No. 21-243

In the Supreme Court of the United States

JAMES WARNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

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

QUESTION PRESENTED

Whether petitioner was entitled to relief on his claim, raised for the first time on appeal, that the district court's instructions constructively amended the indictment in his case.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

United States v. *Warner*, No. 18-cr-20255 (Feb. 5, 2020)

United States Court of Appeals (6th Cir.):

United States v. *Warner*, No. 20-1148 (Feb. 8, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rule:

Miscellaneous:

In the Supreme Court of the United States

No. 21-243

JAMES WARNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is not published in the Federal Reporter but is reprinted at 843 Fed. Appx. 740.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2021. A petition for rehearing was denied on March 29, 2021 (Pet. App. 34-35). The petition for a writ of certiorari was filed on August 13, 2021. 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 Eastern District of Michigan, petitioner was convicted on two counts of conspiring to commit theft from a federally funded program and federal

program bribery, in violation of 18 U.S.C. 371 and 666(a)(1)(A) and (B); one count of conspiring to commit federal program bribery, in violation of 18 U.S.C. 371 and 666(a)(1)(B); two counts of theft from a federally funded program, in violation of 18 U.S.C. 666(a)(1)(A); one count of federal program bribery, in violation of 18 U.S.C. 666(a)(1)(B); three counts of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); and one count of obstructing justice, in violation of 18 U.S.C. 1519. Pet. App. 16-17. He was sentenced to 120 months of imprisonment, to be followed by two years of supervised release. *Id.* at 19, 21. The court of appeals affirmed. *Id.* at 1-14.

1. Between 2010 and 2017, petitioner participated in kickback schemes with three contractors that he supervised in his positions with the Wayne County Airport Authority and the West Bloomfield Township Water and Sewerage Department in Michigan. Pet. App. 2. Petitioner's schemes generally consisted of supplying the contractor with confidential information to help it win bids with his employer, and then approving the contractor's inflated invoices for work that the contractor did not perform, in exchange for a cut of the contractor's earnings. *Ibid.*

Petitioner worked as the Airport Authority's water operator and one of several department managers. Presentence Investigation Report (PSR) ¶ 9. Petitioner used inside knowledge of the airport's operations to help a sewer contractor, William Pritula, successfully bid for work. PSR ¶ 11. After Pritula secured the contract, petitioner used a dummy e-mail account in Pritula's name to send himself doctored invoices that inflated the scope of work that Pritula performed. Gov't C.A. Br. 5. In his role as an airport employee, petitioner

then falsely certified that the work had been performed, forwarded the invoices for payment, and delivered the payments to Pritula. *Id.* at 5-6. In total, petitioner received more than $5 million in kickbacks from the $19 million that the Airport Authority paid Pritula. *Id.* at 6; PSR ¶¶ 18-19.

Petitioner ran a similar scheme at the airport with a plumbing contractor, Douglas Earles. Gov't C.A. Br. 6. After helping Earles secure contracts, petitioner prepared invoices on his behalf, submitted them through a dummy e-mail account, and then approved them in his capacity as an employee of the Airport Authority. PSR ¶¶ 12-13. The invoices both inflated the amount of work done and charged the airport for work that was not done at all. PSR ¶ 12; Gov't C.A. Br. 6. Petitioner's kickbacks from Earles totaled over $113,000. *Ibid.*

Petitioner also colluded with Gary Tenaglia, an electrical contractor who maintained the airport's parking garages. PSR ¶ 14. At their first meeting to discuss the kickbacks, petitioner instructed Tenaglia to remove his sweater and open his shirt to confirm that he was not wearing a recording device. *Ibid.* Petitioner then wrote on a napkin a number ("5K") that Tenaglia understood to represent a required cash payment, which petitioner characterized as the "cost of doing business" at the airport. *Ibid.* Petitioner eventually demanded 10% of Tenaglia's airport business. Gov't C.A. Br. 2. Tenaglia paid petitioner hundreds of thousands of dollars over the course of the scheme. PSR ¶ 14.

After an internal audit at the Airport Authority uncovered irregularities in one of Tenaglia's invoices, petitioner left his position, erased his electronic devices, and obtained employment at the Water and Sewerage Department. Pet. App. 2; Gov't C.A. Br. 6-7. Federal

investigators confronted Tenaglia, who agreed to cooperate and recorded petitioner engaging in a similar kickback scheme at his new job. Pet. App. 2; PSR ¶¶ 15-16. When the agents later interviewed petitioner, he admitted to receiving "bribes" from two contractors. Pet. App. 2; PSR ¶ 16. A search of petitioner's home revealed envelopes stuffed with cash and reflecting large cash payments, financial records that ultimately led to the seizure of several million dollars, and a cell phone containing login information for the dummy e-mail accounts used to send invoices to the Airport Authority. Gov't C.A. Br. 8-9.

