No. 07-471

In the Supreme Court of the United States

TRACY RATLIFF-WHITE, 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

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
VIJAY SHANKER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in a prosecution for wire fraud under 18 U.S.C. 1343 (Supp. III 2003), it was sufficient that petitioner, who schemed to secure payments from a Veterans Administration Hospital for services that were not performed, could have reasonably foreseen that some use of the wires would follow from the scheme, whether or not petitioner could have foreseen the specific use of the wires charged in the indictment.

2. Whether proof that petitioner's scheme caused a wire transmission of funds into her bank account constituted a non-prejudicial variance from, rather than a constructive amendment of, the indictment's allegation that petitioner caused a wire transmission of funds, intended to be paid to petitioner's bogus company, from the Department of the Treasury to the Federal Reserve Bank.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 493 F.3d 812.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2007. The petition for a writ of certiorari was filed on October 9, 2007 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of two counts of committing wire fraud, in violation of 18 U.S.C. 1343 (Supp. III 2003). The district court sentenced her to 21 months of imprisonment, to be

followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioner was a veteran of the United States Navy who had been diagnosed with post-traumatic stress disorder and rated as 100% disabled by the Veterans Administration (VA). Her disability rating entitled her to receive monetary benefits of approximately $2500 each month from the VA as well as unlimited medical care at any VA facility. In November 2001, petitioner asked Hines Veterans Administration Hospital (Hines), located near Chicago, Illinois, to provide her with 24-hour companion care to help her cope with recurring flashbacks associated with her post-traumatic stress disorder. Because Hines lacked sufficient resources to provide that level of care, it hired or attempted to hire private care-taking companies. Two different companies contracted with the VA to provide companion-care services to petitioner, but, finding her a difficult client, both companies terminated their contracts with the VA after one month. A third company declined to provide services after an initial meeting with petitioner, and Hines then told petitioner she would have to locate appropriate companion-care services on her own. Pet. App. 2a; Tr. 42-43.

In April 2002, petitioner approached Dorothy Norwood, an employee of one of the home health care companies that had previously provided services to petitioner, about forming a care-taking company called Compassionate Home Health Services (CHHS). Petitioner named herself president of CHHS, responsible for hiring employees and handling invoices and employee time sheets, and appointed Norwood vice president. As vice president, Norwood was to handle all communications with Joseph Rio, an administrator at Hines,

because Rio would recognize petitioner's voice. In return, petitioner promised Norwood a $2000 monthly salary and access to a company car. After accepting the position, Norwood called Rio at Hines, identified herself as vice president of CHHS, and offered to provide companion care services to petitioner at certain hourly rates. Rio agreed to Norwood's terms, and their agreement was memorialized in a contract prepared and faxed to Rio by petitioner. Pet. App. 2a-3a; Tr. 375-379.

Over the next several months, petitioner prepared and Norwood faxed to the VA invoices and time sheets reflecting services purportedly performed by CHHS for petitioner. Those services, however, had not actually been performed. According to Norwood's daughter, who occasionally assisted in typing invoices and time sheets, petitioner once confided that some of the names on the time sheets were "made-up" and that the services on the time sheets and invoices had not been performed. Pet. App. 3a; Tr. 381-386.

The VA ultimately authorized payments totaling $32,100 to CHHS based upon the invoices and time sheets submitted by petitioner and Norwood. The payments were made by electronic transfer to a bank account jointly owned by petitioner, Norwood, and Norwood's daughter. Pet. App. 3a-4a; Tr. 350, 380, 390-392.

In August 2002, after certain events caused Rio to question CHHS's legitimacy, the VA terminated its contract with CHHS. In October 2002, the VA's Office of the Inspector General searched petitioner's apartment and found CHHS's bogus time sheets, invoices, and tax-related information. Agents also seized and subsequently searched petitioner's computer, which contained a template for CHHS letterhead, CHHS invoices and time sheets, and other documents related to CHHS.

During the search, petitioner did not deny her involvement with CHHS; rather, she told a VA agent that she was the president of CHHS, that it was a real company, that the individuals identified in the invoices were employees of the company, and that it had clients other than herself. Petitioner also acknowledged that she had cashed checks from the joint account that she had opened with Norwood and Norwood's daughter. Pet. App. 4a; Tr. 464-465, 541-545.

