

No. 17-6477

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IN THE SUPREME COURT OF THE UNITED STATES

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HAROLD DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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# QUESTION PRESENTED

Whether the government's evidence at trial constructively amended petitioner's indictment, requiring reversal of his conviction for sex trafficking of a minor, in violation of 18 U.S.C. 1591 (2012).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the Federal Reporter but is available at 711 Fed. Appx. 254. The district court's order denying petitioner's motion for judgment of acquittal is not reported in the Federal Supplement but is available at 2016 WL 10679085.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2017. The petition for a writ of certiorari was filed on October 17, 2017. 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 Western District of Tennessee, petitioner was convicted on one count of sex trafficking of a minor, in violation of 18 U.S.C. 1591 (2012), and 18 U.S.C. 2, and one count of using a facility in interstate commerce to promote prostitution, in violation of 18 U.S.C. 1952 and 2. Judgment 1-2. The district court sentenced petitioner to 151 months of imprisonment, to be followed by five years of supervised release. Id. at 3-4. The court of appeals affirmed. Pet. App. 1-7.

1. Petitioner convinced Yanisha Rivera, who was his girlfriend at the time, to work as a prostitute. Pet. App. 1. Petitioner and Rivera "operated out of a hotel in Memphis, Tennessee, and used Backpage.com -- a website known to facilitate prostitution -- to set up 'dates.'" Id. at 1-2. Petitioner "then recruited a minor female, D.B, to join their 'team,'" advertised D.B's picture on Backpage.com, and "arranged a date at a hotel for Rivera and D.B. to 'work' together on the evening of June 7, 2014." Id. at 2. Although "the trio went to the hotel," they then left because petitioner "'thought it was a set up.'" Ibid.

Shortly after the three left the hotel, a police officer conducted a traffic stop of petitioner's vehicle based on an expired registration. Pet. App. 2. After detaining petitioner

because he did not have a valid driver's license, the officer searched the car and discovered "indicia of sex trafficking -- numerous bags of condoms, lingerie, lubricant, and hygiene products." Ibid. Authorities later determined that D.B. was a 17-year-old minor. Ibid. Petitioner claimed that he believed D.B. was 19 years old. Ibid.

2. A federal grand jury charged petitioner with one count of sex trafficking of a minor, in violation of 18 U.S.C. 1591 (2012), and one count of using a facility in interstate commerce to facilitate prostitution, in violation of 18 U.S.C. 1952. Pet. App. 2. As to the sex-trafficking count, the indictment charged that petitioner:

did knowingly recruit, entice, harbor, transport, provide, obtain, and maintain by any means, in and affecting interstate commerce, D.B., a minor whose identity is known to the Grand Jury, and did benefit, financially and by receiving something of value, knowing and in reckless disregard of the fact that D.B. had not attained the age of 18 years and would be caused to engage in a commercial sex act, and knowing that force, fraud, and coercion would be used to cause D.B. to engage in a commercial sex act; all in violation of Title 18, United States Code, Sections 1591(a)(1) and (2), (b)(1) and (2), (c), and Section 2.

Indictment 1.

At the time of petitioner's offense conduct, the relevant portion of Section 1591 provided:

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce  
\* \* \* recruits, entices, harbors, transports, provides,

obtains, or maintains by any means a person; \* \* \*  
 knowing, or in reckless disregard of the fact, \* \* \*  
 that the person has not attained the age of 18 years and  
 will be caused to engage in a commercial sex act, shall  
 be punished as provided in subsection (b).

\* \* \*

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

18 U.S.C. 1591(a)(1) and (c) (2012).

Before trial, petitioner filed a motion in limine to preclude the district court from instructing the jury that the government need not prove petitioner's knowledge of D.B.'s age if the jury found that petitioner had a reasonable opportunity to observe her. Pet. 12-13. He argued that such an instruction would constructively amend the indictment, on the theory that the indictment had charged only that petitioner violated 18 U.S.C. 1591(a)(1) (2012), not that he violated Section 1591(c). Pet. 13. The court denied the motion on the first day of trial. Ibid.

