No. 19-1362

In the Supreme Court of the United States

JASON LAUT, 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 closing argument constructively amended the indictment in his case.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1-9) is not published in the Federal Reporter but is reprinted at 790 Fed. Appx. 45.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2019. A petition for rehearing was denied on January 9, 2020 (Pet. App. 10). On March 16, 2020, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including May 8, 2020, and the petition was filed on June 8, 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 Illinois, petitioner was convicted on six counts of wire fraud, in violation of

18 U.S.C. 1343; 29 counts of making false statements, in violation of 18 U.S.C. 1001; two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a); and one count of tampering with a consumer product, in violation of 18 U.S.C. 1365(a)(4). Pet. App. 11-14. He was sentenced to 111 months of imprisonment, to be followed by three years of supervised release. *Id.* at 14-15. The court of appeals affirmed. *Id.* at 1-9.

1. Between 2013 and 2015, petitioner was a paramedic supervisor for MedStar ambulances in southwestern Illinois. Pet. App. 2. Memorial Hospital provided MedStar with narcotics boxes, filled with a standardized inventory, for each ambulance. *Ibid.* When a predetermined proportion of the drugs in a box were consumed, the paramedic would exchange the used box for a full one at the hospital. *Ibid.* A narcotics log cataloging the drugs used or wasted accompanied each box. *Ibid.* MedStar also maintained patient records cataloging each time a drug was administered to a patient in an ambulance. Trial Tr. (Tr.) 364-366. As a supervisor, petitioner was one of a limited number of people who could alter those records after the fact. Tr. 892. MedStar's computer program automatically tracked such changes. *Ibid.*

The standard inventory of the narcotics boxes included the painkillers fentanyl and morphine. Pet. App. 2; Tr. 96. During the relevant period, petitioner, who had developed a painkiller addiction after a 2013 surgery, routinely stole fentanyl and morphine from the narcotics boxes. Pet. App. 2-5. Petitioner employed two strategies for concealing his theft. In some instances, he replaced the stolen drugs with water or saline through "pinholes" in the vials' tops and then placed the vials back in the boxes, where they appeared unused.

Ibid. In other instances, he falsified MedStar's narcotics logs and patient records to reflect (inaccurately) that fentanyl and morphine had been administered to patients. *Ibid.*

Around September 2014, a Memorial Hospital pharmacist discovered tampered fentanyl vials when restocking a narcotics box. Pet. App. 2. The hospital responded by recalling all the fentanyl from the narcotics boxes. *Id.* at 2-3. The hospital's recall investigation identified 57 tampered vials, 54 of which came from MedStar ambulances. *Ibid.*

In January 2015, the hospital began restocking the narcotics boxes with fentanyl. Pet. App. 3. In May 2015, petitioner asked the on-duty pharmacist to check the vials in a narcotics box because "he had heard" that tampering was occurring again and he wanted to ensure he received genuine drugs in his box. *Ibid.* The pharmacist discovered that the vials had indeed been altered and replaced them with new ones before issuing petitioner the box. *Ibid.* A second recall followed in which 28 tampered vials of fentanyl were discovered, 26 of which came from MedStar ambulances. *Ibid.*

This time, Memorial Hospital undertook a more extensive investigation. It required MedStar to drug-test its employees, and only petitioner tested positive for fentanyl. Pet. App. 3. An audit of Medstar records revealed 91 discrepancies attributable to petitioner. *Id.* at 4; Tr. 359-360. Investigators confiscated petitioner's narcotics box, which was missing both its fentanyl and morphine despite the absence of any record in the accompanying log showing that those medications had been administered. Tr. 282-283, 404-407. Investigators subsequently searched petitioner's work vehicle and discovered empty fentanyl vials, syringes, and other

paraphernalia associated with injection drugs. Pet. App. 5; Tr. 292-294.