2. In May 2004, a grand jury in the Northern District of Illinois returned an indictment charging petitioner and Norwood with two counts of committing wire fraud, in violation of 18 U.S.C. 1343 (Supp. III 2003). Pet. App. 31a-38a. Count 1 charged that on or about July 16, 2002, petitioner and Norwood "knowingly caused to be transmitted in interstate commerce from Hyattsville, Maryland to Dallas, Texas, by means of wire communication * * * payment instructions for $22,470 in funds intended for Compassionate Home Health Services, from the United States Department of the Treasury, Hyattsville, Maryland to the Federal Reserve Bank in Dallas, Texas." Pet. App. 35a-36a (Indictment Count 1, para. 10). Count 2 charged that on or about August 15, 2002, petitioner and Norwood "knowingly caused to be transmitted in interstate commerce from Hyattsville, Maryland to Dallas, Texas by means of wire communication * * * payment instructions for $9,150 in funds intended for Compassionate Home Health Services, from the United States Department of the Treasury, Hyattsville, Maryland, to the Federal Reserve Bank in Dallas, Texas." *Id.* at 36a (Indictment Count 2, para. 2). The indictment also alleged that it was part of petitioner's scheme that Norwood instructed the VA to deposit payments for services purportedly performed by

CHHS into the joint bank account, and that it was part of the scheme that petitioner and Norwood caused the VA to deposit approximately $32,000 into the joint bank account. Pet. App. 35a (Indictment Count 1, paras. 7, 8).

At trial, to prove that the transmission of payment instructions had in fact occurred on the dates charged, the government called Alice Merculief, a United States Treasury (Treasury) representative, who explained the standard procedure for electronically depositing funds into the accounts of VA "vendors" like CHHS. According to Merculief, the VA's processing center in Austin, Texas, first submitted payment files to the Treasury's mainframe computer in Hyattsville, Maryland, where the payment files were validated. Next, the Hyattsville office sent a "pre-edit" report, which identified the number and amount of payments reflected on the payment files received from the VA, to the Treasury's remote financial center in Austin, which certified the payment. The Austin financial center then formatted the payment request and transmitted it remotely from the Treasury's mainframe in Hyattsville to the Federal Reserve Bank in Dallas, Texas. The formatted files contained information identifying the payments requested by the VA, such as the routing number for the bank into which the deposit was to be made, the account number for the account into which the deposit was to be made, and the amount of the deposit. Finally, the Federal Reserve Bank validated the payment, sent confirmation to the Treasury, and deposited the funds into the appropriate vendor account. Pet. App. 4a-5a; Tr. 174-178.

Merculief also authenticated records from the Treasury's database reflecting that, on behalf of the VA, the Treasury had paid CHHS $22,470 on July 16, 2002, and $9,150 on August 15, 2002. Merculief testified that in-

structions regarding each payment would have been transmitted from Hyattsville to the Federal Reserve Bank in Dallas. She acknowledged, however, that the records did not document the multi-step transmission of payment instructions between the VA in Austin, Treasury in Hyattsville, Treasury in Austin, and the Federal Reserve Bank in Dallas. Pet. App. 5a; Tr. 182-184.

Joseph Rio testified that the standard procedure described by Merculief was not followed in making the July 16, 2002, payment at issue in Count 1. He said that because Norwood represented that she needed to pay CHHS employees immediately, he arranged for an "off line" electronic payment directly to the bank account shared by petitioner, Norwood, and Norwood's daughter. Rio acknowledged on cross-examination that Hines's fiscal department "did not use the usual procedure of notifying the VA's payment center in Austin and having them send the funds." Thus, there was no intermediate wire transfer from Hyattsville to Dallas, as alleged in Count 1, but rather a wire transfer directly from Dallas to petitioner's shared bank account. Rio could not describe the "off line" process in detail, and did not know how Hines's fiscal department was able to override the traditional three- to four-week payment process. Merculief testified that she was not familiar with the "off line" process. Pet. App. 5a-6a.

The jury found petitioner guilty of both counts of wire fraud.[1] The district court sentenced her to concurrent terms of 21 months of imprisonment, to be followed by three years of supervised release. In addition, she

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[1] Norwood had pleaded guilty to the charges in the indictment. Dist. Ct. J. (Nov. 30, 2005).

and Norwood were ordered to make joint and several restitution of $32,100 to Hines. Pet. App. 6a.

