No. 24-7349

IN THE SUPREME COURT OF THE UNITED STATES

REYMUNDO ARREDONDO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record

MATTHEW R. GALEOTTI
Acting Assistant Attorney General

ANDREW W. LAING
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 that the government's evidence and the district court's instructions constructively amended the indictment in his case.

IN THE SUPREME COURT OF THE UNITED STATES

No. 24-7349

REYMUNDO ARREDONDO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is available at 2024 WL 4490606.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2024. A petition for rehearing was denied on January 30, 2025 (Pet. App. B1). On April 23, 2025, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 30, 2025. The petition for a writ of certiorari was filed on May 27, 2025. 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 California, petitioner was convicted on one count of escape from custody, in violation of 18 U.S.C. 751(a) and 4082(a). Judgment 1. The district court sentenced him to five years of probation. Judgment 2. The court of appeals affirmed. Pet. App. A1-A26.

1. On June 6, 2021, petitioner was serving the last month of his federal sentence at a halfway house. Pet. App. A2. He sought and obtained permission to leave the halfway house to go to a hospital, but, while he was gone, he learned that the halfway house believed he had escaped. Ibid. Petitioner "contacted [the halfway house] to explain that he had not escaped, and he was ordered to return." Ibid. Petitioner claims that, when he arrived at the halfway house, he was "denied * * * entry" by a supervisor, while the supervisor claims petitioner "refused her order to come inside." Ibid. It is, however, undisputed that petitioner left the halfway house and stayed at his mother's house until he was arrested four months later hiking nearby. See ibid.

A federal grand jury in the Southern District of California returned an indictment charging petitioner with one count of escape from custody, in violation of 18 U.S.C. 751(a) and 4082(a). Pet. App. A2. The indictment alleged that petitioner failed "to remain within the extended limits of his confinement" and failed "to report as directed to" his halfway house. Indictment 1. Prior to

trial, petitioner moved for a bill of particulars, asking "whether the 'specific factual scenario of liability'" related to his initial absence from the halfway house, to his final departure after briefly returning from the hospital, or to both. Pet. App. A2. The government responded that petitioner was alleged to have committed his escape offense when, after coming back from the hospital, petitioner "left the [halfway house] without permission and did not return." Id. at A3. The government's response also observed that escape is a continuing offense "and could be proven based on [petitioner's] 'failure to report back to the facility in which he was confined.'" Ibid. (alteration omitted).

On the "assumption" that "the government intended to prove he left without permission, not that he failed to return afterward," petitioner's defense at trial "stressed that the evidence strongly suggested [he] was denied entry" when he returned from the hospital. Pet. App. A3. "So in rebuttal, the government stressed [petitioner's] failure to call or return to [the halfway house] even though he knew he had time left on his federal sentence." Ibid. And a jury instruction--"to which [petitioner] raised no relevant objection"--informed the jury that "'willfully failing to remain within the limits of [petitioner's] confinement'" refers to a willful failure "'to return within the extended limits of his confinement' and not to a specific direction to report." Id. at A5.

During its deliberations, the jury inquired "whether the charge was 'being considered today solely for'" the day petitioner came back from the hospital "or for 'every day after.'" Pet. App. A3. Over petitioner's objection, the district court instructed the jury that escape "is a continuing offense[,] which means that an escapee can be held liable for the knowing and willful failure to return to custody even after his initial departure." Id. at A3-A4.

The jury found petitioner guilty. Pet. App. A4. The district court sentenced petitioner to five years of probation. See Judgment 2.

2. The court of appeals affirmed in an unpublished memorandum decision. Pet. App. A1-A26. The court rejected petitioner's argument that "the government's use of the continuing offense theory varied or amended the indictment." Id. at A4; see id. at A4-A6.

The court of appeals accepted that "if an indictment specifies that the defendant committed a particular offense in a particular time or place, he cannot be convicted based on evidence that he committed a different offense at a different time or place." Pet. App. A4. But it disagreed with petitioner's contention that the indictment in this case was limited solely to the theory "that he escaped on June 6 or disobeyed an instruction to return," ibid., finding instead that the indictment encompassed a failure to return even without "a specific direction to report," id. at A5.

