No. 99-1052

In the Supreme Court of the United States

WILLIAM P. VERKIN, 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

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether there was a constructive amendment of the indictment at trial, where petitioner was indicted on one count of bank fraud and one count of conspiracy to commit bank fraud, and at trial the government produced evidence proving that, in order to accomplish the fraud, petitioner misrepresented the appraised value of a parcel of land.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 193 F.3d 517 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1999. The petition for rehearing was denied on September 21, 1999 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on December 17, 1999. 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 Texas, petitioner was convicted on one count of bank fraud, in violation of 18 U.S.C. 1344, and one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. 371. Pet. 1-2, 8-9. He was sentenced to 33 months' imprisonment and assessed a $5000 fine. *Id.* at 8-9. The court of appeals affirmed. Pet. App. A1-A4.

1. As described in the indictment, petitioner, a real estate broker, and his business partners engaged in two related business ventures. Pet. App. E4-E5. One involved the purchase of 500 acres of real estate; the other involved the acquisition of a beer distributorship (Burkett's) that had defaulted on loans it owed to the Government Employee Credit Union (GECU). *Id.* at E3-E4. Before the opportunity to purchase Burkett's arose, petitioner entered into four earnest money contracts giving him the right to buy the 500 acres of real estate for a down payment of $1.5 million and $7.4 million in promissory notes. *Id.* at E6. Along with his partners, petitioner purchased the common stock of Burkett's from its previous owners. *Id.* at E7. Petitioner and his partners then decided to structure a deal whereby they would obtain additional loans from GECU for the down payment on the property and for refinancing Burkett's debt of $6.6 million, and would pledge the land as collateral for the loan. *Id.* at E7. To that end, they represented to GECU that $2.2 million of the loan proceeds were needed to pay off unnamed previous partners. *Id.* at E4, E6-E7.

Petitioner approached his employee George Beach to act as the purported previous partner. Pet. App. E4-E5, E8-E9. Beach signed a "sham" joint venture agree-

ment with petitioner in which petitioner agreed to pay Beach $2.2 million if Beach would convey to him the legal title in the real estate. *Id.* at E8. That agreement furthered the fraud because Beach had no legal interest in the property and petitioner already had signed contracts to purchase the property from the sellers for only $1.5 million down. Petitioner and his partners then forwarded this sham joint venture agreement to GECU, to induce the credit union to believe that petitioner and his partners needed the $2.2 million to buy out Beach's interest in the property. *Id.* at E9.

Following receipt of a legal document ostensibly showing that Beach had conveyed legal title to the property to the partners, GECU wired the title company, which petitioner partly owned, about $2.4 million of proceeds from the loans, of which $2.2 million was to be paid to Beach. Pet. App. E9. Petitioner and his partners then caused the title company to pay the sellers of the property $1.5 million, the down payment specified in the original earnest money contract that petitioner had entered into with the sellers. *Id.* at E9-E10. The title company also gave Beach a check for $2.2 million, which he endorsed back to the title company. *Id.* at E10. The title company then gave Beach a check for $5000, his fee for participating in the scam, and each of the four partners checks for $226,000. *Ibid.*

Two years later, Burkett's filed for bankruptcy, causing a multi-million dollar loss to the National Credit Union Share Insurance Fund. Pet. App. E10.

As described in the indictment, the object of the conspiracy was to enable the defendants to "unjustly enrich themselves with other people's money by skimming about $666,000.00 of federally insured proceeds" from the GECU loans to Burkett's, and to "prevent detection of their receipt of the money." Pet. App. E5-

E6. The indictment explained that the "method and means of the conspiracy" were that the defendants made it appear that they needed $2.2 million from the GECU loan to buy out Beach's interest in the property, when in fact, that money was "kicked back" to petitioner and his partners from which they skimmed about $666,000. *Id.* at E6. The facts described above were outlined in a section of the indictment alleging "these and other overt acts." *Id.* at E6. The bank fraud scheme charged in count two referred back to the facts outlined in the conspiracy count. *Id.* at E11-E12.

2. In 1995, petitioner and two of his co-conspirators proceeded to trial, and the jury found them guilty on both counts. Pet. 3-4.

3. In an unpublished opinion, the court of appeals reversed the convictions on evidentiary grounds and remanded for a new trial. Pet. App. C9. It rejected the defendants' contention that the evidence was insufficient to sustain their convictions. *Id.* at C15. It described the focus of the prosecution as the payment of the $226,826 to each of the defendants. *Id.* at C4.

