No. 20-401

# In the Supreme Court of the United States

DEVAN PIERSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether petitioner was entitled to relief on his claim, raised for the first time on appeal, that the government's evidence and the district court's instructions constructively amended the indictment in his case.

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## OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-6) is unreported. A prior opinion of the court of appeals (Pet. App. 8-33) is reported at 925 F.3d 913.

## JURISDICTION

The judgment of the court of appeals was entered on July 21, 2020. The petition for a writ of certiorari was filed on September 22, 2020. 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 Indiana, petitioner was convicted on one count of possessing heroin, cocaine, and methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 851; on one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and

on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1; Pet. App. 35. He was sentenced to a mandatory lifetime term of imprisonment. Judgment 2; Pet. App. 1, 37. The court of appeals affirmed. Pet. App. 1-6, 8-33.

1. The Indianapolis Police Department obtained a warrant to search an apartment where they believed petitioner was distributing drugs. Pet. App. 9. On August 18, 2016, while preparing to execute the warrant, police observed a "disheveled, jittery man"—whom they described as looking like a substance abuser—ride a bicycle to the apartment parking lot and climb into the passenger seat of a gray Chevrolet Malibu. *Ibid.* A moment later, he exited the car and rode away on his bicycle. *Ibid.* Petitioner then emerged from the car's driver's seat, retrieved a white bag from the trunk, and entered the apartment building. *Ibid.*

The officers executed the warrant. Pet. App. 9. Upon entering the apartment, they found the white bag sitting on top of the shoes petitioner had been wearing when he entered the building. *Id.* at 9-10. The white bag contained substantial quantities of heroin, cocaine, and methamphetamine. *Id.* at 10. Next to the white bag, the officers found two other bags containing distribution quantities of drugs. *Ibid.* The officers also located additional evidence of drug trafficking in the apartment, including surgical masks, plastic gloves, digital scales, and a bottle of lactose. *Ibid.* In a kitchen drawer, the officers found a Taurus Model PT 24/7 G2 .45 caliber handgun (the "kitchen gun"). *Ibid.*

Officers then searched the Malibu, which contained papers showing that petitioner owned the car. Pet. App. 10. In a hidden compartment located inside the center

console, they found another gun—a Taurus Model PT 145 .45 caliber handgun (the "car gun"). *Ibid.*

2. A federal grand jury indicted petitioner on three counts: (1) knowingly possessing with intent to distribute heroin, cocaine, or 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1); (2) possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and (3) possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2; Pet. App. 9, 68-69. In Counts 2 and 3, the indictment specified only the car gun, not the kitchen gun, as the basis for the charges. Pet. App. 10-11.

At trial, the government presented evidence regarding both guns. The kitchen gun was introduced into evidence along with all the other items found in the apartment's kitchen as evidence of petitioner's drug trafficking, see Gov't C.A. Br. 15-16; Pet. App. 18 n.3, and pictures of both guns were sent to the jury for deliberations, Pet. App. 11. Petitioner did not object to any of this evidence. *Ibid.* Before closing arguments, the district court gave the final jury instructions—approved by both sides—including the Seventh Circuit's pattern criminal jury instruction for Counts 2 and 3, which referenced only "a firearm" without specifying a particular one. *Id.* at 11, 18 (citation and emphasis omitted). In closing arguments, however, the government focused the jury on the car gun, "making at least five statements that either tied the car gun to the drug trafficking crime of Count I or clarified that the car gun was the gun at issue in Counts II and III." *Id.* at 11-12. And when the prosecutor briefly referred to the kitchen gun, he again clarified that it was not the gun charged in the indictment. See *id.* at 12 ("The indictment deals with the gun

in the car. What is charged in Count II and III is the stolen handgun behind the panel of the Defendant's car.").

