No. 01-752

In the Supreme Court of the United States

RANDLE CURTIS DANIELS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a constructive amendment of petitioner's indictment occurred at trial in this case and required reversal of petitioner's money laundering conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 252 F.3d 411.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2001. A petition for rehearing was denied on June 15, 2001 (Pet. App. A12-A13). The petition for a writ of certiorari was filed on August 17, 2001. 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 Northern District of Texas, petitioner was convicted of one count of bank theft, in violation of

18 U.S.C. 2113(b); and one count of money laundering, in violation of 18 U.S.C. 1957. He was sentenced to 30 months' imprisonment. The court of appeals affirmed. Pet. App. A1-A8.

1. In 1995, petitioner received a check for $46,000 from his insurance company to cover the cost of repairs to his house, which had been damaged by a storm. The check was payable jointly to petitioner and Colonial Savings Bank, which held the mortgage on petitioner's house. Petitioner and the bank manager eventually agreed that the bank would pay petitioner $16,000 immediately and would place the remaining $30,000 in a trust account, to be disbursed as needed to pay for the repairs to petitioner's house. Pet. App. A1-A2.

While the $16,000 check was being prepared, petitioner stole a blank, signed bank check from the desk of a bank employee. Petitioner made the bank check out for $29,800 to "cash or Marsha Veach," and directed Veach, who was his girlfriend, to deposit it in her account. Veach deposited the bank check and later wrote a check for $29,500 to Texas Commerce Bank, where petitioner had an account. Pet. App. A2; Gov't C.A. Br. 7-11.

2. A federal grand jury returned an indictment charging petitioner with bank theft, in violation of 18 U.S.C. 2113(b) (Count 1), and with engaging in a monetary transaction in property derived from unlawful activity, in violation of 18 U.S.C. 1957 (Count 2). Pet. App. A19-A20. Count 2 alleged that petitioner had "caused the withdrawal in the amount of $29,500 from the account of Marsha Veach." *Id.* at A20.

3. At trial, Veach testified that petitioner had directed her to deposit the stolen bank check into her account. 2/1/00 Tr. 187, 191. Veach further testified that she and petitioner had argued about the arrange-

ments for repairing petitioner's home, and that she had eventually decided to return the money to petitioner. *Id.* at 192. On direct examination, Veach testified that she had made the check out to Texas Commerce Bank "at [petitioner's] request." *Id.* at 192-194. On cross-examination, however, Veach testified that it was her own idea to "move the money into [petitioner's] account." *Id.* at 198.

Petitioner testified in his own defense. He denied that he had stolen the blank check and claimed that a bank representative had given the check to him. Pet. App. A2; Gov't C.A. Br. 9-10.

In his closing argument concerning the money laundering count, defense counsel noted that if petitioner "didn't commit bank theft, then he can't have laundered money that he knew came from bank theft." 2/4/00 Tr. 27-28. Petitioner's counsel also argued that the evidence showed that "Marsha Veach moved the money," and that it was Veach's idea, not petitioner's, to withdraw the money from her account and deposit it in petitioner's account. *Id.* at 27.

The government's rebuttal argument pointed out that petitioner had asked Veach to deposit the stolen check in her account and noted that the government was not required to prove "that the defendant personally did every act constituting * * * the offense." 2/4/00 Tr. 38 (Pet. App. A32). Government counsel stated that "when Marsha made the deposit, it was at his request. He didn't have to make the deposit in her savings account in order for him to be found guilty of money laundering. She did it at his request." *Ibid.* (Pet. App. A33). Counsel then went on to summarize the evidence that petitioner was guilty of money laundering based on the transaction charged in the indictment—the check from Veach to Texas Commerce

Bank. *Id.* at 38-40. Counsel explained that "we're alleging that [petitioner] had her make [the check] out to Texas Commerce Bank and not him as one more attempt to distance himself from that money that he stole." *Id.* at 39.

At the close of the evidence, the district court instructed the jury that petitioner could be found guilty on the money laundering count only if the government had proved beyond a reasonable doubt that petitioner "knowingly engaged or attempted to engage in a monetary transaction in criminal derived property," that the property was "derived from a specified unlawful activity, namely bank theft," and that petitioner "knew that the property represented the proceeds of some form of unlawful activity." Pet. App. A24. The court defined the term "monetary transaction" to include "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution." *Id.* at A26. The court cautioned the jury, however, that its duty was "to decide whether * * * [petitioner] is guilty of the crime charged," and that petitioner was "not on trial for any act, conduct, or offense not alleged in the Indictment."[1] *Id.* at A27. The jury found petitioner guilty on both the bank theft and money laundering counts. *Id.* at A1.