At the close of the government's case, petitioner moved for judgment of acquittal, arguing that the government had not put on sufficient evidence for the jury to find beyond a reasonable doubt that petitioner knew or recklessly disregarded the fact that D.B. was a minor. Pet. 13. The district court denied that motion as well. Ibid.

When instructing the jury on the elements of the Section 1591 count, the district court stated in relevant part:

The second element of the offense that the Government must prove beyond a reasonable doubt is that "D.B." was under the age of 18 and [that] the defendant knew or recklessly disregarded that fact.

If you find that the defendant had a reasonable opportunity to observe "D.B.," the Government is not required to prove that the defendant knew that "D.B." was under the age of 18.

Pet. App. 5. The jury found Davis guilty on both counts of the indictment. Judgment 1-2.

3. Petitioner then filed a post-trial motion for judgment of acquittal, arguing in relevant part that the government's evidence had constructively amended the indictment. See Pet. 14. Petitioner maintained that Section 1591(c) -- which then provided that the government need not "prove that the defendant knew" the victim was a minor if he had "a reasonable opportunity to observe" her -- set forth an "independent theory of criminal culpability for sex trafficking of a minor" that dispensed with both the knowledge requirement and the reckless-disregard requirement in Section 1591(a)(1). Ibid. He further contended that the government had obtained the conviction under that assertedly separate theory, but that the theory had not been charged in the indictment, which did not explicitly include a "reasonable opportunity to observe" the victim in its description of the charge. Ibid.

The district court denied the motion, determining that the jury instructions and the evidence were consistent with the indictment. D. Ct. Doc. 122, at 5-15 (Dec. 5, 2016). The district court noted some disagreement in the courts of appeals about the proper interpretation of the then-existing version of Section 1591(c) that applied in petitioner's case. Id. at 6-7. Some courts viewed that version of Section 1591(c) as an independent liability provision that did not require the government to prove any mens rea. Ibid. Other courts instead held that it merely described a means of committing the offense and did not negate the government's requirement to prove the mens rea in every case. Ibid. The district court read unpublished Sixth Circuit precedent to adopt the latter view -- that the government must always prove that the defendant either knew or recklessly disregarded that the victim was a minor, regardless of whether the defendant had a reasonable opportunity to observe the victim. Id. at 8-9 (citing United States v. Jackson, 622 Fed. Appx. 526 (6th Cir. 2015)).

The district court found that the jury instructions, the indictment, and the government's evidence at trial were all consistent with that interpretation of the statute. D. Ct. Doc. 122, at 13-15. The court observed that the jury was instructed that it must find that petitioner knew or recklessly disregarded the victim's age and that the indictment likewise charged that

petitioner knew or recklessly disregarded the victim's age. Id. at 13-14. And the court stated that "[e]ven if" the government's "reasonable-opportunity evidence were problematic here, which it [was] not, any such evidence almost certainly would also bear on [petitioner's] knowledge of or reckless disregard for D.B.'s age." Id. at 14-15.

The district court sentenced petitioner to 151 months of imprisonment on the Section 1591 count and 40 months of imprisonment on the Section 1592 count, to be served concurrently, to be followed by five years of supervised release. Judgment 3-4.

2. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-7. As relevant here, petitioner argued that, "because his indictment did not mention th[e] 'reasonable opportunity to observe' substitute for actual knowledge" in Section 1591(c), "the government's evidence and the jury instructions on this substitute constituted a constructive amendment." Id. at 3. The court rejected that argument. Id. at 3-6.