During deliberations, the jury had a copy of the indictment, which specified the model of the car gun. Pet. App. 12. The verdict form referred the jury to the indictment, requiring the jury to mark "guilty" or "not guilty" for each charge "as described in the Indictment." *Ibid.* The jury returned guilty verdicts on all three counts. *Ibid.* The district court sentenced petitioner to a mandatory lifetime term of imprisonment on Count 1, five years on Count 2 to be served consecutively with the life sentence, and ten years on Count 3 to be served concurrently. *Ibid.*

3. The court of appeals affirmed. Pet. App. 8-33.

As relevant here, petitioner argued for the first time on appeal that the admission of the kitchen gun and the jury instructions, which did not specify that Counts 2 and 3 were based exclusively on the car gun, constructively amended the indictment. Pet. App. 12-13. Because petitioner did not raise that argument in the district court, the court of appeals applied the plain-error standard, which permits a court to grant relief only if "(1) an error occurred, (2) the error was plain, (3) it affected the defendant's substantial rights, and (4) it seriously affected the fairness, integrity, or public reputation of the proceedings." *Id.* at 13 (citing *United States* v. *Olano*, 507 U.S. 725, 732-738 (1993)).

The court of appeals concluded that a constructive amendment had occurred, based on its assessment that "the evidence and jury instructions created the possibility of conviction based on either the car gun or kitchen gun, though the indictment required, more narrowly, that guilt be based on [petitioner's] possession of only

the car gun." Pet. App. 15. But it found that petitioner could not satisfy the second and third elements of the plain-error standard. It determined that the constructive amendment was not "plain" because the governing "precedent [wa]s unclear as to whether and when factors such as closing arguments, verdict forms, and indictment copies in deliberations can contribute to or prevent constructive amendments." *Id.* at 20. And it also found that the error did not affect petitioner's "substantial rights," because "[a]mple evidence" established his guilt of possessing the charged car gun in furtherance of drug-trafficking activities. *Id.* at 24; see *id.* at 28 ("[W]e are confident that if no constructive amendment had occurred, the verdict would have been the same.").

This Court vacated the court of appeals' judgment and remanded for reconsideration in light of *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). Pet. App. 7. On remand, the Seventh Circuit found no reason to alter its holding. *Id.* at 1-6.

**ARGUMENT**

Petitioner contends (Pet. 7-23) that this Court should review the court of appeals' application of the plain-error standard to the circumstances of his case. The decision below is correct, and petitioner identifies no circuit conflict that warrants this Court's review. Indeed, the Court has recently and repeatedly denied certiorari in cases presenting the same or similar issues, including a near-identical petition earlier this Term. In any event, this case would be a poor vehicle to resolve the conflicts that petitioner alleges.

1. As a threshold matter, no further review is warranted in this case because no constructive amendment occurred. Not only would the absence of such an error

be an alternate ground for affirmance, but even the significant debatability of the point would impede consideration of how the plain-error standard should apply.

The Grand Jury Clause 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. This Court has held that every element of a criminal offense must be charged in an indictment. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998). Although an indictment need not similarly allege all of the facts that the government intends to prove at trial, a violation of the Grand Jury Clause may result where the indictment specifies particular facts underlying an element of the offense, the government proves different facts at trial to establish that element, and the jury may have found guilt on that distinct basis. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 219 (1960).

Not all deviations between the theory of guilt specified in the indictment and the government's trial evidence constitute "constructive amendments." Where the divergence does not substantially alter the charged theory of guilt, lower courts have characterized the discrepancy as a mere "variance" from the indictment, which affords no grounds for reversal unless the divergence "is likely to have caused surprise or otherwise been prejudicial to the defense." 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.6(c) (4th ed. 2020). In contrast, where the divergence places before the jury an entirely new basis for conviction and the jury finds guilt on that new basis, lower courts treat the divergence as a "constructive amendment" of the indictment that violates the Grand Jury Clause. See *ibid.*

No constructive amendment occurred here. The government emphasized repeatedly during closing arguments that the car gun formed the basis for Counts 2 and 3. Pet. App. 11-12, 21. And the district court provided the jury a copy of the indictment, which specified the model of the car gun, to consider during its deliberations. *Id.* at 12. The verdict form required the jury to mark "guilty" or "not guilty" for each charge "*as described in the Indictment*." *Ibid.* (emphasis added). The jury was thus well aware that only the car gun was at issue, and its finding of guilt on Counts 2 and 3 was accordingly based on the car gun, not the kitchen gun.

