No. 12-780

In the Supreme Court of the United States

DANIEL D'AMELIO, 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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QUESTION PRESENTED

Whether a constructive amendment of the indictment occurred in this case, requiring reversal of petitioner's conviction for attempted sexual enticement of a minor using a facility or means of interstate commerce, in violation of 18 U.S.C. 2422(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 683 F.3d 412. The order of the district court granting petitioner's motion for a new trial (Pet. App. A35-A66) is reported at 636 F.Supp.2d 234.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2012. A petition for rehearing was denied on September 24, 2012 (Pet. App. A67-A68). The petition for a writ of certiorari was filed on December 21, 2012. 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 one count of attempted sexual entice-

ment of a minor using a facility or means of interstate commerce, in violation of 18 U.S.C. 2422(b). Pet. App. A3. The district court subsequently granted petitioner's motion for new trial. *Id.* at A35-A66. The court of appeals reversed. *Id.* at A1-A34.

1. Petitioner, a 47-year-old man, made contact over the Internet with someone whose online profile indicated that she was a 12-year-old girl named "Mary." Pet. App. A4. "Mary" was, in reality, a police-created persona. *Ibid.* Petitioner engaged in a number of online and telephone conversations with "Mary," which included discussion of her sexual history and what petitioner enjoyed doing sexually with girls. *Id.* at A37. The police arrested petitioner leaving a park with an undercover officer posing as "Mary." *Id.* at A38.

A federal grand jury indicted petitioner on one count of attempted sexual enticement of a minor using a facility or means of interstate commerce, in violation of 18 U.S.C. 2422(b). Pet. App. A5. The indictment contained a single substantive paragraph, which stated:

> From on or about August of 2004, up to and including in or about September of 2004, in the Southern District of New York, [petitioner], a/k/a "Wamarchand@aol.com," the defendant, unlawfully, willfully, and knowingly, did use a facility and means of interstate commerce to persuade, induce, entice, and coerce an individual who had not attained the age of 18 years to engage in sexual activity for which a person can be charged with a criminal offense, and attempted to do so, to wit, [petitioner] used a computer and the Internet to attempt to entice, induce, coerce, and persuade a minor to engage in sexual activity in violation of New York State laws.

Ibid.

2. A year and a half before trial, the government informed petitioner of its intention to introduce evidence of the telephone conversations between petitioner and "Mary," and it provided petitioner with recordings of those conversations. Pet. App. A5-A6. At trial, the government introduced transcripts of the nine online chat sessions between petitioner and "Mary," copies of the e-mails petitioner sent to "Mary," and recordings of their six telephone calls and two in-person meetings. *Id.* at A6.

The district court instructed the jury that the government was required to prove that petitioner "used a facility or means of interstate commerce" to attempt to entice the person he believed to be a minor to engage in sexual activity and that "[b]oth the telephone and the internet" qualified as facilities or means of interstate commerce. Pet. App. A8-A9. Petitioner had objected to that instruction on the ground that the indictment referred only to the Internet. *Id.* at A6. The district court, however, had reasoned that the instruction did not constructively amend the indictment because the Internet and telephone evidence concerned "the same course of conduct consisting of a series of conversations that were designed to cultivate a relationship, with, and ultimately to induce, a minor to come to a meeting for the purpose of having sex." *Id.* at A6-A8. The district court had concluded that reliance on the telephone calls was, at most, a variance in the indictment and that petitioner could not show prejudice, given his advance notice of the government's intent to introduce the telephone evidence. *Id.* at A8.

3. The jury found petitioner guilty. Pet. App. A9. The district court, however, granted petitioner's motion for a new trial. *Id.* at A66. Reaching the opposite con-

clusion from the one it had reached during the trial, the district court held that the jury instructions had, in fact, constructively amended the indictment. *Id.* at A35-A66.

The court emphasized that it "reache[d] this conclusion reluctantly." Pet. App. A65. It recognized that "[a]ll the communications relied on by the Government, whether e-mails or telephone calls, took place as part of a single course of conduct—one designed, under the Government's theory of the case, to gain the trust of a child and convince her to meet [petitioner] in person, so he could lure her into a secluded place for the purpose of engaging in sexual conduct." *Id.* at A56. The district court also recognized that the "telephone conversations would inevitably have been admitted into evidence at [petitioner's] trial, if only to complete the narrative, whether the indictment mentioned them or not" and that petitioner had not objected to their admission. *Id.* at A56-A57. But the court nevertheless deemed itself bound by precedent to order a new trial, notwithstanding its determination that "this case is not on 'all fours' with the cases in which constructive amendments were found." *Id.* at A65.