2. The grand jury returned an original and two superseding indictments in this case. Each included the same first 37 counts, alleging wire fraud, identity theft, and false statements; they varied only as to charges of product tampering. The original indictment from January 2017 did not include any tampering charges. Pet. App. 23-32. The first superseding indictment, returned in June 2017, included two tampering charges: one alleged tampering on or about September 14, 2014 (the date of the first hospital recall), and another alleged tampering on or about May 25, 2015 (the date of the second hospital recall). *Id.* at 33-43. The second superseding indictment—the one on which petitioner proceeded to trial—was returned in October 2017 and contained only one tampering charge, in Count 38, which alleged tampering that ran from "on or about January 26, 2015, to on or about May 25, 2015," the period between when the hospital resumed stocking the narcotics boxes with fentanyl after the first recall and the second recall. *Id.* at 44, 53.

At trial, the government "painstakingly walked through the 91 [paperwork] discrepancies" that petitioner had created over the course of his scheme, and presented evidence of petitioner's positive drug test and the drug paraphernalia recovered from his vehicle. Pet. App. 4-5. Because petitioner's fraud and false statements spanned the period from 2013 to 2015, see *id.* at 48-52, the government introduced evidence of petitioner's 2014 tampering as well as his 2015 tampering, *id.* at 4-5; see *id.* at 5 (noting the relevance of that evidence).

In describing the 2015 tampering during its closing argument, the government noted that "this is after [petitioner's] tampering had already been caught once," but "[h]e got away with it." C.A. App. A1065. And with respect to the tampering element of acting "with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk," 18 U.S.C. 1365(a), the government referenced the total number of instances of tampering—"57 times in 2014, 28 times in 2015." C.A. App. A1133. In addition, in rebuttal, the government argued that there was "only one person with a Fentanyl problem, those 85 vials." *Id.* at A1164; see *id.* at A1159 (noting "there were 85 tampered vials"). Petitioner did not object to any of those statements. Pet. App. 6.

At the close of the case, the court provided the jury with a copy of the second superseding indictment and instructed the jury that "the government must prove that the crime happened reasonably close to the dates" in the indictment, but not necessarily "on those exact dates." Pet. App. 5-6; Jury Instructions 11. And the verdict form for the tampering charge directed the jury to "Count 38 of the Second Superseding Indictment." Pet. App. 6. Petitioner did not object to that instruction or that portion of the verdict form. *Ibid.*

The jury found petitioner guilty on all 38 counts. See Pet. App. 6, 11-14. The court sentenced him to 111 months of imprisonment, to be followed by three years of supervised release. *Id.* at 14-15.

3. The court of appeals affirmed in an unpublished order. Pet. App. 1-9. Petitioner argued that the prosecution's reference to the 2014 tampering in connection

with Count 38, in conjunction with the absence of an express jury instruction that Count 38 was limited to the 2015 conduct, amounted to a constructive amendment of the indictment. *Id.* at 5-6. Because petitioner had failed to raise that claim in the district court, the court of appeals reviewed for plain error. *Id.* at 6.

The court of appeals declined to determine whether a constructive amendment had occurred. Pet. App. 7. The court instead determined that even if one had, petitioner failed to satisfy two elements of the plain-error standard. *Ibid.* First, it found any error was not "plain" because "no precedent squarely addresses whether the court's provision to the jury of the indictment and a verdict form (specifying that the jury should convict based only on the actions alleged in the indictment) mitigates the potential harm from the prosecution's arguments and evidence." *Ibid.* Second, it found petitioner could not show prejudice because the evidence overwhelmingly established his guilt for the charged tampering in 2015. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-25) 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 repeatedly denied certiorari in cases presenting similar issues. In any event, this case would be a poor vehicle to resolve the conflict that he 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 the Grand Jury Clause requires every element of a criminal offense to 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 also 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 convicted 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), at 809 & n.23 (2d ed. 1999) (citing cases). In contrast, where the divergence places before the jury an entirely new basis for conviction and the jury instructions permit conviction 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 second superseding indictment charged petitioner with product tampering "[f]rom on or about January 26, 2015, to on or about May 25, 2015," Pet. App. 53, and the evidence at trial distinguished between the tampering that occurred in 2014 and the tampering that occurred in 2015. See pp. 3-5, *supra*. The district court provided the jury with the second superseding indictment and instructed the jury that "[t]he government must prove that the crime happened reasonably close to the dates" specified therein. Jury Instructions 11; Pet. App. 6; see *United States* v. *Nersesian*, 824 F.2d 1294, 1323 (2d Cir.) (holding that when an indictment uses "'on or about' language," "the government is not required to prove the exact date, if a date reasonably near is established") (citation omitted), cert. denied, 484 U.S. 958 (1987). A jury following those instructions—as it is presumed to do, see *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838, 841 (2009) (per curiam)—could only have convicted petitioner on Count 38 based on his 2015 conduct.