4. The court of appeals affirmed. Pet. App. A1-A8. Petitioner argued, *inter alia*, that the jury charge on the money laundering count had constructively amended the indictment by permitting the jury to convict him for causing the deposit of the criminally

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[1] The prosecutor read the indictment to the jury at the beginning of the trial, and a copy of the indictment was given to each juror. 1/31/00 Tr. 71, 78-79.

derived funds, rather than for causing the withdrawal of the funds as alleged in the indictment. Because petitioner had not objected to the jury instructions at trial, the court of appeals reviewed his claim for plain error. *Id.* at A5 & n.8 (citing *United States* v. *Olano*, 507 U.S. 725 (1993)). Under that standard, an appellate court may correct an error not raised below only if there was (1) error, (2) that was "plain," (3) that "affected the substantial rights of the defendant," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at A5 (quoting *Olano*, 507 U.S. at 736).

The court of appeals "[a]ssum[ed] without deciding" that the first three prongs of the plain-error test were met, but declined to "exercise [its] discretion to correct any error." Pet. App. A5. The court reasoned that "[t]he two acts—deposit and withdrawal—are so closely linked here that * * * the 'fairness, integrity or public reputation of judicial proceedings' is not implicated." *Id.* at A6. The court observed that evidence concerning the deposit was "relevant to prove that [petitioner] controlled the funds and to impeach any testimony that the withdrawal was Veach's own idea." The court further explained that although the jury might have "credited [Veach's] testimony and convicted [petitioner] for the unindicted act of depositing illicit funds," it was "equally possible that the jury disbelieved her testimony and properly convicted [petitioner] for the indicted act of withdrawing illicit funds." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-10) that the court of appeals' decision in this case conflicts with the decision of the Fourth Circuit in *United States* v. *Floresca*, 38 F.3d 706 (1994) (en banc), and that the conflict warrants

resolution by this Court. In *Floresca*, the court of appeals held that "constructive amendments of a federal indictment are error *per se*, and * * * must be corrected on appeal even when not preserved by objection." *Id.* at 714. While the Fifth Circuit here held that the constructive amendment of an indictment does not automatically require reversal where the claim was not preserved below, see Pet. App. A5-A6 & n.8, this case presents an inappropriate vehicle to address the issue, because petitioner failed to demonstrate that a constructive amendment occurred at trial.[2]

1. A constructive amendment of the indictment occurs when the evidence at trial or the jury instructions so modify essential elements of the offense charged that there is a substantial likelihood that the defendant has been convicted of a different offense than the one charged in the indictment. See, *e.g.*, *United States* v. *Miller*, 471 U.S. 130, 138-145 (1985); *Stirone* v.

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[2] This Court has granted certiorari in *United States* v. *Cotton*, No. 01-687 (Jan. 4, 2002), in which the question presented is whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals, on plain error review, automatically to vacate the enhanced sentence. Some courts of appeals have expressed the view that the analysis in a case like *Cotton* has some elements in common with the analysis in a case involving a constructive amendment. See *United States* v. *Thomas*, 274 F.3d 655, 671-672 (2d Cir. 2001) (en banc); *United States* v. *Cotton*, 261 F.3d 397, 405 (4th Cir. 2001); *United States* v. *Maynie*, 257 F.3d 908, 920 (8th Cir. 2001), petition for cert. pending, No. 01-7565 (filed Jan. 4, 2002). The decision in *Cotton* may therefore shed light on constructive amendment claims raised for the first time on appeal, effectively resolving any conflict between the approach taken in *Floresca* and the approach taken by the Fifth Circuit here. The petition in this case need not be held for *Cotton*, however, because there was no constructive amendment on the facts of this case.

United States, 361 U.S. 212, 218-219 (1960). In this case, the district court instructed the jury that its task was to determine whether petitioner was "guilty of the crime charged," and that petitioner was "not on trial for any act, conduct, or offense not alleged in the Indictment." Pet. App. A27. Moreover, the indictment was read to the jury at the beginning of the trial, and the court gave the jurors copies of the indictment for use during their deliberations. 1/31/00 Tr. 71, 78-79. The court's instructions therefore precluded the jury from finding petitioner guilty of money laundering based on any monetary transaction other than the one—"the withdrawal in the amount of $29,500 from the account of Marsha Veach"—that was identified in the indictment. Pet. App. A20; see *United States* v. *Holley*, 23 F.3d 902, 912 (5th Cir.) (no constructive amendment where indictment was read to jury, jurors had a copy of indictment during deliberations, and instructions included a reminder that jury must consider only crime charged in indictment), certs. denied, 513 U.S. 1043 (1994) and 513 U.S. 1083 (1995).