The absence of any constructive amendment in these circumstances would impede consideration of the questions raised in the petition. First, although the court of appeals concluded that a constructive amendment had occurred, the government may "defend [the] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (citation omitted). Petitioner does not suggest in this Court that he is entitled to relief even if his indictment was not constructively amended, and the absence of a constructive amendment would thus be an alternate ground for affirmance. Second, as discussed further below, even significant doubt about whether a constructive amendment occurred would preclude a determination that any error was "plain."

2. Under the plain-error standard, a defendant is entitled to relief for an unpreserved error only if he can show (1) error; (2) that was plain; (3) that affected his substantial rights; and (4) that seriously affected the

fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); see Fed. R. Crim. P. 52(b). Petitioner cannot satisfy that standard. See Pet. App. 20, 24.

a. For purposes of the second element, "'[p]lain' is synonymous with 'clear' or, equivalently, 'obvious.'" *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (citation omitted). Here, because petitioner failed to identify any precedent addressing the key issues in this case—namely, the relevance of "closing arguments, verdict forms, and indictment copies in deliberations"—any error was not "obvious." Pet. App. 20. Petitioner's primary basis for claiming "plain" error is simply that "[i]t has been settled law since at least this Court's decision in *Stirone* that a constructive amendment is a reversible error." Pet. 16. But as this Court has recognized, many rules of criminal law "concern matters of degree, not kind." *Henderson* v. *United States*, 568 U.S. 266, 278 (2013). Thus, even when a district court's decision is "wrong" under a general rule, it "is not necessarily *plainly* wrong." *Ibid.* Indeed, because nearly every error can be traced to some well-established rule at a high level of generality, petitioner's approach would effectively collapse the first and second prongs of the plain-error standard. For example, although the Confrontation Clause, U.S. Const. Amend. VI, clearly prohibits the admission of testimonial hearsay, see *Crawford* v. *Washington*, 541 U.S. 36, 50-53 (2004), that does not in itself make every error about what counts as "testimonial" a "plain" error, see, *e.g.*, *United States* v. *Springer*, 165 Fed. Appx. 709, 717 (11th Cir. 2006).

Petitioner points out that the court of appeals characterized a prior circuit precedent finding a constructive amendment as involving "'very similar' facts." Pet.

21 (quoting Pet. App. 15) (discussing *United States* v. *Leichtnam*, 948 F.2d 370 (7th Cir. 1991)). But the court of appeals explained that the *Leichtnam* majority "never discussed" the potentially clarifying "factors" present in this case, and thus "provide[d] little direct guidance on the effects of such clarifications outside of evidence and jury instructions." Pet. App. 22.

b. Petitioner also cannot satisfy the third element of the plain-error standard, which generally requires a defendant to show that the error was "prejudicial," meaning that it "affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. Here, petitioner does not even attempt to show that the alleged error had such an effect. To the contrary, the evidence that petitioner "possessed the car gun and that his possession of that gun was in furtherance of a drug trafficking crime" was so "[s]trong" that the court of appeals was "confident that if no constructive amendment had occurred, the verdict would have been the same." Pet. App. 28. And the risk of juror "confusion" was exceedingly low, as the "events at trial should have made the charges against [petitioner] clear to the jury." *Id.* at 21; see *id.* at 29; p. 7, *supra*.

Rather than attempt to show otherwise, petitioner contends that under *Stirone* v. *United States*, *supra*, constructive amendments qualify as structural errors immune from the normal prejudice inquiry. See Pet. 14 ("The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment.") (quoting *Stirone*, 361 U.S. at 218-219). Petitioner's reading of *Stirone* is unfounded. *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 21-22. And although this Court has identified certain structural errors representing exceptions to that principle, it has not listed constructive amendments to an indictment among them. See, *e.g.*, *United States* v. *Marcus*, 560 U.S. 258, 263 (2010); *Neder* v. *United States*, 527 U.S. 1, 8 (1999); *Johnson*, 520 U.S. at 468-469. In light of that clarifying case law, *Stirone* should not be interpreted to exempt constructive amendments from the normal prejudice inquiry.