Petitioner suggests that the government conceded the existence of a constructive amendment below, see Pet. 2, 7, 9, 22, 24, citing page 18 of the government's brief and oral argument in the court of appeals, see Pet. 7, 22. That is incorrect. In both instances, the government recounted the evidence and argument from trial, but did not suggest that either amounted to a constructive amendment. See Gov't C.A. Br. 18.

Moreover, although the court of appeals itself did not decide it, this issue would impede consideration of the

questions raised in the petition. First, because the government may "defend its 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), it would be an alternate ground for affirmance. Petitioner does not suggest in this Court that he is entitled to relief even if his indictment was not constructively amended. 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 that (1) there was error; (2) the error was plain; (3) the error affected his substantial rights; and (4) the error 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. 7.

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 finding a constructive amendment in circumstances analogous to this case, any error was not "obvious." See Pet. App. 7. Petitioner's 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. 17. 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).

Furthermore, petitioner cannot satisfy the third element of the plain-error standard, which generally requires that the error was "prejudicial," meaning that it "must have 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, as the court of appeals correctly found, the evidence of petitioner's 2015 tampering was so "strong" that the jury "almost certainly" would have found him guilty of the charge even without the challenged closing-argument statements. Pet. App. 7; see p. 6, *supra*.

Rather than attempt to show otherwise, petitioner instead contends that under *Stirone* v. *United States*, *supra*, constructive amendments qualify as structural errors immune from the normal prejudice inquiry. See Pet. 15 ("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 amend-

ment.") (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. 10-22) 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. 10-15) 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 this prong 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 petitioner identifies require a defendant to demonstrate prejudice to satisfy the third prong, and differ only in the precise phrasing they use to describe the required showing. See Pet. 12-15; compare Pet. App. 8 (defendant must make "a showing that defendant probably would have been acquitted absent the error"), 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").[*]

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[*] Petitioner also cites (Pet. 13) *United States* v. *Reyes*, 102 F.3d 1361 (5th Cir. 1996), but that case involved the fourth prong of the plain-error test, not the third. See *id.* at 1365-1366.

It is far from clear that these variations in phrasing reflect meaningfully different standards. Petitioner's observation (Pet. 14-15) that the Eighth Circuit's approach 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 (8th Cir. 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 charge was supported by "strong evidence" and that "even absent the putative constructive amendment, the jury almost certainly would have found [petitioner] guilty of the 2015 tampering charge." Pet. App. 7. 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. 10-12) 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 (3d Cir.), 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 *Olano*'s fourth element, which permits courts to recognize an error only when it "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, 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 pp. 17-18, *infra*.

Finally, petitioner observes 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. Compare *United States* v. *Pierson*, 925 F.3d 913, 924 (7th Cir. 2019) ("Our circuit uses a fairly low threshold for constructive amendment."), cert. granted, judgment vacated, 140 S. Ct. 1291 (2020). 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 and 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 petitioner alleges here. *United States* v. *Camara*, 908 F.3d 41, 46 (4th Cir. 2018); see Pet. 7. 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, see, *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. 17-20) 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. 17-18 (citation omitted). Petitioner's claim of a conflict is mistaken.

At the outset, petitioner misreads the decision below, which did not require him to identify a prior opinion addressing the same "specific factual circumstances." Pet. 18. 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 district court's general instructions limit the jury to the facts charged in the indictment. See Pet. App. 7 (noting the absence of precedent addressing "whether the court's provision to the jury of the indictment and a verdict form (specifying that the jury should convict based only on the actions alleged in the indictment) mitigates the potential harm from the prosecution's arguments and evidence").

The cases 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. 17. 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 governed 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 affect the outcome. 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 jury almost certainly would have found [petitioner] guilty of the 2015 tampering charge" "even absent the putative constructive amendment." Pet. App. 7; 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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