No. 19-1362

In the
Supreme Court of the United States

JASON LAUT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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The government does not and cannot deny that the courts of appeals are in open and acknowledged conflict about how the plain error standard should be applied in constructive amendment cases. Instead, the government attempts to describe the split as narrow and of no practical consequence. In fact, there are few questions more material to a plain error analysis than whether and to what extent a defendant must show prejudice, and just how "plain" the error must be.

There is no better illustration of that than this case. Had petitioner been convicted in the Fourth Circuit, the government's constructive amendment would have been "error *per se*," requiring reversal "even when not preserved by objection." *United States v. Floresca*, 38 F.3d 706, 714 (4th Cir. 1994). And in several other circuits, his conviction would have been far more likely to be reversed. Here, however, the Seventh Circuit found no need to even decide whether an error occurred because its plain error standard—which it readily acknowledged is particularly "demanding" compared to standards employed by other circuits—imposes such a "high bar" that petitioner could not secure relief even assuming the government did commit constitutional error. Pet.App.7; *see also United States v. Pierson*, 925 F.3d 913, 924 (7th Cir. 2019).

It is thus little surprise that the government spends much of its opposition trying to change the subject, pressing various alternative grounds for affirmance that the Seventh Circuit did not reach. Of course, this Court is a court of review, not of first

review. In all events, the government's alternative arguments are meritless. Despite efforts to walk back previous concessions, the government has already acknowledged that it presented evidence of a separate, uncharged crime in support of petitioner's conviction—allowing the jury to convict on that separate, uncharged conduct, which is, by definition, a constructive amendment error under *Stirone v. United States*, 361 U.S. 212 (1960). Therefore, the first prong of plain error review is satisfied. Likewise, the fourth prong is easily satisfied when, as here, a plain constitutional error has affected a defendant's substantial rights. Indeed, it is hard to see how a constitutional error that this Court has deemed *per se* reversible in the ordinary course could be deemed to not even affect the fairness or integrity of judicial proceedings. Accordingly, this case presents an excellent vehicle to resolve this open and acknowledged circuit split.

I. The Decision Below Squarely Conflicts With The Decisions Of Several Other Circuits.

The decision below holds that defendants cannot obtain relief from a constructive amendment error under plain error review unless the defendant can both (1) affirmatively prove that he or she "probably would have been acquitted absent the error"; and (2) point to past "precedent [that] squarely addresses" the precise factual circumstances of his or her case. Pet.App.7-8. Each of those holdings directly conflicts with the holdings of other circuits.

1. Courts around the country have consistently and repeatedly recognized that the circuits are split over what test to apply when determining whether a

constructive amendment affected a defendant's substantial rights. While the government attempts to minimize this clear circuit split, many of the government's own cited authorities explicitly acknowledge it. *See*, *e.g.*, *United States v. Pierson*, 925 F.3d 913, 924-25 (7th Cir. 2019) (identifying three categories of approaches, while noting that even within those categories, the circuits disagree), *vacated on other grounds by Pierson v. United States*, 140 S.Ct. 1291 (Mem) (2020); *United States v. Brandao*, 539 F.3d 44, 57-60 (1st Cir. 2008) (identifying four separate approaches). And the Seventh Circuit, by its own estimate, applies the most "demanding" standard of all. *Pierson*, 925 F.3d at 925.

The government attempts to cast the differences as "narrow[]" and "lack[ing] practical significance." Those claims are belied by the cases. Both the Second and Fourth Circuits have squarely held that a constructive amendment is always *per se* prejudicial. *See United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001); *Floresca*, 38 F.3d at 714. While the Third Circuit has rejected that rule, it places the burden on the government to rebut a presumption of prejudice. *United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002). The Seventh Circuit, by contrast, requires the defendant to prove prejudice—an approach that it has explicitly acknowledged conflicts with *Thomas*, *Floresca*, and *Syme*, among others. *See Pierson*, 925 F.3d 924-25.

That clear circuit split alone is reason enough to warrant this Court's review. And, despite the government's contentions, even the circuits that require defendants establish prejudice do not apply

the same standard. For example, the government claims that the Tenth Circuit aligns with the Seventh Circuit based on language from *Miller* saying that a "defendant must show a 'reasonable probability that, but for the error claimed, the result of the proceeding would have been different." Opp'n 12 (quoting *United States v. Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018)). But *in the very next sentence in Miller*, the Tenth Circuit clarified that "[a] reasonable probability ... should not be confused with[ ] a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Id.* (citations and internal quotations omitted). Quoting this clarifying language, the Seventh Circuit acknowledged that the Tenth Circuit's approach *conflicted* with that of the Seventh Circuit by "demand[ing] less of a showing" from a defendant. *Pierson*, 925 F.3d at 925.

The other cases the government cites similarly reflect a deepening circuit split that includes far more lenient standards concerning a defendant's burden. *See*, *e.g.*, *United States v. Madden*, 733 F.3d 1314, 1323 (11th Cir. 2013) (finding prejudice whenever a court "cannot say 'with certainty' that with the constructive amendment, [the defendant] was convicted solely on the charge made in the indictment").