Furthermore, *Stirone* involved a preserved error—not, as here, a forfeited one. See 361 U.S. at 214. This Court has reserved the question whether alleged errors that are not subject to harmless-error analysis when preserved also automatically satisfy the third element of plain-error review when they are not. See, *e.g.*, *Marcus*, 560 U.S. at 263; see also *United States* v. *Brandao*, 539 F.3d 44, 62 (1st Cir. 2008) ("[E]ven if *Stirone* does require automatic reversal of constructive amendments for preserved claims of error on harmless error review, that would not necessarily mean that prejudice should be presumed on plain error review."). Petitioner fails to acknowledge that gap, much less bridge it.

3. Petitioner asserts (Pet. 9-21) that the courts of appeals are divided over how to apply the second and third elements of plain-error review to constructive-amendment claims. Neither alleged conflict warrants this Court's review.

a. Petitioner primarily alleges (Pet. 9-14) a circuit conflict regarding the application of the third element of the plain-error test, which requires the defendant to show that the alleged error affected his "substantial rights." *Johnson*, 520 U.S. at 467 (citation omitted). In particular, petitioner contends the circuits differ as to whether a showing of prejudice is required to satisfy

that element and, if so, what degree of prejudice is necessary. The purported conflict is narrower than petitioner suggests and lacks practical significance.

Most of the circuits that petitioner identifies require a defendant to demonstrate prejudice to satisfy the third element, and differ only in the precise phrasing that they use to describe the required showing. See Pet. 11-14; compare Pet. App. 24 (defendant must show that "but for [the constructive amendment] the defendant probably would have been acquitted") (brackets and citation omitted), with *Brandao*, 539 F.3d at 58 (defendant bears "burden of demonstrating a reasonable probability that, but for the error, the result of the proceeding would have been different"); *United States* v. *Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018) (defendant must show a "reasonable probability that, but for the error claimed, the result of the proceeding would have been different"), cert. denied, 139 S. Ct. 1219 (2019); *United States* v. *Madden*, 733 F.3d 1314, 1323 (11th Cir.) (defendant must show that the error "affected the outcome of the district court proceedings") (citation omitted), cert. denied, 136 S. Ct. 1314 (2013), appeal after remand, 624 Fed. Appx. 706 (11th Cir. 2015), cert. denied, 136 S. Ct. 1532 (2016); *United States* v. *Lawton*, 995 F.2d 290, 294-295 (D.C. Cir. 1993) (finding third element satisfied where the error appeared to be "outcome-determinative").*

It is far from clear that the variations in phrasing reflect meaningfully different standards. Petitioner's observation (Pet. 13-14) that the Eighth Circuit's ap-

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* Petitioner also cites (Pet. 12) *United States* v. *Reyes*, 102 F.3d 1361 (5th Cir. 1996), but that case involved the fourth element of the plain-error standard, not the third. See *id.* at 1365-1366.

proach is "arguably as demanding" as that of the Seventh Circuit suggests they do not. The Eighth Circuit requires a defendant to show a "reasonable probability [he] would have been acquitted" but for the error. *United States* v. *Gavin*, 583 F.3d 542, 547 (2009). But there is no discernable distinction between that articulation of the standard and the phrasing used by many of the courts cited above. See, *e.g.*, *Brandao*, 539 F.3d at 58 (defendant bears "burden of demonstrating a reasonable probability that, but for the error, the result of the proceeding would have been different"). And even assuming the various formulations are distinct, petitioner fails to show that they make a significant practical difference—particularly in a case like this one, where the court below found that the indicted charges were supported by "strong evidence" and noted its "confiden[ce]" that even "if no constructive amendment had occurred," the "verdict would have been the same." Pet. App. 28. In light of that finding, petitioner correctly does not maintain that any of the circuits described above would have granted relief, nor does he identify any case in those circuits finding prejudice to a defendant's substantial rights on similar facts.