3. Petitioner appealed, claiming, among other things, that the government failed to present sufficient evidence to establish that the wire transmissions charged in Counts 1 and 2 occurred or were "caused" by her. The court of appeals rejected petitioner's arguments and affirmed her convictions. Pet. App. 7a-24a.

The court first held that the evidence was sufficient to prove the charges in Count 2, relating to the August 15, 2002, payment to CHHS. Because there was no evidence of a deviation from standard practice as to that payment, the court held that Merculief's testimony adequately established that the wire transmissions took place as charged. In addition, the court held, petitioner knew that payments to CHHS would be electronically transmitted to the joint account, and thus she clearly foresaw that her fraud on the VA would result in wire transmissions. Pet. App. 8a-11a. It was not necessary, the court explained, for the government to prove that a specific mailing or wire transmission was reasonably foreseeable; rather, it was sufficient to show that petitioner "knew that some use of the wires would follow." *Id.* at 9a-10a. "With respect to Count Two, then, the evidence was sufficient to show both that a wire transmission occurred on August 15, 2002, and that [petitioner] 'caused' a wire transmission in furtherance of her scheme on that day." *Id.* at 11a.

Second, the court of appeals held that the evidence was sufficient to show that a wire transmission occurred on July 16, 2002, the date charged in Count 1, and that petitioner foresaw a wire transmission in connection

with the charges in that count.[2] Pet. App. 11a-24a. The court stated that because the VA deviated from its standard practice in order to expedite the July 16, 2002, payment to CHHS, the government could not rely on Merculief's testimony on the standard payment procedure to prove that payment instructions were transmitted from Hyattsville, Maryland, to Dallas, Texas, on July 16, 2002, as alleged in Count 1. *Id.* at 11a-12a. But the court rejected petitioner's claim that that discrepancy compelled automatic reversal. The fact that Count 1 pinpointed a particular step in the payment process while the proof at trial established a different step meant that there was a variance between the indictment and the proof, *id.* at 16a-18a, which "is fatal only when the defendant is prejudiced in his defense because he cannot anticipate from the indictment what evidence will be presented against him or is exposed to the risk of double jeopardy," *id.* at 13a (quoting *Hunter* v. *New Mexico*, 916 F.2d 595, 599 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991)).

The variance here, the court held, "was harmless, because [petitioner] was not deprived of an adequate opportunity to prepare a defense or exposed to a risk of being prosecuted twice for the same offense." Pet. App. 20a-21a. Specifically, the court reasoned that petitioner had notice because the language of the indictment made clear that the prosecution sought to prove that she

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[2] The court of appeals noted that, in light of the fact that it had affirmed petitioner's conviction on Count 2 and petitioner received concurrent terms of imprisonment and supervised release on Counts 1 and 2, it was required to assess the sufficiency of the evidence on Count 1 solely because each count resulted in a $100 special assessment. Pet. App. 11a n.3 (citing *Ray* v. *United States*, 481 U.S. 736, 737 (1987) (per curiam)).

caused the VA to deposit approximately $32,100 in funds representing payment for services purportedly performed by CHHS into her jointly owned account, knowing that CHHS had not provided any such services; she could not have been surprised by the evidence showing the electronic transfer of funds to her bank account on July 16, 2002; through discovery, she was advised that the government would proffer documents to prove the interstate wire transmission of funds into her shared account; and her counsel could not show that she would have conducted the defense case any differently had the indictment charged only the deposit of $22,470 on July 16, 2002, rather than the transmission of payment instructions between Hyattsville and Dallas, especially given that petitioner conceded that payments were wired from the Federal Reserve Bank in Dallas to her bank account. *Id*. at 21a-22a. "Given that [petitioner] concedes 'that payments were wired from the Federal Reserve Bank in Dallas, Texas to [petitioner's] bank account,' what defense she might have offered is wholly unclear." *Id.* at 21a.

Accordingly, the court of appeals held that any variance between the language of Count 1 and the proof at trial was harmless, and it thus affirmed the conviction on that count. Pet App. 23a.[3]

ARGUMENT

Petitioner contends (Pet. 14-30) that the court of appeals erred in holding that it was sufficient that she could have reasonably foreseen that her scheme to de-

[3] The court of appeals also rejected petitioner's claim that the government introduced improper "bad acts" evidence in violation of Federal Rule of Evidence 404(b). Pet. App. 24a-28a. Petitioner does not renew that claim in this Court.

fraud would have caused wire transfers, whether or not she could have foreseen the particular wire transfers charged in the indictment, and that the discrepancy between Count 1's allegation of a particular wire transfer and the proof at trial of a different wire transfer constituted a harmless variance. Petitioner's claims lack merit and further review by this Court is unwarranted.