The court of appeals noted that the indictment "specifically calls out subsection (c) as a portion of the statute the grand jury charged [petitioner] with violating." Pet. App. 4. The court acknowledged that "the indictment d[id] not expressly use the subsection's 'reasonable opportunity to observe' language," ibid., but reasoned that "citation to that subsection -- which

only addresses that knowledge substitute, and nothing more -- sufficed in this circumstance, as it gave 'the official or customary citation of the statute ... that the defendant is alleged to have violated,'" id. at 4-5 (quoting Fed. R. Crim. P. 7(c)(1)). The court further concluded that the jury instructions "properly track the statute cited in the indictment, the government's evidence, and [Section] 1591(a)'s elements." Id. at 5. Thus, the court held that petitioner "did not meet his burden" of demonstrating that "'the evidence presented and the jury instructions'" constructively amended the indictment. Id. at 6 (citation omitted).

In a footnote, the court of appeals stated that "[b]ecause [petitioner's] indictment expressly charged him with violating [Section] 1591(c), we need not consider -- as [petitioner] urges us to do -- whether the 'reasonable opportunity to observe' provision is a distinct theory of culpability independent from knowledge or reckless disregard." Pet. App. 6 n.2.

#### ARGUMENT

Petitioner contends (Pet. 17-27) that 18 U.S.C. 1591(c) (2012) set forth an independent theory of criminal liability that was not included in his indictment, and that the indictment was constructively amended at trial by the evidence and instruction to the jury about his "reasonable opportunity to observe" the victim.

Petitioner's contention hinges on his construction of a superseded version of Section 1591(c), an issue of limited and diminishing importance now that Congress has amended Section 1591 to clarify the relevant requirements. Petitioner has not identified any disagreement since the statute was amended about its meaning or about what must be pleaded in an indictment charging a violation of the statute. In any event, even under the previous version of the statute, the lower courts correctly rejected petitioner's constructive-amendment claim. Further review is not warranted.

1. The Grand Jury Clause of the Fifth Amendment 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. That right protects a defendant from being "tried on charges that are not made in the indictment against him." Stirone v. United States, 361 U.S. 212, 217 (1960).

Petitioner argues (Pet. 27) that whether Section 1591(c) is a different offense from Section 1591(a) is "unsettled." But that was true only before Congress amended the statute. At the time of petitioner's offense, some courts concluded that the then-existing version of Section 1591(c) "supplie[d] an alternative to proving any mens rea with regard to the defendant's awareness of the victim's age." United States v. Robinson, 702 F.3d 22, 32 (2d Cir. 2012) (emphasis omitted), cert. denied, 568 U.S. 1203 (2013).

On that view, Sections 1591(a) and 1591(c) “provide[d] the government with three distinct options -- prove beyond a reasonable doubt that: (1) the defendant had knowledge of the victim’s underage status; (2) that the defendant recklessly disregarded that fact; or (3) that the defendant had a reasonable opportunity to observe the victim.” Ibid.; accord United States v. Duong, 848 F.3d 928, 929-930 (10th Cir. 2017); United v. Copeland, 820 F.3d 809, 813 (5th Cir.), cert. denied, 136 S. Ct. 2531 (2016). By contrast, the Eleventh Circuit concluded that, where the government relied on the defendant’s “reasonable opportunity to observe the victim,” it still was required to prove “that he recklessly disregarded the fact that she was under the age of eighteen.” United States v. Mozie, 752 F.3d 1271, 1282, 1286, cert. denied, 135 S. Ct. 422 (2014). The Sixth Circuit adopted a similar, defendant-friendly view of the statute in its unpublished decision in United States v. Jackson, 622 Fed. Appx. 526, 528 (2015) (the government must prove “[r]eckless disregard of the victim’s age” even if the defendant had a reasonable opportunity to observe the victim).