Petitioner also points (Pet. 11) to the Third Circuit, which applies a rebuttable presumption that constructive amendments satisfy the third plain-error element. See *United States* v. *Syme*, 276 F.3d 131, 154, cert. denied, 537 U.S. 1050 (2002). But the Third Circuit has recognized that overwhelming evidence of guilt—in other words, the absence of prejudice—warrants denial of relief under the fourth plain-error element, which permits courts to grant relief only when the error "seriously affects the fairness, integrity or public reputation

of judicial proceedings." *Olano*, 507 U.S. at 736 (brackets and citation omitted); see *United States* v. *Greenspan*, 923 F.3d 138, 142, 153 (3d Cir. 2019) (declining to reverse under the fourth prong "because the evidence was overwhelming and essentially uncontroverted"). Petitioner therefore fails to show that his case—or any appreciable number of cases—would come out differently in the Third Circuit. See p. 17, *infra*.

Finally, petitioner observes (Pet. 9-11) that the Second and Fourth Circuits treat constructive amendments as per se prejudicial. See *United States* v. *Thomas*, 274 F.3d 655, 670 (2d Cir. 2001); *United States* v. *Floresca*, 38 F.3d 706, 714 (4th Cir. 1994). Again, petitioner fails to show that his case would have come out differently there, or that those circuits grant relief for unpreserved, alleged constructive amendments in a meaningfully higher percentage of cases. In particular, both circuits appear to apply a more demanding standard than the Seventh Circuit for finding constructive amendments in the first place. See Pet. App. 24 ("Our circuit uses a fairly low threshold for constructive amendment."). The Second Circuit requires "a *substantial likelihood* that the defendant may have been convicted of an offense other than that charged in the indictment," *Thomas*, 274 F.3d at 670 (emphasis added; citation omitted), thereby effectively incorporating a prejudice inquiry into the definition of a constructive amendment. And the Fourth Circuit has found that a constructive amendment does not occur in circumstances where the only variation from the indictment is to allow the jury to rely on "different means" to satisfy an element of the offense—the very error that the court of appeals found here. *United States* v. *Camara*, 908 F.3d 41, 46 (4th Cir.

2018). Petitioner thus has not shown that he would have obtained relief in either of these circuits.

At bottom, petitioner has failed to demonstrate that any conflict in the circuits is more than academic. The purported circuit conflict has existed for decades, see, *e.g.*, *Floresca*, 38 F.3d at 714 (4th Cir. 1994); *Lawton*, 995 F.2d at 294-295 (D.C. Cir. 1993), and this Court has repeatedly denied petitions for writs of certiorari raising these and similar conflicts—including the near-identical petition highlighted by petitioner (see Pet. 23 n.2) arising from the same circuit earlier this Term, see *Laut* v. *United States*, No. 19-1362 (Nov. 16, 2020); see also, *e.g.*, *Weed* v. *United States*, 138 S. Ct. 2011 (2018) (No. 17-1430); *Pryor* v. *United States*, 552 U.S. 828 (2007) (No. 06-10280); *Phillips* v. *United States*, 552 U.S. 820 (2007) (No. 06-1602); *Newman* v. *United States*, 541 U.S. 988 (2004) (No. 03-1161); *Spero* v. *United States*, 540 U.S. 819 (2003) (No. 02-1737); *Bonilla* v. *United States*, 534 U.S. 1135 (2002) (No. 01-1034); *Scott* v. *United States*, 523 U.S. 1024 (1998) (No. 97-1335). The same result is warranted here.

b. Petitioner additionally contends (Pet. 17-19) that the courts of appeals are divided on the second prong of the plain-error test, which requires that any error be "plain." *Olano*, 507 U.S. at 734. In particular, he argues that some circuits (including the court of appeals in this case) treat an error as plain only if existing precedent "squarely addresses the specific factual circumstances of the particular case," whereas in others "all that matters for purposes of determining whether a constructive-amendment error is plain is that it has long been settled law that a constructive amendment is unconstitutional." Pet. 17 (citation omitted). Petitioner's claim of a conflict is mistaken.