2. The government fares no better with its attempt to deny the clear split on what makes a constructive amendment a "plain" error. Opp'n 16. For example, the Fourth Circuit has explicitly held that "under *Stirone*, constructive amendments of a federal indictment are error *per se*, and under *Olano*,

must be corrected on appeal even when not preserved by objection." *Floresca*, 38 F.3d at 714. While *Floresca* left unanswered the question of whether there could ever be an occasion where a court might refuse to overturn a conviction in a constructive amendment case based on the *fourth* prong of the plain error test, it made no such reservation concerning the second prong—*i.e.*, whether an error is "plain". *Id.* at 712.

To the contrary, *Floresca* made clear that "it is utterly meaningless to posit that any rational grand jury *could* or *would* have indicted ... because it is plain that th[e] grand jury *did not*, and, absent waiver, a constitutional verdict cannot be had on an unindicted offense." *Id.* The government fails to explain how this approach can possibly be reconciled with the Seventh Circuit's demand that a defendant show that the specific facts of a case "lend themselves to clear application of [the] circuit's precedent" just to prove that an error was "plain." *See Pierson*, 925 F.3d at 923. The government's attempts to recast decisions of the Tenth and D.C. Circuits likewise fail. *Compare* Opp'n 16-17, *with Miller*, 892 F.3d at 1235 (noting error was plain simply because "it is settled law in th[e] circuit, as elsewhere, that ... if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars"); *United States v. Lawton*, 995 F.2d 290, 294 (D.C. Cir. 1993) (explaining that error was plain simply because instructions "clearly outlined a substantially broader field of potential criminality" than the indictment).

That a constructive amendment is constitutional error *per se* has been clear since at least this Court's

decision in *Stirone*. *See Stirone*, 361 U.S. 212. And courts like the Fourth, Tenth, and D.C. Circuits recognize that there is no need to conduct a quasi-habeas/qualified immunity analysis to determine whether such an error is "plain." The Seventh Circuit and others do not, and demand a higher showing. This Court should resolve this circuit split.

3. Unable to deny the division among the circuits, the government tries to minimize its practical importance. But the difference between requiring a defendant prove prejudice and requiring no prejudice showing at all is obvious. So too is the difference between making prejudice the defendant's burden to prove versus the government's burden to disprove. Indeed, this Court has often granted certiorari to resolve issues concerning who bears what burden of proof in criminal cases. *See*, *e.g.*, *Nelson v. Colorado*, 137 S.Ct. 1249 (2017); *Parke v. Raley*, 506 U.S. 20 (1992); *Martin v. Ohio*, 480 U.S. 228 (1987); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The government does not seriously suggest that there is no practical difference between requiring a defendant prove prejudice and treating an error as *per se* prejudicial. Instead, it claims that the Second and Fourth Circuits "appear to apply a more demanding standard than the Seventh Circuit for finding constructive amendments in the first place." Opp'n 14. That claim is hard to reconcile with the fact that no defendant in the Seventh Circuit has obtained relief under the Seventh Circuit's self-described more "demanding" approach in more than two decades. *See Pierson*, 925 F.3d at 924-25. That makes the Seventh Circuit an outlier even among circuits that *have*

conducted a prejudice analysis, which reinforces that the Seventh Circuit was correct to describe its approach as the most "demanding" in the nation. *See*, *e.g.*, *Miller*, 891 F.3d at 1231-38 (granting relief on plain error); *Madden*, 733 F.3d at 1319-23 (same); *United States v. Choy*, 309 F.3d 602, 607-08 (9th Cir. 2002) (same); *United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001) (same); *United States v. Gregg*, 47 F. App'x 1, 3 (D.C. Cir. 2002) (same). In all events, if the circuits really are in disagreement over what is required to prove a constructive amendment, then that just reinforces the need for this Court's intervention.

Finally, the government claims that this "circuit conflict has existed for decades, and this Court has repeatedly denied petitions for writs of certiorari raising these and similar conflicts." Opp'n 15 (collecting cases). But all but one of the petitions the government cites was filed well over a decade ago, at a time when the government was arguing that the split was likely to resolve itself. *See*, *e.g.*, Br. in Opp'n, *Philips v. United States*, No. 06-1602, 2007 WL 2315226, at *12-14. In the past 13 years, not only has that prediction proven incorrect, but several more circuits—including the Seventh Circuit, which resolved an intra-circuit split on the issue in *Pierson*—have now weighed in and, in doing so, deepened the circuit split. *See*, *e.g.*, *Pierson*, 925 F.3d 913; *United States v. Miller*, 891 F.3d 1220 (10th Cir. 2018); *United States v. Madden*, 733 F.3d 1314 (11th Cir. 2013); *United States v. Gavin*, 583 F.3d 542 (8th Cir. 2009). Meanwhile, the Second, Third, and Fourth Circuits have reaffirmed their rules even as other circuits have rejected them. *See*, *e.g.*, *United States v. Pryor*, 474

Fed. Appx. 831, 833-34, n.5 (2d Cir 2012); *United States v. McKee*, 506 F.3d 225, 229-32, n.3 (3d Cir. 2007); *United States v. Randall*, 171 F.3d 195, 210 (4th Cir 1999); *see also United States v. Medley*, 972 F.3d 399, 406-10, n.4 (4th Cir. 2020).

