficient evidence to support a jury finding that the funds at issue were derived, at least in part, from a specified unlawful activity, *i.e.*, federal health care fraud. The court reasoned that the jury could have so concluded based on the agents' statement that the money they were laundering derived from various frauds, "including a health care scam being run by Russian confederates." *Id.* at 3a-5a.

b. The court next rejected petitioner's claim that he was entrapped as a matter of law on the ground that the jury could have rationally concluded that he was not entrapped. Pet. App. 5a. The court explained that "the jury was by no means required to accept [petitioner's] claim of government inducement." *Id.* at 6a. Moreover, the court noted, "[i]t was [petitioner], echoed by Zellermaier, who offered to continue this illicit service, thereby demonstrating his predisposition." *Ibid.* The court also concluded that the jury's apparent rejection of petitioner's claim that he was intimidated into the illegal activity was not "unreasonable as a matter of law." *Ibid.*

c. The court of appeals also rejected petitioner's claim that a conviction for money laundering conspiracy without proof of an overt act violates due process. Pet. App. 7a. It noted that this claim is foreclosed by this

Court's decision in *Whitfield* v. *United States*, 543 U.S. 209 (2005), and further concluded that "nothing in the record indicates conduct by government agents so egregious, repugnant, or conscious-shocking as to implicate due process." Pet. App. 7a (citing *United States* v. *Jackson*, 345 F.3d 59, 67 (2d Cir. 2003), cert. denied, 540 U.S. 1157 and 541 U.S. 956 (2004); *United States* v. *Rahman*, 189 F.3d 88, 131 (2d Cir.), cert. denied, 528 U.S. 982 (1999) and 528 U.S. 1094 (2000); *United States* v. *Duggan*, 743 F.2d 59, 84 (2d Cir. 1984)). The court also found no merit to petitioner's reliance on *Lawrence* v. *Texas*, 539 U.S. 558 (2003), rejecting his assertion that "most law-abiding persons would have acted as he did." Pet. App. 7a.

d. Finally, the court of appeals rejected petitioner's argument that there was either a constructive amendment of the indictment or an impermissible variance between the indictment and the trial evidence. Pet. App. 8a-9a. The court noted that the indictment charged a money laundering conspiracy from October 2002 through January 2003, and that the district court's ruling that the government had failed to establish petitioner's involvement in the charged conspiracy before December 18, 2002, narrowed the time frame within which the government had to carry its burden of proof. The court explained, however, that this did not alter any essential element of the charged conspiracy, and therefore was not a constructive amendment of the indictment. In addition, the court concluded that there was no material difference between the trial evidence and the factual circumstances of the charged conspiracy, and thus no variance. As to the latter point, the court of appeals further concluded that petitioner could not in any event demonstrate the "substantial prejudice" necessary

to secure a reversal on a claim of variance. *Id.* at 9a (citing *United States* v. *McDermott*, 245 F.3d 133, 139 (2d Cir. 2001)).

ARGUMENT

1. Petitioner contends (Pet. 13) that there was no agreement sufficient to constitute a criminal conspiracy, but merely an "agreement to make an offer" that is insufficient to constitute a conspiracy. That contention is based largely on petitioner's disagreement with the jury's verdict and the court of appeals' characterization of the evidence against him. Petitioner's factbound contention does not warrant further review. See Sup. Ct. R. 10; see also *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In any event, his contention is without merit. The court of appeals correctly concluded that the government proved that petitioner and Zellermaier closely collaborated to offer money-laundering services to the undercover agents, and that such proof demonstrates an agreement to commit an unlawful act—*i.e.*, a conspiracy. Pet. App. 3a. The court also correctly concluded that it is irrelevant to the existence of that conspiracy that the agents did not accept the offer. *Ibid.*

Petitioner further contends (Pet. 10-13) that the court of appeals' resolution of that question "cannot be squared" with the decisions of three other courts of appeals. Pet. 13 (citing *United States* v. *Iennaco*, 893 F.2d 394 (D.C. Cir. 1990); *United States* v. *Jones*, 765 F.2d 996 (11th Cir. 1985); *United States* v. *Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980)). That claim is without merit. Those cases do not establish a different legal rule

than the decision below; rather, those cases turned on their different facts.