4. The court of appeals reversed, "find[ing] at most a variance in proof" that petitioner had neither claimed nor shown to be prejudicial, rather than a constructive amendment that might have warranted an automatic new trial under circuit precedent. Pet. App. A12; see *id.* at A13 & n.2, A14 n.3; see generally *id.* at A1-A34. The court of appeals explained that a constructive amendment occurs only when "the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an of-

fense other than that charged in the indictment." *Id.* at A12 (citation omitted). "By contrast," it explained, "a variance occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." *Id.* at A13-A14 (brackets and citation omitted). The court of appeals observed that it had "consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *Id.* at A13 (emphasis and citation omitted).

The court rejected defendant's argument that "the indictment specifically limited the conduct that constituted the 'core of criminality' and that the jury instructions expanded the basis for conviction beyond the specific conduct charged." Pet. App. A15-A16. The court of appeals concluded that "the 'core of criminality' for this crime did not encompass a specific facility and a specific means of interstate commerce," but instead encompassed petitioner's attempt to gain the trust of and have sexual contact with a minor. *Id.* at A27. The court reasoned that the circumstances of this case differed from the circumstances of *Stirone* v. *United States*, 361 U.S. 212 (1960), in which this Court had reversed a conviction in light of "the distinctly different sets of facts and theories presented and charged to the jury." Pet. App. A26-A27; see *id.* at A18-A26.

The court of appeals also concluded that the "proof at trial did not modify an 'essential element' of the alleged crime," because whether petitioner "used the Internet or a telephone makes no difference under the relevant statute, and affected neither the government's case nor the sentence imposed." Pet. App. A28-A29 (internal quotation marks, brackets, and citation omitted). "In

this case," the court reasoned, "the essential elements of the enticement crime involved communications conveyed by facilities of interstate commerce, not the specific interstate commerce facilities used to achieve these communications." *Id.* at A30-A31.

The court of appeals additionally found that the allegations in the indictment "substantially correspond[ed]" with the proof and jury instructions, "as they involve[d] a single course of conduct." Pet. App. A33-A34. The court observed that "although the 'to wit' clause in [petitioner's] indictment specifies use of the Internet, the clause preceding that language is generally framed and references the use of 'a facility and means of interstate commerce' in unspecified terms." *Id.* at A31. Because the telephone is a "facility and means of interstate commerce," the court of appeals reasoned, "it was not fatal to petitioner's conviction that the jury was instructed that both the telephone and Internet qualify as facilities of interstate commerce." *Ibid.* (citation omitted). Rather, "where the indictment charged a single course of conduct and the deviation from the interstate commerce facilities alleged in the 'to wit' clause did not permit conviction for a functionally different crime, it cannot be said that the deviation in evidence broadened the possible basis for conviction beyond that contained in the indictment." *Id.* at A31-A32 (internal quotation marks and brackets omitted).

ARGUMENT

Petitioner renews his claim (Pet. 9-29) that the jury instructions constructively amended his indictment. That fact-bound claim lacks merit; the court of appeals' decision does not conflict with a decision of any other court of appeals or of this Court; and no further review is warranted.

1. a. The Grand Jury Clause of the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. That right protects a defendant from being "tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960).

Lower courts have treated differences between the government's evidence at trial and the factual theory specified in the indictment in two ways. Where the divergence does not substantially alter the charged theory of guilt, lower courts have characterized it as a "mere variance" from the indictment and have held that it affords no grounds for reversal unless the divergence "is likely to have caused surprise or otherwise been prejudicial to the defense." 5 Wayne R. LaFave et al., *Criminal Procedure* § 19.6(c), at 334 & n.23 (3d ed. 2007) (citing cases). Only where the divergence provides an entirely new basis for conviction have lower courts characterized the divergence as a "constructive amendment" of the indictment and generally held that it constitutes structural error (thereby requiring automatic reversal where an objection has been properly preserved). *Ibid*; see also, *e.g.*, *United States* v. *Mubayyid*, 658 F.3d 35, 49 (1st Cir. 2011) ("In contrast to a variance, a constructive amendment occurs where the crime charged has been altered, either literally or in effect, after the grand jury last passed upon it.") (internal quotation marks and citation omitted), cert. denied, 132 S. Ct. 2378 (2012); see also 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 516, at 48-49 (4th ed. 2011) (Wright) ("[A] constructive amendment involves a difference between the pleading

and proof so great that it essentially changes the charge.").