1. Petitioner argues (Pet. 14-21) that the court of appeals erred in holding that it was sufficient that the government proved that she reasonably could have foreseen some wire transmission associated with the fraud, rather than the particular wire transmission charged in the indictment.

A defendant commits wire fraud under Section 1343 if she (1) participates in a scheme to defraud; (2) intends to defraud; and (3) causes a wire transmission in furtherance of the fraudulent scheme. 18 U.S.C. 1343 (Supp. III 2003).[4] One "causes" a wire transmission by acting with the knowledge that use of the wires will occur in the ordinary course of business or where use of the wires can be reasonably foreseen. *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954); *United States* v. *Mann*,

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[4] 18 U.S.C. 1343 (Supp. III 2003) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

493 F.3d 484, 493 (5th Cir. 2007); *American Auto. Accessories, Inc.* v. *Fishman*, 175 F.3d 534, 542 (7th Cir. 1999).

The court of appeals held that the government was not required to prove that the wire transmissions of payment instructions from Hyattsville to Dallas—the wire transmissions alleged in the indictment—were reasonably foreseeable; rather, "[t]o satisfy the causation element, the government need only show that the defendant knew that some use of the wires would follow." Pet. App. 9a. "Our case law," the court held, "does not require that a specific mailing or wire transmission be foreseen." *Id.* at 9a-10a.

The court of appeals' holding is consistent with this Court's holding in *Pereira* that "[w]here one does an act with knowledge that *the use of the mails will follow in the ordinary course of business*, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." 347 U.S. at 8-9 (emphasis added); see *United States* v. *Maze*, 414 U.S. 395, 399-400 (1974). *Pereira* did not hold that a mail fraud defendant must have knowledge of a *particular* use of the mails. See *United States* v. *Pimental*, 380 F.3d 575, 589 (1st Cir. 2004) ("[I]t is simply the 'use of the mails' in the course of the scheme rather than the particular mailing at issue that must be reasonably foreseeable for the causation element of a mail fraud offense to be satisfied."), cert. denied, 543 U.S. 1177 (2005); see also *United States* v. *Bortnovsky*, 879 F.2d 30, 38-39 (2d Cir. 1989) ("[T]he element of causation of § 1341 has been so liberally construed as to suggest that it requires only that the use of the mail itself, rather than a particular mailing, be reasonably foreseeable."); *United States* v. *Martino*, 648 F.2d 367, 405 (5th Cir. 1981) ("[I]t is

well settled that one 'causes' the use of the mails when he does some act in which it is reasonably foreseeable that the mails will be used."), cert. denied, 456 U.S. 943, and 456 U.S. 949 (1982).

Petitioner claims (Pet. 18) that the court of appeals' holding conflicts with the holding in *United States* v. *Smith*, 934 F.2d 270 (11th Cir. 1991). While there is some tension between the court of appeals' approach and *Smith*, it creates no conflict warranting this Court's review. In *Smith*, the defendant participated in the staging of an automobile accident, feigned an injury, and collected $450 from State Farm Insurance Company. He was convicted of mail fraud based solely on the fact that, following his in-person receipt of a claims draft from the local State Farm agent, an "accounting copy" of the draft was mailed to State Farm's regional headquarters in Tallahassee, Florida. *Id.* at 271. The mailing of the accounting copy was the only mailing involved in the scheme and the only mailing mentioned in the indictment. See *id.* at 273. The Eleventh Circuit reversed the defendant's conviction, holding that the mailing of the accounting copy occurred *after* Smith obtained the money that was the object of his scheme and thus "was not proven to be necessarily incident to an essential part of the scheme." *Id.* at 272 (internal quotation marks omitted). In an alternative holding, the court concluded that the charged mailing was not reasonably foreseeable to Smith. *Id.* at 272-273. The court observed that trial testimony demonstrated that the defendant had no reason to know "that an accounting copy of the draft, *or any other kind of information*, would be sent through the mails." *Id.* at 272 (emphasis added). In a passage petitioner cites (Pet. 19), the Eleventh Circuit noted that while other cases have held that in insur-

ance fraud cases "it is foreseeable that communications involving the policy, the details of the claim, or requests for the payment of the claim would be mailed," "the substantive counts of [the defendant's] indictment did not allege such mailings," and "[i]n this case the government was required by the narrowly drawn indictment to show that mailings of accounting drafts were reasonably foreseeable, and it did not." *Smith*, 934 F.3d at 273.