At the outset, petitioner misinterprets the decision below, which did not require him to identify a prior opinion addressing the same "specific factual circumstances." Pet. 17. Instead, the court of appeals reasoned that prior precedents failed to establish even a *general* rule for circumstances where the government introduces evidence beyond the indictment but the verdict form and the government's statements at trial direct the jury to the facts charged in the indictment. See Pet. App. 20 ("Our precedent is unclear as to whether and when factors such as closing arguments, verdict forms, and indictment copies in deliberations can contribute to or prevent constructive amendments.").

The decisions cited by petitioner do not show that another circuit would have found it "plain" that a constructive amendment occurred here. In *United States* v. *Miller*, *supra*, the government indicted the defendant on the basis of a single false statement, but introduced evidence of a separate false statement at trial, and the jury instructions failed to limit the jury to the false statement specified in the indictment. 891 F.3d at 1232. Under petitioner's theory, the Tenth Circuit could have found a plain error simply by reciting the proposition that a "constructive amendment is a reversible error." Pet. 16. But the court did not do that, instead engaging in a lengthy discussion of both in- and out-of-circuit cases addressing similar circumstances. See *Miller*, 891 F.3d at 1233-1236; *id.* at 1233 (examining case involving a "similar situation"). Contrary to petitioner's contention, that approach comports with the decision below.

The other two cited decisions likewise do not conflict with the decision here. In *United States* v. *Floresca*, *supra*, the court read to the jury the statutory provision

charged in the indictment, but then instructed the jury on the meaning of a different provision altogether—thereby permitting the jury to find guilt on the basis of either provision. 38 F.3d at 709. That case (unlike this one) was thus directly controlled by *Stirone*, where the court instructed the jury on "charges that [were] not made in the indictment against him." 361 U.S. at 217; see *Floresca*, 38 F.3d at 711 (discussing *Stirone*). A similar error occurred in *United States* v. *Lawton*, *supra*. See 995 F.2d at 294 (discussing *Stirone* and noting that the jury instructions "clearly outlined a substantially broader field of potential criminality" than that specified in the indictment). Neither decision shows that the relevant circuit would find the asserted error in this case "plain."

4. At all events, this case presents a poor vehicle for reviewing the questions presented because even a favorable decision likely would not make a practical difference. Petitioner was sentenced to a mandatory term of life in prison, without the possibility of release, on Count 1, which was not dependent on possession of a firearm. Pet. App. 37. He has not shown that vacatur of Counts 2 and 3 would have any meaningful effect on his sentence or otherwise change his circumstances.

In addition, regardless of whether petitioner could succeed on the second or third plain-error requirements, he would still fail on the fourth. In *United States* v. *Cotton*, 535 U.S. 625 (2002), the district court sentenced the defendants to terms of imprisonment that exceeded the statutory maximum sentence for the charge set out in the indictment. This Court held that the defendants nevertheless were not entitled to relief under the fourth plain-error element because the evidence of the relevant sentence-enhancing fact omitted

from the indictment was "overwhelming" and "essentially uncontroverted." *Id.* at 633 (quoting *Johnson*, 520 U.S. at 470). The Court added that "[t]he real threat * * * to the 'fairness, integrity, and public reputation of judicial proceedings' would be if [the defendants], despite the overwhelming and uncontroverted evidence," were to receive a lighter sentence for a "less substantial" crime "because of an error that was never objected to at trial." *Id.* at 634.

The same logic bars relief here, where the court of appeals was "confident that if no constructive amendment had occurred, the verdict would have been the same." Pet. App. 28; see *Marcus*, 560 U.S. at 265-266 ("[W]e have suggested that, in most circumstances, an error that does not affect the jury's verdict does not significantly impugn the 'fairness,' 'integrity,' or 'public reputation' of the judicial process.") (citation omitted). Further review of the questions presented is unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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