To resolve the disagreement, Congress amended the statute in May 2015, after petitioner’s 2014 offense conduct. See Justice for Victims Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227. Today, Section 1591(c) provides that “[i]n a prosecution

under [Section 1591(a)(1) (Supp. IV 2016)] in which the defendant had a reasonable opportunity to observe" the victim, "the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years." 18 U.S.C. 1591(c) (Supp. IV 2016) (emphasis added). The House Report accompanying the 2015 amendment stated that it was intended to "codify" the Second Circuit's decision in Robinson so that "the government [need not] prove beyond a reasonable doubt that a defendant knew or recklessly disregarded the fact that the victim was under the age of 18 if the defendant had 'a reasonable opportunity to observe the person.'" H.R. Rep. No. 7, 114th Cong., 1st Sess. 6 (2015).

Congress's amendment of the statute means that the question presented here -- whether proof at trial that a defendant had a reasonable opportunity to observe the victim under Section 1591(c) requires that the indictment specifically reference Section 1591(c)'s reasonable-opportunity requirement -- is of limited and diminishing importance. Contrary to petitioner's claim (Pet. 27) that the "correct culpable mental standard" under Section 1591 is "unsettled," Congress's 2015 amendment has resolved any doubt about the proof required. Petitioner has not identified any disagreement in the circuits since the statute was amended either on what an indictment must charge under Section 1591 or on what

the government must prove for a conviction under Section 1591. As a result, going forward, the question presented is unlikely to arise with any meaningful frequency, and thus does not warrant this Court's review.

2. Even applying the predecessor version of Section 1591(c), the lower courts correctly rejected petitioner's claim that his indictment was constructively amended.

The district court held the government to a higher standard than some other courts by determining that, even if the government introduced evidence of petitioner's reasonable opportunity to observe the victim, it was required in all events to prove that petitioner either knew or recklessly disregarded the victim's age. The court determined that the indictment and the jury instructions incorporated that higher standard and that the evidence at trial was sufficient to prove it. In other words, even assuming that the grand jury indicted petitioner based solely on the charge that he knew or recklessly disregarded the victim's age (without charging him with a reasonable opportunity to observe the victim), the court found that the government proved at trial that petitioner knew or recklessly disregarded the victim's age, and that the jury was properly instructed that it was required to find that petitioner knew or recklessly disregarded the victim's age before it could find petitioner guilty. The court thus correctly

determined that no constructive amendment occurred because the grand jury charged the same thing that the petit jury found based on sufficient evidence -- that petitioner at least recklessly disregarded the victim's age. The court's factbound determination does not warrant this Court's review.

In addition, the court of appeals identified an independent reason for rejecting petitioner's constructive-amendment argument even if, as petitioner contends (Pet. 18), the predecessor version of Section 1591(c) created a separate theory of liability. Although petitioner asserts (Pet. 26) that "it cannot be known whether the grand jury would have indicted based upon [petitioner having] 'a reasonable opportunity to observe'" the victim, that is incorrect. The grand jury's charge specifically included Section 1591(c). Indictment 1 (petitioner acted "in violation of Title 18, United States Code, Sections 1591(a)(1) and (2), (b)(1) and (2), (c), and Section 2"). Because the defendant's reasonable opportunity to observe the victim was the only issue addressed in the then-existing version of Section 1591(c), and given that the indictment also included an allegation of an even greater mens rea, the particular charge here necessarily encompassed the lesser reasonable-observation theory. Neither the grand jury in approving the indictment, nor petitioner in receiving it, would have lacked notice that the government's case could include

evidence that petitioner had a “reasonable opportunity to observe” the victim.\*

3. Petitioner relies (Pet. 23-25) on United States v. Lockhart, 844 F.3d 501, 516 (5th Cir. 2016), and United States v. Davis, 854 F.3d 601, 604 (9th Cir. 2017), both of which found, applying the prior version of Section 1591, that a defendant’s indictment had been constructively amended. But those cases are inapposite because neither indictment contained a reference to Section 1591(c) and because the court in each case took the view (contrary to the district court’s determination here) that the jury could have returned a guilty verdict without finding that the defendant at least recklessly disregarded the victim’s age. Lockhart, 844 F.3d at 515-516; Davis, 854 F.3d at 604-605.