Smith does stand in some tension with the analysis applied by the court of appeals in this case. See *Pimental*, 380 F.3d at 590 n.7 (following same approach as the Seventh Circuit in this case and noting "tension" with *Smith*). But *Smith* does not give rise to a conflict warranting resolution by this Court for at least three reasons. First, the portion of *Smith* on which petitioner relies was an alternative holding at best. The court had previously concluded that the charged mailing did not execute the scheme (because it occurred after the defendant had obtained the object of his scheme). It therefore had no need to consider the issue of reasonable foreseeability. Second, in *Smith* the government offered no proof of any other mailings, but instead relied on cases indicating that mailings incident to insurance claims can be foreseen. *Smith* rejected that line of argument. See 934 F.3d at 273 ("We do not believe the bare fact that large organizations mail communications between offices brings every fraud against such entities within the federal mail fraud statute."). Here, in contrast, the court held that wire transfers were reasonably foreseeable in the execution of petitioner's scheme not simply because large organizations (like the VA) use the wires, but because petitioner's scheme entailed the use of electronic transmissions to make payments into her account. The use of the wires was thus integral to peti-

tioner's scheme. Third, unlike in *Smith*, the very transaction that involved use of the wires, as proved at trial, *was* alleged in the indictment. Pet. App. 35a (Indictment Count 1, paras. 7, 8); see *id.* at 17a-18a ("[T]he indictment expressly references the wire transmissions proved at trial—deposits totaling $32,100 into the account [petitioner] shared with Norwood and her daughter."). And the charged wire transfers were closely related to electronic transfers of funds that petitioner indisputably caused and clearly reasonably foresaw. On these facts, given the close relationship of the charged wire transfers and the nature of the scheme, it is far from clear that the Eleventh Circuit would find reversible error.

2. a. Petitioner contends (Pet. 21-30) that the court of appeals erred in holding that a non-prejudicial variance, rather than a constructive amendment, occurred when the government proved that she caused a different wire transmission from that alleged in Count 1. The court, however, correctly found a permissible variance under the standard articulated in *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985): a permissible variance occurs where the facts proved at trial clearly conformed to one of the theories of the offense contained within the indictment, and thus the indictment gave the defendant notice of the charges and was sufficient to allow the defendant to plead it in the future as a bar to subsequent prosecutions.

As *Miller* makes clear, the critical question in determining whether a constructive amendment has occurred is whether the jury considered a crime not charged by the grand jury, not whether the jury considered facts other than those alleged in the indictment that pertain to the charged offense. See 471 U.S. at 136. The court

of appeals here asked that very question. Pet. App. 14a (asking whether "different evidence supports the charged crime [as with a variance]" or whether "the evidence supports a crime other than that charged [as with an amendment]") (quoting *United States* v. *Pisello*, 877 F.2d 762, 765 (9th Cir. 1989)). The court found that the indictment "expressly references the wire transmissions proved at trial—deposits totaling $32,100 into the account [petitioner] shared with Norwood and her daughter," and thus there is no need to "wonder whether the grand jury would have indicted for the crime actually proved, because it did." *Id.* at 17a-18a (internal quotation marks and citation omitted). Thus, the indictment gave petitioner notice and was sufficient to allow petitioner to plead it in the future as a bar to subsequent prosecutions. *Id.* at 20a-22a. The government's proof at trial did not alter the crime charged in the indictment. At bottom, the wire fraud scheme involved petitioner's misrepresenting to the VA that she had received care from CHHS and causing the VA to deposit money into her shared bank account. See *id.* at 35a (Indictment Count 1, paras. 7, 8). That theory was not abandoned at trial. Accordingly, the court of appeals did not err in concluding that nothing more than a non-prejudicial variance occurred.