In *Iennaco*, unlike here, the court of appeals concluded that there was no agreement between the only two possible co-conspirators. In that case, an undercover agent gained the confidence of a man named "Visciano," who worked on the agent's behalf to try to arrange a drug deal with the defendant. *Iennaco*, 893 F.2d at 395. The agent wanted to buy heroin; the defendant, through Visciano, offered to sell cocaine. The agent expressed possible interest in buying cocaine, but only if the defendant produced a sample and only if the cocaine was "absolutely perfect" and "very cheap." *Id.* at 398. The agent reiterated his interest in buying heroin; the defendant offered to supply gems. The defendant offered to introduce the agent to potential heroin suppliers if the agent would pay for him to go to Italy; the agent rejected this proposal. *Id.* at 395. The court, in an opinion by then-Judge Ginsburg, found insufficient evidence that the defendant and Visciano ever conspired to supply drugs to the agent. *Id.* at 397.[2] This was so because, inter alia, Visciano was acting on behalf of the agent, and "always said he had first to check with [the agent], his employer." *Ibid.* Given that Visciano did not, or could not, make an agreement with the defendant on his own behalf, the court concluded that there were "various unaccepted offers and much tentative talk, but no agreement between Iennaco and Visciano, acting on [the agent's] behalf, to possess or distribute either heroin or cocaine." *Id.* at 398.

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[2] As the court of appeals noted, the government agent could not himself be a conspirator. *Iennaco*, 893 F.2d at 397 n.3 (citing *United States* v. *Barboa*, 777 F.2d 1420, 1422 (10th Cir. 1985); *United States* v. *Escobar de Bright*, 742 F.2d 1196, 1200 (9th Cir. 1984)).

Petitioner seems (Pet. 11) to read *Iennaco* as holding that there can be no conspiracy unless the seller and the buyer reach an agreement. But *Iennaco* merely held that "there must be an agreement to commit *some* offense." 893 F.2d at 398. Here, there was such an agreement: petitioner and Zellermaier agreed to jointly offer the illegal services. That agreement was not subject to any unaccepted conditions. It is thus irrelevant here whether petitioner and Zellermaier's offer to the undercover agents was accepted or declined, or subject to an unfulfilled condition set by the agents. Petitioner and Zellermaier "closely collaborated" to offer money laundering services to the agents, and the court of appeals correctly held that the government established "that there was a conspiratorial 'meeting of the minds'" between the two. Pet. App. 3a.

Melchor-Lopez is distinguishable for similar reasons. In that case, the Ninth Circuit held that the government had failed to prove that either defendant reached an agreement with his "would-be co-conspirators." 627 F.2d at 891. Defendant Melchor-Lopez insisted on certain conditions that were unacceptable to his would-be co-conspirators. *Ibid.* And although defendant Kommatas attempted to negotiate an agreement to purchase a controlled substance, he had made no agreement with anyone to carry out an illegal act. *Id.* at 892. Here again, petitioner's analogy (Pet. 13-14) to *Melchor-Lopez* suggests that the relevant "agreement" was the never-consummated agreement between petitioner and Zellermaier, on the one hand, and the undercover agents on the other. This is simply incorrect. The agreement that constituted the conspiracy in this case is the agreement between petitioner and Zellermaier. And as to

that, the jury correctly found that they had a "meeting of the minds" and agreed to carry out an illegal act.

Petitioner's reliance on *Jones* is also misplaced. There, in what the Eleventh Circuit characterized as a "very fact-specific case," see 765 F.2d at 1001, the court of appeals concluded that two defendants had not reached an agreement sufficient to support a drug-smuggling conspiracy where the joint proposal that they submitted to an undercover agent contained so many significant preconditions, not satisfied by the agent, that it could not be said that the defendants had agreed between themselves to commit an illegal act. *Id.* at 1003. Significantly, in *Jones* it was the *offerors* whose unsatisfied preconditions precluded a finding of an agreement. In contrast, here petitioner and Zellermaier offered to find a new broker to serve the illegal function of masking the true identity of the owners of the laundered funds. Petitioner and Zellermaier agreed to make the offer, and they made it, either to be accepted or declined, but they put no conditions on its acceptance. Petitioner asserts that the *agents* set a precondition, *i.e.*, they wanted to be repaid their missing money before doing any more business with petitioner and Zellermaier. But this condition has no bearing on the question whether petitioner and Zellermaier agreed without reservation to make the offer to commit an unlawful act, as the jury concluded they did.