The court of appeals correctly concluded that no constructive amendment occurred in the particular circumstances of this case. Both the district court and the court of appeals determined that all of the communications relied on by the government, whether over the Internet or on the phone, occurred as part of "a single course of conduct." Pet. App. A27, A56. That course of conduct had "a single, ultimate purpose," namely, "to entice 'Mary,' whom [petitioner] believed was 12 years old, 'into a position where she could become the victim of a sexual predator.'" *Id.* at A27 (quoting *id.* at A56). As the court of appeals observed, in addition to the "to wit" allegation referencing the Internet, the indictment also includes "generally framed" language that "references the use of 'a facility and means of interstate commerce' in unspecified terms [and] the telephone is 'a facility and means of interstate commerce.'" *Id.* at A31. The telephone calls were undisputedly relevant, "whether the indictment mentioned them or not," to the "narrative" of petitioner's crime, *id.* at A57; petitioner was notified a year and a half before trial of the government's intent to introduce them, *id.* at A5-A6; and petitioner did not object to their introduction, *id.* at A57. Allowing the jury to consider the telephone calls, in addition to the online communications, as a potential basis for conviction accordingly did not permit conviction of an offense not charged in the indictment.

2. Petitioner errs in contending (Pet. 9-16) that the decision below conflicts with this Court's decision in *Stirone* v. *United States*, *supra*. In *Stirone*, the indictment charged that the defendant had obstructed interstate commerce, in violation of the Hobbs Act (18 U.S.C.

1951), by interfering with a concrete supplier's shipments of sand into Pennsylvania. 361 U.S. at 213-214. At trial, however, the government presented evidence that the defendant had obstructed interstate commerce because concrete made from the sand was to be used to build a steel plant, which would then export steel from Pennsylvania to other States. *Ibid.* In the jury charge, the district court then instructed the jury that it could find the defendant guilty of the crime charged based either on a finding that he obstructed the interstate market for sand shipped into Pennsylvania or on a finding that he obstructed the interstate market for steel shipped out of Pennsylvania. *Id.* at 214. This Court concluded that, by allowing the jury to rely on the defendant's alleged interference with the market for steel shipped out of Pennsylvania, the district court had unconstitutionally broadened the indictment, thereby potentially allowing the defendant to be "convicted on a charge the grand jury never made against him." *Id.* at 219.

Stirone does not compel the conclusion that petitioner's indictment was constructively amended in the circumstances of this case. The Court recognized in *Stirone* that not every divergence between the indictment and the proof at trial requires reversal. See 361 U.S. at 215, 217. As the court of appeals observed, the jury in *Stirone* was permitted to find the defendant guilty based "on a complex of facts distinctly different from that which the grand jury set forth in the indictment." Pet. App. A20 (quoting *Jackson* v. *United States*, 359 F.2d 260, 263 (D.C. Cir.) (describing *Stirone*), cert. denied, 385 U.S. 877 (1966)). In this case, by contrast, the proof involved "a single set of discrete facts consistent with the charge in the indictment." *Id.*

at A21; see *id.* at A26-A27. As discussed above, both lower courts found that the online communications and telephone calls were part of a single course of conduct designed to lure a 12-year-old girl into a sexual encounter. See *ibid.* Unlike in *Stirone*, where the additional proof was of a factually unrelated means of obstructing commerce (impeding steel shipments out of Pennsylvania rather than sand shipments into Pennsylvania), the proof here was all part of the same basic crime.

3. Petitioner also errs in contending (Pet. 16-29) that the court of appeals' decision conflicts with decisions in the Fourth, Fifth, Seventh, and Ninth Circuits. Although not every circuit articulates the standard in precisely the same way, those courts all agree with the court of appeals here that not every divergence between allegation and proof is a constructive amendment; that the question is one of degree; and that a constructive amendment occurs only when the circumstances permit conviction on a significantly different set of facts or for a different offense. See Pet. App. A15 (constructive amendment occurs when "the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment") (citation omitted); *United States* v. *Allmendinger*, 706 F.3d 330, 339 (4th Cir. 2013) (constructive amendment occurs when "the indictment is altered to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment") (citation omitted); *United States* v. *Thompson*, 647 F.3d 180, 184 (5th Cir. 2011) (constructive amendment occurs when defendant could "be convicted