As for the lone case that comes from this past decade, that was a case in which the First Circuit determined that there was no constructive amendment at all, and thus had no occasion to discuss anything about how the plain error standard applies. *See United States v. Weed*, 873 F.3d 68, 74-75 (1st Cir. 2017). That likely explains why the government saw no need even to file a brief in opposition, and this Court did not request one. *See Weed v. United States*, No. 17-1430 (April 18, 2018). In short, this split is real, it is consequential, and it necessitates this Court's resolution.

II. This Case Presents An Excellent Vehicle For Resolving The Circuit Split.

This case presents an excellent vehicle to resolve the questions presented. The Seventh Circuit resolved this case on plain error alone—assuming without deciding that there was an error—and its high bar on plain error review was dispositive. *See* Pet.App.7-8. Unable to deny as much, the government instead advances several alternative grounds for affirmance. *See* Opp'n 6-9, 17-18. But no court has resolved any of the government's alternative arguments, and as this Court has often reminded, it is "a court of review, not of first review." *United States v. Haymond*, 139 S.Ct. 2369, 2385 (2019) (internal quotations omitted). Accordingly, whether some other grounds that the Seventh Circuit declined to address might form a basis

for sustaining petitioner's conviction can be sorted out by the Seventh Circuit in the first instance in the event this Court concludes that the Seventh Circuit applied the wrong legal standard.

The government also argues that this is a poor vehicle because the Seventh Circuit did not resolve whether there was an error in the first place. *See* Opp'n 6-9. In fact, that makes this a particularly good vehicle because it confirms that the plain error test was dispositive. Further, the government argues that analysis of the first prong of the plain error test—*i.e.*, whether there was an error—is inextricably intertwined with the analysis of the second prong—*i.e.*, whether the error was plain. *See* Opp'n 6-9. But that argument is just a variation on the Seventh Circuit's view of the "plain" prong, as the government is essentially arguing that there cannot be an error (plain or otherwise) absent prior precedent addressing virtually the same facts. *See* Opp'n 6-10. If that test is correct, then this Court can affirm, for the Seventh Circuit has already concluded that petitioner loses if constructive amendment claims are subject to some sort of quasi-habeas/qualified immunity standard. If it is wrong, then the Court can reverse and remand for reconsideration under the correct test. Either way, the absence of a ruling on the error question is no obstacle to resolution of the questions presented.[1]

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[1] That said, if this Court would prefer to resolve the questions presented in a case where the lower court concluded that there was a constructive amendment, it could grant the recently filed petition in *Pierson*, the case in which the Seventh Circuit first articulated its unusually "demanding" plain error standard, and hold this petition pending resolution of that one. *See Pierson v. United States*, No. 20-401 (U.S.). There, the court concluded that

In any event, the government's argument that there was no error is belied by the record and the government's own admissions. *See*, *e.g.*, Gov't C.A. Br. 18 (conceding that government relied on evidence of 57 tampered vials found during a separate, uncharged, and unresolved 2014 tampering crime to help prove the "extreme indifference" prong of Count 38); Oral Argument 18:06 (noting that "[the government] did in fact combine the 54 [*sic*] [from 2014] and the 24 [*sic*] vials [from 2015] in that argument"). By "broadening the possible bases for conviction [on Count 38] from that which appeared in the indictment," the government allowed the jury to convict on an entirely separate product tampering crime. *See Miller*, 471 U.S. at 138. That is the definition of a constructive amendment. *See id.* ("As the *Stirone* Court said, the issue was 'whether [*Stirone*] was convicted of an offense not charged in the indictment.'" (quoting *Stirone*, 361 U.S. at 213)).

The government alternatively suggests that even if there was a plain error that affected petitioner's substantial rights, he still should not get relief under the fourth prong of the plain-error test because the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Opp'n 17-19. But as the Tenth Circuit recently observed, "where a constitutional error has affected the defendants' substantial rights, thus satisfying the third prong of the plain error test, it is ordinarily natural to conclude that the fourth prong is also satisfied and reversal is

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there was a constructive amendment, but then concluded that the error did not satisfy the plain-error test. *See Pierson*, 925 F.3d at 922.

necessary in the interest of fairness, integrity, and the public reputation of judicial proceedings. Not to reverse to correct the error is to ignore the injury the defendant suffered from the violation of his or her constitutional rights." *Miller* 891 F.3d at 1237 (citation omitted). *United States v. Cotton* did not displace that rule, but rather involved a unique set of "essentially uncontroverted" facts that are simply inapposite here. 535 U.S. 625, 629-34 (2002). Indeed, the argument that a constructive amendment does not affect the fairness or integrity of a judicial proceeding is fundamentally irreconcilable with *Stirone*'s holding that a constructive amendment is reversible error *per se*, which likely explains why even the Seventh Circuit did not embrace that argument.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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