2. Petitioner next contends (Pet. 16-20) that the court of appeals erred in concluding that the government had sufficiently represented to petitioner that the money at issue was proceeds from specified unlawful activity. This contention is without merit and no further review is warranted.

Section 1956(a)(3) makes it a crime to launder or attempt to launder funds that have been represented to be the proceeds of certain kinds of "specified unlawful activity," including health care fraud. 18 U.S.C. 1956(a)(3), 1956(c)(7)(F) (defining specified unlawful activity to include "any act or activity constituting an offense involving a Federal health care offense"); 18 U.S.C. 24 (defining "Federal health care offense" to include a violation of 18 U.S.C. 1347 (entitled "Health care fraud" and making any scheme "to defraud any healthcare benefit program" a federal crime). Section 1956(a)(3) enables the government to conduct undercover money laundering investigations despite the absence of actual criminal proceeds.

To bring a defendant's conduct within the sphere of Section 1956(a)(3), the government must prove that the agent represented the funds to be the proceeds of "specified unlawful activity," and that the defendant believed the money was the proceeds of specified unlawful activity. See, *e.g.*,*United States* v. *Leslie*, 103 F.3d 1093, 1103 (2d Cir.), cert. denied, 520 U.S. 1220 (1997). The courts of appeals have generally held that such representations need not be explicit, and need only convey to the defendant circumstances that would cause him to believe the funds were from the specified unlawful activity. See *ibid.* (agents' comments that the money was "powder-type" money and that it should not be brought over the border because it contained traces of drugs was sufficient to prove representation and defendant's belief that the money was the proceeds of a drug transaction); *United States* v. *Wydermyer*, 51 F.3d 319, 327 (2d Cir. 1995) (statements indicating that the money came from shipments of arms smuggled into the country was sufficient to represent that the proceeds derived from viola-

tions of the Arms Export Control Act); *United States* v. *Kaufmann*, 985 F.2d 884, 893 (7th Cir.) (representation is sufficient if the law enforcement officer makes defendant "aware of circumstances from which a reasonable person would infer that the property was drug proceeds"), cert. denied, 508 U.S. 913 (1993); *United States* v. *Castaneda-Cantu*, 20 F.3d 1325, 1331 (5th Cir. 1994) (same); *United States* v. *Starke*, 62 F.3d 1374, 1382 (11th Cir. 1995) (same); *United States* v. *Castellini*, 392 F.3d 35, 46 (1st Cir. 2004) (same); *United States* v. *Jensen*, 69 F.3d 906, 911 (8th Cir. 1995), cert. denied, 517 U.S. 1169 (1996); *United States* v. *McLamb*, 985 F.2d 1284, 1291 (4th Cir. 1993) (agent's indirect comments were sufficient representations because "any person of ordinary intelligence would have recognized" that the money with which he proposed to buy a car was the proceeds of illegal drug activity). These courts have reasoned that "[t]o hold that a government agent must recite the alleged illegal source of [the] . . . property at the time he attempts to transfer it in a 'sting' operation would make enforcement of the statute extremely and unnecessarily difficult; 'legitimate criminals,' whom undercover agents must imitate, undoubtedly would not make such recitations before each transaction." *Kaufmann*, 985 F.2d at 892 (quoting *United States* v. *Arditti*, 955 F.2d 331, 339 (5th Cir.), cert. denied, 506 U.S. 998 (1992)).