b. Petitioner asserts (Pet. 27) that this Court's review is needed to resolve a "circuit conflict over the proper standard for distinguishing a permissible variance from an impermissible constructive amendment." She points to no decision, however, that acknowledges a conflict or suggests, as she asserts, that the circuits have divided into "two basic approaches." Pet. 24. While the line between permissible variances and constructive amendments is case-specific, the circuits generally apply

the same standard: a constructive amendment occurs where the charging terms of the indictment are altered, while a variance occurs where the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. See, *e.g.*, *United States* v. *McKee*, No. 05-3297, 2007 WL 3132417, at *3 n.7 (3d Cir. Oct. 29, 2007); *United States* v. *Whirlwind Soldier*, 499 F.3d 862, 870 (8th Cir. 2007) (a variance occurs where the charging document does not change, only the evidence against which the defendant expected to defend varies, while a constructive amendment occurs where the essential elements of the offense as charged in the indictment are altered in such a manner that the jury is allowed to convict the defendant of an offense different from or in addition to the offenses charged in the indictment); *United States* v. *Budd*, 496 F.3d 517, 521 (6th Cir. 2007) (a constructive amendment results when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions that 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 the one charged in the indictment, while a variance occurs when the charging terms of the indictment are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment); *United States* v. *Dupre*, 462 F.3d 131, 140 (2d Cir. 2006) (a constructive amendment occurs when 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, while a variance occurs when the charging terms of the indictment are left unal-

tered, but the evidence at trial proves facts materially different from those alleged in the indictment), cert. denied, 127 S. Ct. 1026, and 127 S. Ct. 1030 (2007); *United States* v. *Hartz*, 458 F.3d 1011, 1020 (9th Cir. 2006) (a constructive amendment occurs when the charging terms of the indictment are altered in effect by the prosecutor or a court after the grand jury has last passed upon them, while a variance occurs where 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); *United States* v. *DeCicco*, 439 F.3d 36, 43 (1st Cir. 2006) (a constructive amendment occurs when the charging terms of the indictment are altered by the prosecution or court after the grand jury has last passed upon them, while a variance occurs when the charging terms remain unchanged but the facts proved at trial are different from those alleged in the indictment); *United States* v. *Williamson*, 53 F.3d 1500, 1512-1513 (10th Cir.) (a variance occurs when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment, while a constructive amendment actually modifies an essential element of the offense charged, thereby effectively altering the substance of the indictment), cert. denied, 516 U.S. 882 (1995). The standard set forth in those cases is precisely the standard applied by the court of appeals here. Pet. App. 13a-14a.

Petitioner contends (Pet. 24) that the Third, Fourth, Fifth, Sixth, and Eleventh Circuits follow a different approach, which she describes as the "essential elements" test. While the cases petitioner cites (Pet. 24-25) reflect different *outcomes* from that here, they do not reflect the application of a different *standard*; and the

fact that some courts use the words "essential elements" does not demonstrate any meaningful difference in approach. In *United States* v. *Chambers*, 408 F.3d 237 (5th Cir. 2005), the government sought to uphold the interstate commerce element of a firearms offense on the basis of facts that were "wholly different than and distinct and separate from *the only facts alleged in the indictment in respect to commerce* * * * (as to which there was no evidence)." *Id.* at 245 (emphasis added). While the court distinguished between misdescriptions of facts constituting an element and reliance at trial on "some actually separate set of facts," *id.* at 244, it did not hold that all variations between an indictment's allegations concerning an element and the proof at trial mandate automatic reversal. And the Fifth Circuit in *Chambers* also relied on decisions of the Seventh Circuit finding a constructive amendment, thus undermining the suggestion that the two courts follow different tests. *Id.* at 244-245 (citing *United States* v. *Leichtnam*, 948 F.2d 370 (7th Cir. 1991), and noting that the Seventh Circuit in that case had relied on prior Fifth Circuit decisions).

Likewise, in *United States* v. *Randall*, 171 F.3d 195, 203 (4th Cir. 1999), the court stated that a constructive amendment occurs where the indictment is altered to change the elements of the offense charged such that the defendant is convicted of a crime other than that charged in the indictment, whereas a variance occurs where different evidence is presented at trial but the evidence does not alter the crime charged in the indictment. The court held that a constructive amendment had occurred because the government alleged one predicate offense for a violation of 18 U.S.C. 924(c) but proved a different predicate offense at trial. *Randall*, 171 F.3d at 210. The court of appeals relied on the hold-

ing of the Seventh Circuit in *United States* v. *Willoughby*, 27 F.3d 263 (7th Cir. 1994), which "addressed the precise issue before [the Fourth Circuit]" and resolved it the same way that the Seventh Circuit had. *Randall*, 171 F.3d at 205 (citing *Willoughby*, *supra*). The fact that the Seventh Circuit found a constructive amendment in the identical factual context belies the claim of a fundamental conflict between its approach and the "essential elements" approach.