2. A grand jury charged petitioner with ten counts in connection with his kickback schemes and the ensuing investigation. See Fifth Superseding Indictment (Indictment) 3-26. Among other things, it charged a separate conspiracy to commit federal program bribery, in violation of 18 U.S.C. 371 and 666(a)(1)(B), for each of petitioner's three kickback schemes at the Airport Authority. Indictment 3-8, 11-17, 19-23. Section 666(a)(1)(B) penalizes a person who, as an "agent of an organization, or of a State, local, or Indian tribal government," "corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more." 18 U.S.C. 666(a)(1)(B). Count 1 pertained to Pritula; Count 5 to Earles; and Count 7 to Tenaglia. Indictment 3-8, 11-17, 19-23.

Petitioner pleaded not guilty and proceeded to trial, where two of his coconspirators testified against him. Pet. App. 16; Gov't C.A. Br. 27. At the close of evidence,

the district court instructed the jury orally and in writing. 6/4/19 Tr. 164-197; D. Ct. Doc. 117 (June 4, 2019). The written instructions included a preliminary page that offered a general summary—without citation to any of the charged statutes—of the conspiracies alleged in Counts 1, 5, and 7. D. Ct. Doc. 117, at 20 (Instruction No. 15). The instructions separately explained the elements of conspiracy and of the relevant substantive offenses, including federal program bribery. See *id.* at 21-22 (Instruction Nos. 16-17). The bribery instructions stated that petitioner was charged with violating 18 U.S.C. 666(a)(1)(B) and that the government had to prove, *inter alia*, that petitioner "solicited, demanded, accepted, or agreed to accept anything of value from another person," intending "to be influenced or rewarded in connection with some business" or transaction of a local government agency. D. Ct. Doc. 117, at 31-32 (Instruction Nos. 25, 26). The court also provided the jury with a copy of the indictment to reference during its deliberations. 6/4/19 Tr. 197. The jury found petitioner guilty on all counts. Pet. App. 4.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-14.

On appeal, petitioner argued, among other things, that Instruction No. 15 constructively amended his indictment by framing Counts 1, 5, and 7 "as conspiracies for the contractors to *offer or pay* [petitioner] a bribe in violation of 18 U.S.C. § 666(a)(2), whereas the indictment framed those same counts as conspiracies for [petitioner] to *solicit or accept* a bribe in violation of 18 U.S.C. § 666(a)(1)(B)." Pet. App. 11. Because petitioner raised that argument "for the first time on appeal," the court of appeals stated that plain-error review would apply, requiring petitioner to show "'(1) there was an

error (2) that was plain, (3) that affected a substantial right, and (4) [that] seriously affected the fairness, integrity, or public reputation of the judicial proceedings,'" in order to obtain relief. *Id.* at 10 (citation omitted).

The court of appeals, however, found no error at all. Pet. App. 11. The court noted that a "[c]onstructive amendment occurs when 'a combination of evidence and jury instructions effectively alters the terms of the indictment and modifies the essential elements of the charged offense to the extent that the defendant may well have been convicted of a crime other than the one set forth in the indictment.'" *Ibid.* (brackets, citation, and emphasis omitted). And the court observed that here Instruction No. 15 did "not outline the elements the jury must consider for federal program bribery," but instead "merely provide[d] a factual summary of the conspiracies at issue in Counts One, Five, and Seven." *Ibid.* The court explained that, "[f]or the specific elements of the bribery offense underlying these counts, the jury was referred to Instruction 26, which frame[d] [petitioner's] offense as § 666(a)(1)(B) *payee* bribery, just as the indictment d[id]." *Ibid.* The court found that, "taken together, the instructions did not present a risk that [petitioner] would be 'convicted of a crime other than the one set forth in the indictment,'" and thus his "constructive amendment claim fail[ed]." *Ibid.* (citation omitted).