4. In 1998, petitioner proceeded to trial for the second time.[1] Pet. 6-9. At trial, the government established, among other things, that petitioner obtained GECU funds by misrepresenting to the credit union that he needed to buy out a previous partner. Gov't C.A. Br. 6, 8-11. In addition, the government introduced evidence concerning the appraisals of the real estate that GECU had requested. Petitioner was responsible for securing the appraisals because he knew the appraisal company. The appraisals that petitioner submitted to GECU substantially overstated the value

[1] Petitioner's coconspirators pleaded guilty before the second trial. Pet. 6.

of the land, as measured by comparable selling prices of nearby property.[2] *Id.* at 7. Following a jury verdict, petitioner again was convicted on both counts. Pet. 8.

5. The court of appeals affirmed. Pet. App. A1-A4. In response to petitioner's contention that the government's evidence of the falsified appraisals unconstitutionally broadened the charges in the indictment, the court, in an unpublished opinion, held that "evidence of an additional false statement does not change the offense with which [petitioner] is charged." *Id.* at A3.

ARGUMENT

1. Petitioner contends (Pet. 10-17), as he did below, that the jury found him guilty of fraud and conspiracy for conduct that was not charged in the indictment, violating his Fifth Amendment right to grand jury indictment and his Sixth Amendment right to a fair trial. The legal principles governing petitioner's claim are well settled. Because petitioner's contentions are highly fact-bound and without merit, this Court's review is not warranted.

As this Court has explained, "[i]t is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." *Schmuck* v. *United States*, 489 U.S. 705, 717 (1989). The constitutional right to indictment by grand jury provides a body independent of the prosecutor and the

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[2] In its decision following the first trial, the court of appeals stated that the appraised value of the property was accurate and in excess of the amount necessary to secure the loan. Pet. App. C14. The government had not introduced evidence to the contrary at that trial, Gov't C.A. Br. 24, but had argued to the court in the presence of the defendant that the appraisal was "a pie in the sky" and "unrealistic," Pet. 3.

judge that determines whether the prosecution will proceed. See *Russell* v. *United States*, 369 U.S. 749, 760-761 (1962). The indictment also guarantees that the accused will have notice of the crimes charged and can plead former jeopardy in any future case. See *id.* at 764.

An indictment "may charge numerous offenses or the commission of any one offense in several ways." *United States* v. *Miller*, 471 U.S. 130, 136 (1985). "As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges * * * other means of committing the same crime." *Ibid.* Nor is it necessary for the government to charge "every single act of execution of the scheme" that it intends to introduce at trial to avoid a constructive amendment of the indictment. *United States* v. *Pless*, 79 F.3d 1217, 1220 (D.C. Cir.), cert. denied, 519 U.S. 900 (1996).

This Court has held that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone* v. *United States*, 361 U.S. 212, 215-216 (1960) (citing *Ex parte Bain*, 121 U.S. 1 (1887)). A constructive amendment of the indictment 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." *United States* v. *Mollica*, 849 F.2d 723, 729 (2d Cir. 1988) (internal quotation marks omitted). The danger is that where the "variation between pleading and proof" is so great that the indictment "cannot fairly be read as charging" the

conduct for which the accused is convicted, no court could know that the grand jury would have been willing to charge that conduct. *Stirone*, 361 U.S. at 217. 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 *Miller*, 471 U.S. at 136.

The court of appeals correctly held that the evidence of the inflated appraisals did not change the offenses for which petitioner was charged. The charges here, bank fraud and conspiracy to commit bank fraud, were based on the scheme, as described in the indictment, "to unjustly enrich [petitioner and his coconspirators] with other people's money by skimming about $666,000.00 of federally insured proceeds" from the GECU loans and "to prevent detection of their receipt of the money." Pet. App. E5-E6. The evidence of the inflated appraisals did not unconstitutionally alter the indictment; instead that evidence demonstrated the existence of the same scheme to obtain fraudulently GECU funds that the credit union would not have loaned to petitioner and his co-conspirators absent the misrepresentations.

In addition, the district court's jury charge did not alter the indicted offenses in any fashion. It clearly instructed the jury that it could find petitioner guilty only if "the Government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the Indictment." Jury Charge 13. It also stated, as to the conspiracy charge, that the jury must find that "two or more persons made an agreement to commit the crime of knowingly executing a scheme and artifice to defraud the Government

Employees Credit Union *as charged in the indictment*." *Id.* at 7 (emphasis added). As to the bank fraud count, it similarly emphasized that "[w]hat must be proven beyond a reasonable doubt is that the accused knowingly executed or attempted to execute a scheme *that was substantially similar to the scheme alleged in the indictment*." *Id.* at 11 (emphasis added). The court made no mention of the appraisals in its charge. In light of the jury instructions, the jury could not have convicted petitioner of any crime other than that alleged in the indictment. See *United States* v. *St. Gelais*, 952 F.2d 90, 95 (5th Cir.) (charge that instructs jury that government must prove scheme alleged in indictment "guarantee[s] [that] the jury did not return a guilty verdict on a theory which broadened the scheme outlined in the indictment"), cert. denied, 506 U.S. 965 (1992).