Petitioner also cites (Pet. 25) United States v. Duong, 848 F.3d 928 (10th Cir. 2017), where the court of appeals rejected

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\* The fact that the grand jury indicted petitioner on a heightened mens rea (acting knowingly or with reckless disregard) means that even if the government had proved at trial only that petitioner had a reasonable opportunity to observe the victim, that would amount at most to a variance from the indictment, as opposed to a constructive amendment. Lower courts have held that where the divergence between an indictment and the government’s evidence at trial does not substantially alter the theory of guilt, that “mere variance” from the indictment affords no grounds for reversal unless the divergence “is likely to have caused surprise or otherwise been prejudicial to the defense.” 5 Wayne R. LaFave et al., Criminal Procedure § 19.6(c), at 334 (3d ed. 2007) (citing cases).

the defendant's constructive-amendment argument on the ground that the indictment had stated that the defendant had a reasonable opportunity to observe the victim. See id. at 930. Duong did not suggest that an indictment would be insufficient if it cited Section 1591(c), as opposed to using the phrase "reasonable opportunity to observe," nor did the Tenth Circuit suggest that it would have reversed a conviction in circumstances like those here.

Although not addressed by petitioner, some courts have held, in the context of other criminal statutes, that an indictment was deficient where it provided a citation to an element of the offense without describing the factual basis for that element. See, e.g., United States v. Gonzalez, 686 F.3d 122, 127-133 (2d Cir. 2012); see also id. at 128-129 (citing cases). It is far from clear that the Sixth Circuit's unpublished opinion here, which found sufficient a charge that alleged a greater mens rea and also included a citation to 18 U.S.C. 1591(c), departs from that general proposition. But even if it did, this case would not be a suitable vehicle for resolving that issue, because the issue did not determine the outcome in petitioner's case and because he raises the question in the context of an expired statute. If this Court were inclined to consider the level of detail that must be specified in a grand jury's indictment, it should wait for a case where that question makes a difference and that would not require

the Court first to resolve the correct construction of a statute that has since been amended.

4. Finally, certiorari is not warranted because petitioner has not shown any prejudice from the error he asserts. Contrary to petitioner's argument (Pet. 19), a constructive amendment is not automatically reversible error.

To the extent that lower courts have held otherwise -- including the court of appeals below, see Pet. App. 4 -- they have relied principally on this Court's decision in Stirone. See, e.g., United States v. Hynes, 467 F.3d 951, 962 (6th Cir. 2006). But 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 22. And although this Court has identified certain structural errors that are exceptions to that principle, it has never listed constructive amendments to an indictment among them. E.g., United States v. Gonzalez-Lopez, 548 U.S. 140, 148-149 (2006); Neder v. United States, 527 U.S. 1, 8 (1999); Johnson v. United States, 520 U.S. 461, 468-469 (1997). To the contrary, this Court has repeatedly held that defects in grand-jury proceedings are susceptible to the usual harmless-error analysis. See United States v. Cotton, 535 U.S. 625, 628-631 (2002) (holding that the failure of an indictment to list an element of the offense -- a fact that enhanced the

defendant's statutory maximum sentence -- is not jurisdictional and is subject to plain-error review if the defendant did not object in the district court); see also Bank of Nova Scotia v. United States, 487 U.S. 250, 255-256 (1988); United States v. Mechanik, 475 U.S. 66, 71-72 (1986).

Petitioner has alleged no prejudice from the indictment's omission of language specifically stating that petitioner had a reasonable opportunity to observe the victim. The citation to Section 1591(c) in the indictment was sufficient to confirm that the grand jury charged petitioner with violating that provision, and to put petitioner on notice that the government would introduce proof at trial regarding his reasonable opportunity to observe the victim. No further review is warranted.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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