upon a factual basis that effectively modifies an essential element of the offense charged or permits the government to convict the defendant on a materially different theory or set of facts than that with which she was charged") (citation omitted); *United States* v. *Ratliff-White*, 493 F.3d 812, 820 (7th Cir. 2007) (constructive amendment occurs when a "complex set of facts" is presented at trial that is "distinctly different from the set of facts set forth in the charging instrument," or the crime charged in the indictment is "materially different or substantially altered at trial") (citation omitted), cert. denied, 552 U.S. 1141 (2008); *United States* v. *Mincoff*, 574 F.3d 1186, 1198 (9th Cir. 2009) (constructive amendment occurs when a "there is a complex of facts presented at trial distinctly different from those set forth in the charging instrument" or "the crime charged in the indictment was substantially altered at trial"), cert. denied, 130 S. Ct. 1108 (2010); see also, *e.g.*, *United States* v. *Ferguson*, 681 F.3d 826, 830 (6th Cir. 2012) (constructive amendment occurs when "the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment") (citations omitted); *United States* v. *Yielding*, 657 F.3d 688, 709 (8th Cir. 2011) (constructive amendment occurs when jury instruction "alters the essential elements of the offense charged in the indictment and thereby creates a 'substantial likelihood' that the defendant was convicted of an uncharged offense"), cert. denied, 132 S. Ct. 1777 (2012).

Notwithstanding the consistency of the circuits' approaches, petitioner attempts to "derive[]" (Pet. 26) an

alternative test from certain specific decisions. None of those specific decisions demonstrates that another court of appeals would have reached a different result on the particular facts of this case.

In *United States* v. *Whitfield*, 695 F.3d 288 (2012), cert. denied, No. 12-7374, 2013 WL 656104 (Feb. 25, 2013), the Fourth Circuit found a constructive amendment when the jury instructions permitted conviction for a crime—bank robbery with death resulting, in violation of 18 U.S.C. 2113(e)—that was a separate offense, with an additional element, from the one charged in the indictment. 695 F.3d at 294-295, 306-309; see *id.* at 308 ("The error arose * * * from the district court's instructions on an element of an *uncharged offense*—the death results offense."). Petitioner here, in contrast, was convicted of the same offense, with the same elements, as the one set forth in the indictment.

In *United States* v. *Leichtnam*, 948 F.2d 370 (7th Cir. 1991), the indictment charged the defendant with using and carrying a firearm, "to wit," a particular Mossberg rifle, during and in relation to drug trafficking, in violation of 18 U.S.C. 924(c). 948 F.2d at 374. The Seventh Circuit concluded that "[i]n the context of the entire jury charge and the entire trial," *id.* at 379, the indictment had been constructively amended by allowing the jury to find guilt based either on the Mossberg rifle or on either of two additional handguns found in a different part of the defendant's residence. *Id.* at 374-381. The court's determination that the handgun evidence was "distinctly different" from the rifle evidence relied on case-specific factors: the prosecutor's admission at oral argument that "he purposefully did not charge the two handguns" because "he 'felt that they were sufficiently attenuated from the drug evidence that it would be in-

appropriate'" to do so, *id.* at 380 & n.2; and the court's observation that while the defendant's former girlfriend had "testified that he carried a gun, obviously a handgun and not a rifle, in the saddle bag of his motorcycle when he delivered narcotics," the record contained "no evidence that the rifle was actually used in a narcotics transaction," *id.* at 380 n.2. Neither circumstance is present here, and it is thus far from clear that the Seventh Circuit would conclude that the jury in this case was presented with "more or different offenses than the grand jury charged," *id.* at 377. Indeed, in a more recent case, the Seventh Circuit has concluded, consistent with the result here, that no constructive amendment occurred in circumstances where a fraud allegation in the indictment "pinpointed a particular step in the payment process" but "the proof at trial * * * established another." *Ratliff-White*, 493 F.3d at 822; compare *id.* at 821-824 (agreeing with the Second Circuit's decision in *United States* v. *Dupre*, 462 F.3d 131 (2006), cert. denied, 549 U.S. 1151 (2007)), with Pet. App. A29-A30 (likewise relying on *Dupre*).