Petitioner claims that the decision below is in conflict with the Ninth Circuit's decision in *United States* v. *Anderson*, 391 F.3d 970 (2004). That case involved a charge that the defendant had laundered money represented to be the proceeds of fraud on federally insured financial institutions. The Ninth Circuit concluded that the government had provided the defendant with "no details whatsoever about the banks purportedly used in the

scheme," and therefore had not made representations that "*sufficiently* track[ed] the federal crime to put the participants on notice of the crime" that was represented to have produced the laundered money. *Id.* at 977 (emphasis added). In so holding on the facts of that case, however, it is not clear that *Anderson* adopted a clear legal principle. Although *Anderson*'s language could be read to mean that the government's representations must track the elements of the purported "specified unlawful activity," the ultimate basis for the decision rested on sufficiency-of-the-evidence grounds. Indeed, as the dissenting judge in *Anderson* noted (391 F.3d at 977-978 (Wallace, S.J., dissenting in part)), an earlier Ninth Circuit decision had held that "the government need not show that the law enforcement officers explicitly stated that the cash in question was the direct product of unlawful activity" and that it was sufficient if the undercover operator "hinted, but never specifically stated, that the funds he needed laundered were proceeds from [drug] trafficking." *United States* v. *Nelson*, 66 F.3d 1036, 1041 (1995) (quoting *United States* v. *Castaneda*, 16 F.3d 1504, 1506 (9th Cir. 1994)). The *Nelson* court cited with approval *Castaneda*, *Wydermyer*, *McLamb*, *Kaufmann*, and *Castaneda-Cantu*. *Ibid.* And the disagreement between the majority and the dissent in *Anderson* was largely one of application of the law to the facts in that case.[3]

In any event, to the extent that there is any tension between the Ninth Circuit's own decisions (see Pet. 18, suggesting that *Nelson* is inconsistent with *Anderson*),

[3] Although the government in this case argued below that *Anderson* was wrongly decided and should not be followed by the Second Circuit, see Gov't C.A. Br. 34-36, it did not concede, as petitioner claims (Pet. 19), that petitioner's conviction could not be sustained under *Anderson*.

the Ninth Circuit has not yet explored further this tension.[4] Indeed, the 2004 *Anderson* decision has not been cited on this point by any court within the Ninth Circuit, and has not been cited favorably on this point by any court at all. Given that the import of *Anderson* beyond its specific facts is uncertain, and that the full Ninth Circuit has not yet decisively spoken to the issue, *Anderson* does not provide a basis for granting review in this case. That is particularly true because the decision below is correct and is consistent with the view of all the other circuits that have addressed the issue.

3. Petitioner also contends that there is "confusion concerning the basic principles of entrapment," and that the Court should grant review to resolve that confusion. Pet. 20 (emphasis omitted). Petitioner's claim lacks merit and does not warrant further review.

Petitioner contends (Pet. 22), for the first time in any court, that there is "confusion regarding the burden of proof necessary to establish inducement," and claims that this confusion warrants review. Petitioner did not challenge the burden of proof before the court of appeals, and the court did not address the issue. There is no reason for the Court to depart from its usual practice of declining to entertain claims that were neither pressed nor passed upon below. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's new argument lacks merit.

Whatever the measure of a defendant's burden with respect to the inducement prong of the defense of entrapment, the district court allowed petitioner to argue entrapment to the jury even though the district court viewed petitioner's claim that he acted because of

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[4] The government did not seek rehearing en banc in *Anderson*.

threats by the agents as "laughable." C.A. App. A474. And the jury, which heard petitioner's testimony and the recorded exchanges that he characterizes as threatening, rejected petitioner's entrapment defense. The court of appeals correctly concluded that the jury's rejection was not unreasonable as a matter of law. Pet. App. 6a-7a.

Petitioner further contends that the court of appeals' reasoning on predisposition is "tautological" because, he claims, it "held that the jury could find predisposition because [petitioner] agreed to launder money." Pet. 22-23. But that misstates the court of appeals' reasoning. The court observed that "the agents' ostensible purpose in meeting with the defendants was to demand that General Credit pay monies past due from the informant, not to propose future money laundering," and that it was petitioner who *offered* to continue the illegal money laundering service. Pet. App. 6a. The court reasoned that a jury could rationally conclude from petitioner's ready willingness to make such an offer that he was predisposed to commit the crime charged. *Id.* at 5a-6a. There is no error in the court's analysis or conclusion.