2. The cases on which petitioner relies to assign error to the court of appeals are unavailing. In *Stirone* v. *United States*, 361 U.S. 212 (1960), this Court found an unconstitutional amendment of the indictment because the proof at trial and the jury charge broadened the bases for conviction from those charged in the indictment. In that case, brought under the Hobbs Act, the indictment charged that Stirone had engaged in extortion that obstructed the victim's receipt of shipments of sand from outside Pennsylvania into that State to be used for production of concrete at the victim's plant. See *id.* at 213-214. At trial, by contrast, the government introduced evidence that the extortion obstructed commerce because concrete made by the victim would be used in a steel mill which would export steel to other States, a separate basis for demonstrating an effect on interstate commerce. See *id.* at 214. In the jury charge, the district court instructed

that the jury could find Stirone guilty based on the alternate theory of interference with commerce. *Ibid.* This Court concluded that the indictment had been unconstitutionally broadened and Stirone was thereby "convicted on a charge the grand jury never made against him." *Id.* at 219.

The other cases that petitioner cites similarly involve instances in which the district court charged the jury in a manner that allowed it to convict on a basis not charged in the indictment. In *United States* v. *Nunez*, 180 F.3d 227 (5th Cir. 1999), the indictment charged the defendant with assault, in violation of 18 U.S.C. 111, by means of a fully loaded .40 caliber Beretta semi-automatic; but the court instructed the jury that it could convict even without the defendant's use of a weapon. In *United States* v. *Doucet*, 994 F.2d 169 (5th Cir. 1993), the indictment charged the defendant with possessing an unregistered firearm modified to fire as a machinegun; but the government argued and the court charged that the defendant could be convicted for possessing the unassembled parts of a machinegun.[3] Here, by contrast, neither the court's jury instructions nor the government's proof at trial altered the crime charged in the indictment. At bottom, the bank fraud scheme involved petitioner's misrepresenting to the credit

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[3] The cases that petitioner cites in footnote six of his petition, Pet. 17 n.6, also do not further his argument. In all but two of the cases, the court impermissibly altered the basis on which the jury could convict through its charge. In *United States* v. *Willoughby*, 27 F.3d 263 (7th Cir. 1994), the trial was by the court, and it found defendant guilty of violating 18 U.S.C. 924(c) (1994 & Supp. IV 1998) by relying on a drug predicate that differed from the predicate charged in the indictment. In *Moore* v. *United States*, 512 F.2d 1255 (4th Cir. 1975), the court found neither a constructive amendment of the indictment nor a fatal variance.

union the need for the loan in order to profit personally. This theory was not abandoned at trial. Instead, the evidence of the inflated appraisals furthered the charged scheme by inducing the credit union to believe that its loan was protected by adequate collateral.

3. Because evidence of the inflated appraisals did not constructively amend the indictment, petitioner's argument (Pet. 18-19) that he was denied notice of the charges against him is misplaced. It is well established that an indictment is not required to set out expressly every action of the defendant that may have contributed to the commission of the crime charged.[4] See, *e.g.*, *United States* v. *Hajecate*, 683 F.2d 894, 898 (5th Cir. 1982) ("What the defendants seek * * * is essentially the disclosure by the government of its full theory of the case and all the evidentiary facts to support it. That is not and never has been required."), cert. denied, 461 U.S. 927 (1983); *United States* v. *Williams*, 679 F.2d 504, 508 (5th Cir. 1982) (indictment need not set forth "facts and evidentiary details necessary to establish each of the elements of the charged offense"), cert. denied, 459 U.S. 1111 (1983). Rather, the primary purposes of the indictment are to give the accused notice of the charges against him, to protect the accused against double jeopardy, and to preserve the role of the grand jury as an independent body interposed between the accused and the state. See, *e.g.*, *Schmuck*, 489 U.S. at 717- 718; *Miller*, 471 U.S. at 134-135; *Russell*, 369 U.S. at 763-764. The indictment in this case did so; it sufficiently alleged the crime charged to afford these constitutional protections.

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[4] In any event, by his own admission, petitioner was aware as early as the first trial that the government believed the appraisals were inflated. Pet. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

KIRBY A. HELLER
Attorney

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