ARGUMENT

Petitioner principally contends (Pet. 16-25) that the court of appeals erred in requiring a showing of prejudice to satisfy the plain-error standard on his constructive amendment claim. And although he does not include it as a separate question presented, petitioner

further suggests (Pet. 25-28) that the court applied the wrong standard for identifying a constructive amendment. Further review is unwarranted. This case does not implicate the sole question presented because the court of appeals did not rely on the plain-error standard to reject petitioner's constructive amendment claim. In any event, the decision below is correct and does not conflict with the decision of any other court of appeals.

1. The court of appeals correctly rejected petitioner's constructive amendment claim.

a. 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 accordingly held that every element of a criminal offense must 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, it must "sufficiently apprise[ ] the defendant of what he must be prepared to meet." *Russell* v. *United States*, 369 U.S. 749, 763 (1962) (citation omitted).

Certain deviations between the theory of guilt specified in the indictment and the theory of guilt presented at trial may violate the defendant's right under the Grand Jury Clause to trial on the basis of an indictment. Where the divergence does not substantially alter the charges, 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 808-809 (1999). In

contrast, where the divergence places before the jury an entirely new basis for conviction and the jury finds guilt on that new basis, lower courts treat the divergence as a "constructive amendment" of the indictment that violates the Grand Jury Clause. See *ibid.*

b. No constructive amendment occurred here. Counts 1, 5, and 7 of the indictment charged petitioner with conspiring to commit federal program bribery, in violation of 18 U.S.C. 666(a)(1)(B). Pet. i; Indictment 3, 11, 19. Petitioner contends that Instruction No. 15 constructively amended those counts by reframing them as conspiracies to offer or pay a bribe in violation of 18 U.S.C. 666(a)(2), rather than conspiracies to solicit or accept a bribe in violation of Section 666(a)(1)(B). Pet. App. 11. But as the court of appeals explained, Instruction No. 15 did not "outline the elements the jury must consider for federal program bribery." *Ibid.* Nor, as petitioner implies (Pet. 12), did it cite Section 666(a)(2). Instead, it provided a plain-language factual summary "of the conspiracies at issue in Counts One, Five, and Seven." Pet. App. 11. And the actual instruction defining the legal elements of federal program bribery, Instruction No. 26, "frame[d] [petitioner's] offense as [Section] 666(a)(1)(B) *payee* bribery, just as the indictment d[id]." *Ibid.*; see D. Ct. Doc. 117, at 21-22 (Jury Instruction Nos. 16-17) (cross-referencing Instruction No. 26 for elements of federal program bribery in Counts 1, 5, and 7). The court of appeals thus correctly recognized that "the instructions did not present a risk that [petitioner] would be 'convicted of a crime other than the one set forth in the indictment,' and his constructive amendment claim fails." Pet. App. 11 (citation omitted).

Petitioner's assertions of error in the court of appeals' decision lack merit. He claims (Pet. 16, 24) that the court erred in requiring a showing of prejudice to satisfy the plain-error standard, but the court did not rely on plain error—it simply found that no error had occurred in the first place. Pet. App. 11. This case therefore does not implicate the sole question presented in the petition. The court of appeals did rely on the plain-error standard in rejecting a *separate* contention that petitioner raised for the first time on appeal—namely, that the instructions produced juror confusion. See *id.* at 11-12. But instructional error based on juror confusion is a distinct claim from constructive amendment, subject to a different substantive standard. See *id.* at 10, 12; see also *United States* v. *Morrison*, 594 F.3d 543, 546 (6th Cir.) ("[W]e 'may reverse a judgment based on an improper jury instruction only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.' * * * '[P]lain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice.'") (citations omitted), cert. denied, 562 U.S. 934 (2010). Petitioner does not challenge the court of appeals' rejection of his juror-confusion claim in this Court.

Petitioner also suggests that the court of appeals erred "by failing to meaningfully distinguish between constructive amendment broadening allegations of criminal conduct and a variance or a divergence of alleged facts." Pet. 25 (citation omitted). Petitioner contends that "[a] jury instruction '*broadening* the bases for conviction from that which appeared in the indictment' is a constructive amendment." *Ibid.* (citation omitted). But the decision below did not reject that

possibility. Instead, the court framed its consideration of petitioner's specific claim here—that the instructions had substituted one statutory crime for another—by stating that a constructive amendment occurs when the theory of guilt presented at trial "effectively alters the terms of the indictment and modifies the essential elements of the charged offense to the extent that the defendant may well have been convicted of a crime other than the one set forth in the indictment." Pet. App. 11 (quoting *United States* v. *Hynes*, 467 F.3d 951, 962 (6th Cir. 2006)). And it found that the instructions did not exhibit the error that petitioner asserted. Petitioner's disagreement with that factbound determination does not warrant this Court's review. See Sup. Ct. R. 10.