4. Petitioner next contends (Pet. 24-26) that due process should bar his conviction and that, under the specific factual circumstances of this case, due process requires proof of an overt act to convict petitioner of conspiring to launder money. Petitioner's legal claim is contrary to this Court's binding precedent, see *Whitfield* v. *United States*, 543 U.S. 209, 214 (2005) (conviction for conspiracy to commit money laundering does not require proof of an overt act in furtherance of the conspiracy). Further review is not warranted, as petitioner's attempt to distinguish *Whitfield* rests on factual contentions that the jury rejected.

Specifically, petitioner contends that proof of an overt act is necessary in a situation where "the only alleged crime is an oral offer to assist in a future criminal enterprise made in response to government threats of violence," and therefore "no jury could possibly find, beyond a reasonable doubt, whether the offer was genuine or a sham made to placate those uttering the threats." Pet. 25. Yet the jury, which heard the full audiotape of the meeting at which petitioner made the offer, rejected petitioner's claim that he had acted because of threats, and the court of appeals correctly rejected petitioner's claim that "most law-abiding persons would have acted as he did." Pet. App. 7a.

5. Petitioner's final contention (Pet. 26-28) is that there was a constructive amendment of the indictment or, alternatively, that there was a material variance that prejudiced him. Petitioner contends (Pet. 27-28) that review by this Court is necessary because "the lower courts and prosecutors require guidance about how conspiracies should be pleaded in indictments." Petitioner's contentions are without merit, and further review is unwarranted.

a. "To prevail on a constructive amendment claim, a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States* v. *Frank*, 156 F.3d 332, 337 (2d Cir. 1998), cert. denied, 526 U.S. 1020 (1999); cf. *United States* v. *Miller*, 471 U.S. 130, 136 (1985) ("As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated

by the fact that the indictment alleges more crimes or other means of committing the same crime.").

The court of appeals correctly concluded that there was no constructive amendment of the indictment. Pet. App. 8a. The court observed that the indictment charged a money laundering conspiracy from October 2002 through January 2003. The court reasoned that the district court's ruling that the government had failed to establish petitioner's involvement in a charged conspiracy before December 18, 2002, effectively "narrowed the time frame within which the government had to carry its burden of proof, but it did not alter any element of the charged conspiracy." *Ibid.*

b. "A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Frank*, 156 F.3d at 337 n.5 (emphasis omitted). The court of appeals correctly concluded that, while the evidence presented to the jury was more narrowly focused as to time than the indictment, there was no material difference in the factual circumstances of the charged conspiracy. Pet App. 8a-9a. Again, this conclusion is correct, and petitioner's claim to the contrary is without merit.

The court of appeals also correctly concluded that petitioner was unable to establish the "substantial prejudice" necessary to secure reversal on a claim of variance. Pet. App. 9a. Before this Court, petitioner makes (Pet. 27) only the bald assertion that the government made a "change in theory," and that, because the change occurred mid-trial, he was "necessarily * * * prejudiced." Petitioner's reliance (*ibid.*) on *Berger* v. *United States*, 295 U.S. 78 (1935), for the proposition that a mid-trial change in theory is necessarily prejudicial is misplaced.

In *Berger*, this Court held that where the indictment charged one large conspiracy but the proof showed two smaller conspiracies, the variance did not require reversal of conviction because there was no substantial prejudice to the defendant. *Id.* at 83-84. In passing, the Court remarked that a variance is immaterial where it "was not of a character which could have misled the defendant at the trial." *Id.* at 83 (quoting *Washington & Georgetown R.R.* v. *Hickey*, 166 U.S. 521, 532 (1897)). The Court never suggested that a variance occurring mid-trial would always be material; indeed the facts and holding in *Berger* show that is not the case because there, as in nearly all cases of claimed variance, the difference between the evidence and the indictment became apparent only at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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