In *United States* v. *Adams*, 778 F.2d 1117 (1985), the Fifth Circuit found a constructive amendment where the indictment charged that the defendant, by using a fake driver's license to purchase guns, had falsified his name, while the jury instructions permitted conviction based on the license's false address. *Id.* at 1118-1125. The Fifth Circuit has explained that the problem in that case was that the latter falsity would have been a "separate crime," *United States* v. *Perez-Solis*, No. 12-40056, 2013 WL 628272, at *8 (Feb. 20, 2013), and it has declined to extend the decision to circumstances where the divergence from the indictment is less severe, see *United States* v. *Jara-Favela*, 686 F.3d 289, 300 & n.6 (2012)

(finding no constructive amendment where proof showed false statements somewhat different from the false statements alleged in the indictment and distinguishing *Adams*). For example, the Fifth Circuit has recently found no constructive amendment where the indictment mentioned only one deprivation of property but a second deprivation, proved at trial, was part of the same "extortionate scheme." *Thompson*, 647 F.3d at 183-186. That decision is analogous to the decision here.*

Finally, in *Howard* v. *Daggett*, 526 F.2d 1388 (1975) (per curiam), the Ninth Circuit found a constructive amendment where the indictment alleged the defendant engaged in interstate travel for the purpose of promoting prostitution by two particularly identified women, in violation of 18 U.S.C. 1952; evidence about other women was introduced at trial; and the judge not only instructed the jury it could convict based on the evidence about those other women, but specifically told the jury to consider the identifying language in the indictment to be surplusage. 526 F.2d at 1389-1390. The Ninth Circuit has explained that the result in *Howard* turned on the possibility of conviction based on "*different behavior* than that alleged in the original indictment," *United States* v. *Garcia-Paz*, 282 F.3d 1212, 1216, cert. denied, 537 U.S. 938 (2002), and has declined to extend it to every discrepancy between proof and indictment, see *id.*

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* Petitioner briefly cites (Pet. 17 & n.4) decisions of the Fourth, Fifth, and Seventh Circuits finding constructive amendments in circumstances where a charge of firearm possession in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c), specified a particular predicate drug-trafficking offense, but the government proved a different predicate drug-trafficking offense at trial. This case does not present that scenario, and for the reasons explained in the text, none of those decisions establishes a general circuit rule that would require a different outcome in this case.

at 1216-1217. Of particular relevance to this case, for example, the Ninth Circuit has held that an indictment charging that the defendant smuggled "certain merchandise, to wit, marijuana," in violation of 18 U.S.C. 545, was *not* constructively amended by the omission of the "to wit" clause from the jury instruction, such that the defendant could have been convicted of smuggling "illegal medicine." *Garcia-Paz*, 282 F.3d at 1214-1217. It is therefore likely that the Ninth Circuit, like the other circuits discussed above, would have reached the same result as the decision below on the facts of this case.

At bottom, the different results in the various decisions cited by petitioner simply reflect the different crimes charged and facts established. Petitioner's own affirmative reliance (Pet. 27 n.8) on other decisions of the Second Circuit reinforces the point. If an intra-circuit conflict in fact existed, the proper course would be for the court of appeals, rather than this Court, to resolve it. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); see Pet. App. A67-A68 (denying rehearing en banc). But what the cited decisions actually illustrate is the fact-intensive nature of the inquiry. See Wright § 516, at 45 ("The distinction between variances and constructive amendments is a matter of degree, and the distinction is rather shadowy.") (footnote omitted). The result reached in this particular case does not warrant this Court's review.

4. Certiorari is not warranted for the additional reason that, even assuming petitioner's indictment was constructively amended, petitioner still would not be entitled to relief. Although the court of appeals did not need to address the issue (because it found no constructive amendment at all, see Pet. App. A13 n.2), a con-

structive amendment is not automatically reversible error.

To the extent that lower courts have held otherwise, they have relied principally on this Court's decision in *Stirone*. But *Stirone* was decided before this Court held in *Chapman* v. *California*, 386 U.S. 18 (1967), that harmless-error analysis generally applies to constitutional errors. *Id.* at 22. And although this Court has identified certain "structural" errors that are exceptions to that principle, it has never listed constructive amendments to an indictment among them. *E.g.*, *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006); *Neder* v. *United States*, 527 U.S. 1, 8 (1999); *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997). To the contrary, this Court has repeatedly held that defects in grand-jury proceedings are susceptible to the usual harmless-error analysis. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255-256 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986); see also *United States* v. *Cotton*, 535 U.S. 625, 629-631 (2002) (holding that defects in an indictment are not jurisdictional and may be forfeited if they do not meet the plain-error test).

Both the district court and the court of appeals concluded that petitioner was not prejudiced by the jury instructions in this case. Pet. App. A14 n.3, A48. Accordingly, no relief would be warranted regardless how the error is characterized.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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