At closing argument, government counsel stated that "when Marsha [Veach] made the deposit, it was at [petitioner's] request. *[Petitioner] didn't have to make the deposit in her savings account in order for him to be found guilty of money laundering.* She did it at his request." 2/4/00 Tr. 38 (Pet. App. A33) (emphasis added). Taken in isolation, the italicized language might conceivably suggest that petitioner's involvement in the deposit of funds in Veach's account was an appropriate basis for finding him guilty of the money laundering offense. Read in context, however, that statement simply reminded the jury that petitioner could be found guilty of money laundering if he directed Veach to carry out the proscribed act rather than

performing the monetary transaction himself. See *ibid.* (Pet. App. A32) ("The law recognizes that ordinarily anything a person can do for himself may also be accomplished by that person through the direction of another person as his agent."). Subsequent portions of the government's closing argument focused on the withdrawal of funds from Veach's account. *Id.* at 38-40; see *id.* at 39 ("we're alleging that he had her make it out to Texas Commerce Bank and not him as one more attempt to distance himself from that money that he stole"). In any event, the jury was unambiguously instructed that its sole task was to determine whether petitioner was guilty of the crimes charged in the indictment, and this Court has repeatedly applied the principle that jurors are "presumed to follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987). This case therefore provides no occasion for consideration of the proper standard of review of an unpreserved claim that the district court's instructions constructively amended the indictment by permitting the jury to convict the defendant of uncharged conduct.

2. Contrary to petitioner's assertion (Pet. 5-6), the ruling below does not conflict with this Court's decision in *Stirone* v. *United States*, 361 U.S. 212 (1960). In *Stirone*, the Court held that a defendant had been deprived of his Fifth Amendment right to a grand jury indictment when the proof at trial and the jury charge broadened the bases for conviction from those charged in the indictment. The Court went on to observe that such a deprivation "is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* at 217. In contrast to this case, however, *Stirone* involved a claim of error that was properly preserved at trial, see *id.* at 214, and the Court thus had no occasion to determine what analysis would

have applied if the claim had been raised for the first time on appeal.

In any event, as we explain above, there was no constructive amendment of the indictment in this case. In *Stirone*, a case brought under the Hobbs Act, the indictment charged that Stirone had engaged in extortion that obstructed the victim's receipts of shipments of sand from outside Pennsylvania into that State to be used for production of concrete at the victim's plant. See 361 U.S. at 213-214. At trial, however, the government introduced evidence of a different impact on commerce—namely, that concrete made by the plant would be used in a steel mill that would export steel to other States. See *id.* at 214. The district court instructed the jury that it could find Stirone guilty of interfering with commerce by extortion based on that alternative theory. *Ibid.* This Court concluded that the indictment had been unconstitutionally broadened and that Stirone was thereby "convicted on a charge the grand jury never made against him." *Id.* at 219. Here, by contrast, the jury instructions made clear that petitioner could be found guilty only of "the crime charged," not "for any act, conduct, or offense not alleged in the Indictment." Pet. App. A27.

Petitioner's reliance (Pet. 7-10) on *United States* v. *Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc), is misplaced for the same reason. The indictment in *Floresca* charged the defendant with witness tampering, in violation of 18 U.S.C. 1512(b)(1), but the district court mistakenly instructed the jury on the elements of a different subsection of the statute, 18 U.S.C. 1512(b)(3). 38 F.3d at 708-709. The court of appeals concluded that the instruction constructively amended the indictment by "stat[ing] a distinct, unindicted offense." *Id.* at 710. In this case, by contrast, the district court correctly

instructed the jury on the elements of the charged offenses, Pet. App. A23-A26, and it reminded the jurors that petitioner was "not on trial for any act, conduct, or offense not alleged in the Indictment," *id.* at A27.

3. Petitioner's reliance (Pet. 10-12) on *Stromberg* v. *California*, 283 U.S. 359 (1931), is likewise misplaced. *Stromberg* did not involve a constructive amendment of an indictment. The defendant in *Stromberg* was convicted of violating a state statute that made it unlawful to display a red flag in a public place for any one of three purposes. *Id.* at 361. After concluding that one of the grounds for conviction under the statute was unconstitutional, this Court held that because it was impossible to tell on which ground the jury relied, the conviction must be reversed. *Id.* at 368-370. As the Court explained in *Griffin* v. *United States*, 502 U.S. 46, 53 (1991), *Stromberg* stands for "the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."

The present case is distinguishable from *Stromberg* in at least three respects. First, unlike petitioner, the defendant in *Stromberg* preserved her constitutional challenge in the trial court. See 283 U.S. at 361. Second, the California statute at issue in *Stromberg* permitted conviction for conduct—the display of a red flag to express peaceful opposition to organized government—that the State lacked power to prohibit. *Id.* at 369-370. Here, by contrast, petitioner's involvement in depositing the stolen check into Veach's account was not constitutionally protected conduct, and it was prohibited by the money laundering statute. See Pet. App. A5-A6 (noting that the "act of causing the deposit of illicit funds could have properly been charged in the

indictment and is prohibited by statute"). Finally, even if *Stromberg* were extended to apply to a possibility that a conviction rested on unindicted conduct, the instructions given in this case specifically precluded the jury from finding petitioner guilty based on acts not charged in the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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