Petitioner is also not assisted by *United States* v. *Keller*, 916 F.2d 628, 633 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991). Contrary to her suggestion (Pet. 24), *Keller* does not support the proposition that a constructive amendment exists whenever the divergence between the indictment and proof at trial "involves facts upon which the Government relied to prove an essential element of the offense." *Keller* found that an approach that asked whether the jury instructions "modified an essential element" "fails to provide meaningful guidance in determining what constitutes an amendment as opposed to a variance," 916 F.2d at 633 (citation omitted), and went on to hold that a constructive amendment occurs when "the essential elements of the offense contained in the indictment are altered to *broaden* the possible bases for conviction beyond what is contained in the indictment," *id.* at 634 (emphasis added). The court held that permitting conviction for a conspiracy based on conspiring with *anyone* was a constructive amendment of an indictment that alleged only one specific co-conspirator. *Ibid.* *Keller* recognized, however, that if "the evidence produced at trial differs from what is alleged in the indictment, then a variance has occurred," so long as "the essential elements of the offense are the same." *Id.* at 633-634. That test is not substantively

different from the test applied by the Seventh Circuit in this case.

Nor does the general language in *United States* v. *Ford*, 872 F.2d 1231, 1235 (6th Cir. 1989), cert. denied, 495 U.S. 918 (1990), or *United States* v. *Crocker*, 568 F.2d 1049, 1060 (3d Cir. 1977), produce a conflict worthy of this Court's resolution. *Ford* involved a conviction that rested on proof of possession of a firearm on November 2, 1986, and August 9, 1987, when the indictment charged possession only on September 28, 1987. 872 F.3d at 1236. *Crocker* involved a conviction that rested on proof of the falsity of a statement in a entirely different manner than as charged in a perjury indictment. 568 F.2d at 1060. Neither case involved, as does this one, proof of a means of establishing an element (*i.e.*, a wire transmission to petitioner's account) that is alleged in the indictment and is closely related to the manner in which that element is said in the indictment to be satisfied.

Thus, the courts of appeals have not developed "different approaches" (Pet. 24) to the question whether a discrepancy between an indictment and the proof at trial constitutes a constructive amendment or a variance. The court of appeals' fact-bound conclusion that a harmless variance occurred does not warrant review.

3. Review is also unwarranted because even assuming, *arguendo*, that an error occurred, it should be found harmless whether that error is characterized as a "constructive amendment" or a "variance." To the extent that lower courts have held that a "constructive amendment" is not amenable to harmless-error analysis, see Pet. 23, they have relied principally on this Court's decision in *Stirone* v. *United States*, 361 U.S. 212, 217 (1960), which held that automatic reversal was war-

ranted when the government proved an element at trial based on a factual theory that deviated from the factual theory advanced in the indictment. *Stirone*, however, was decided before this Court's comprehensive adoption of constitutional harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18, 22 (1967). As Justice Stewart noted in his concurrence in that case, before *Chapman*, this Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.'" *Id.* at 42-43 (collecting cases). Because *Stirone* was decided in an era in which constitutional errors generally required per se reversal, that decision does not control the analysis in this case. In the wake of *Chapman* (and later cases subjecting analogous errors to harmless-error review), harmless-error analysis should be applied to any error resulting from a divergence between the facts specified in the indictment and the facts presented by the government at trial. Cf. *United States* v. *Cotton*, 535 U.S. 625 (2002); *Neder* v. *United States*, 527 U.S. 1 (1999).

Petitioner's entire petition for a writ of certiorari is devoted to the question of whether there was "error"; petitioner does not address whether any error that occurred would be amenable to harmless-error analysis in these circumstances. Under the facts of the case, any divergence between the proof and the charge was clearly harmless. The indictment expressly referenced the wire transfer to petitioner's bank account that the government proved at trial. The indictment thus gave petitioner notice and was sufficient to allow petitioner to plead it in the future as a bar to subsequent prosecutions. And given petitioner's concession that payments from the government were wired to her account, Pet. App. 21a, there can be no contention here that alteration

of the proof at trial compared to the allegations of the indictment prejudiced her. Accordingly, any alleged divergence of the proof at trial from the specific terms of the indictment was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
VIJAY SHANKER
Attorney

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