Petitioner further criticizes (Pet. 26) the decision below for purportedly defining a constructive amendment as "a form of variance requiring the defendant to show prejudice." But the court of appeals' statement that petitioner's claim requires a showing of "a risk" that he was "'convicted of a crime other than the one set forth in the indictment,'" Pet. App. 11 (citation omitted), simply reflects this Court's own recognition that such a risk is inherent in the very notion of a constructive amendment. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 213 (1960) ("The crucial question here is whether [defendant] was convicted of an offense not charged in the indictment."). Petitioner has not explained how a constructive amendment might occur in the absence of any risk that the jury deviated from the charges in the indictment.

2. Petitioner alleges that the circuits are divided over the issues raised in the petition. He principally contends (Pet. 19-25) that the courts of appeals are in conflict over how to apply the plain-error standard to

unpreserved constructive-amendment claims. As explained, however, the decision below did not rest on the plain-error standard. Instead, the court of appeals simply found that no constructive amendment occurred. Pet. App. 11. Accordingly, the alleged circuit conflict is not implicated here. In any event, this Court has recently and repeatedly denied petitions for writs of certiorari raising similar alleged conflicts. See, *e.g.*, *Pierson* v. *United States*, 141 S. Ct. 1371 (2021) (No. 20-401); *Laut* v. *United States*, 141 S. Ct. 866 (2020) (No. 19-1362); *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).

Petitioner separately contends (Pet. 27-28)—outside the apparent scope of the question presented—that the decision below conflicts with decisions from other circuits as to the standard for distinguishing between variances and constructive amendments. The court of appeals here stated that a constructive amendment occurs when the theory of guilt at trial "effectively alters the terms of the indictment and modifies the essential elements of the charged offense to the extent that the defendant may well have been convicted of a crime other than the one set forth in the indictment." Pet. App. 11 (citation omitted). The cases that petitioner cites are consistent with that standard. See, *e.g.*, *United States* v. *Keller*, 916 F.2d 628, 636 (11th Cir. 1990) (finding a constructive amendment where "the instructions allowed the jury to convict the defendant on grounds not

alleged in the indictment, thereby modifying an essential element of the offense charged"), cert. denied, 499 U.S. 978 (1991); *United States* v. *Madden*, 733 F.3d 1314, 1318 (11th Cir. 2013) (similar), cert. denied, 136 S. Ct. 1532 (2016); *United States* v. *McKee*, 506 F.3d 225, 231 (3d Cir. 2007) (stating that a "constructive amendment occurs when the terms of the indictment are effectively modified by the court's actions such that 'there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment'") (citation omitted).

More specifically, petitioner contends that the decision below conflicts with decisions stating that a constructive amendment occurs when evidence or jury instructions "broaden the possible bases for conviction beyond what is contained in the indictment." Pet. 27 (quoting *Keller*, 916 F.2d at 634) (brackets and citation omitted); see *United States* v. *Zingaro*, 858 F.2d 94, 103 (2d Cir. 1988) ("The introduction of evidence concerning that loan impermissibly broadened the charges against [defendant.]"); *United States* v. *Floresca*, 38 F.3d 706, 710 (4th Cir. 1994) (en banc) ("A constructive amendment to an indictment occurs when" the jury instructions "broaden[] the possible bases for conviction beyond those presented by the grand jury."); *United States* v. *Syme*, 276 F.3d 131, 151 (3d Cir.) (finding a constructive amendment "when a court instructs a jury on a ground for conviction that is not fully contained in the indictment"), cert. denied, 537 U.S. 1050 (2002); *McKee*, 506 F.3d at 231 (similar); *United States* v. *Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001) (finding a constructive amendment where "the jury instruction permitted the jury to convict the defendants of violating a work practice standard they were not charged in the

indictment with violating"); *Madden*, 733 F.3d at 1318-1319 (similar). But as explained, see pp. 9-10, *supra*, the court of appeals in this case did not explicitly preclude such a constructive amendment theory—and, in any event, found that the jury instructions did not diverge from the charged theory of guilt at all, whether to broaden or narrow it. Pet. App. 11. And petitioner does not assert that any of the cases he cites found a constructive amendment in circumstances akin to those present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

NOVEMBER 2021