The court of appeals observed that this Court's decision in United States v. Bailey, 444 U.S. 394 (1980), had held both that the escape crime defined in 18 U.S.C. 751 is a continuing offense and that "an indictment that closely tracks the statutory language, as the indictment did here, suffices to charge a continuing offense even if not expressly stated in the indictment." Pet. App. A5 (citing Bailey, 444 U.S. at 413-414). The court determined that here, "the failure to return is part of the escape offense, not a distinct crime, so it was included in the indictment even if not expressly referenced." Ibid. And the court found that the indictment, the government's response to petitioner's motion for a bill of particulars and motion to dismiss, and the jury instructions all reflected that petitioner was charged with, and convicted on the basis of, "not just his initial escape" but also his "failure to return" to the halfway house. Ibid.; see id. at A5-A6.

Judge Clifton dissented, deeming the circumstances to present "a constructive amendment of or prejudicial variance from the indictment." Pet. App. A26; see id. at A7-A26. Viewing the evidence as reflecting that halfway house staff had "denied [petitioner] reentry into confinement," Judge Clifton reasoned that, because petitioner "was never permitted or directed to return," he could not be guilty of the continuing offense of escape. Id. at A20-A21. Judge Clifton also took the view that "[e]ven if the indictment had included the offense charged," the

government had argued for conviction on that ground only as a "late change in theory" at trial. Id. at A22; see id. at A25-A26.

ARGUMENT

Petitioner renews (Pet. 9-24) his claim that his indictment was constructively amended at trial. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. This Court has repeatedly denied writs of certiorari to review petitions asserting that the courts of appeals apply different standards to constructive-amendment claims. See Little v. United States, 142 S. Ct. 125 (2021) (No. 20-7820); Benitez v. United States, 586 U.S. 1077 (2019) (No. 18-5464); D'Amelio v. United States, 569 U.S. 968 (2013) (No. 12-780). It should follow the same course here.

1. 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 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 allege all of the facts that the government intends to prove at trial, a violation of the Grand Jury Clause may 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 found guilt 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." 5 Wayne R. LaFave et al., Criminal Procedure § 19.6(c) (4th ed. Nov. 2024 update). 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.

2. The court of appeals correctly found that "[t]here was * * * no variance or amendment" in this case. Pet. App. A6; see id. at A4-A6. The court observed that the indictment charged petitioner with violating 18 U.S.C. 751(a) and 4082(a) by "willfully failing to remain within" and "willfully failing to report as directed to" the halfway house. Pet. App. A5; see Indictment 1. And the court explained that, under United States v. Bailey, 444 U.S. 394 (1980), "closely track[ing] the statutory language, as the indictment did here, suffices to charge a continuing offense" and thus "the failure to return is part of the

escape offense, not a distinct crime, so it was included in the indictment even if not expressly referenced." Pet. App. A5 (citing Bailey, 444 U.S. at 414). Indeed, the dissent appears to have acknowledged that the indictment "included all the elements required for the continuing offense of escape." Id. at A24.

The court of appeals also found that "the indictment--especially read alongside" the government's further explication of it in a bill of particulars and an unobjected-to jury instruction that presumably reflected the parties' joint understanding--"was broad enough to encompass [petitioner's] failure to return, not just his initial escape." Pet. App. A5. The government specifically identified that escape is "'a continuing offense'" and "could be proven on a theory that a defendant 'fail[ed] to report back to the facility in which he was confined.'" Id. at A6. Petitioner was thus aware of "the possibility the government would prove its case based on Arredondo's failure to return." Ibid. Nor did the jury instructions and the district court's response to the jury's question broaden or vary from those documents; instead, they correctly explained that failing to remain within the limits of petitioner's confinement included failing to return to confinement. Id. at A5.

Petitioner is therefore incorrect in asserting (Pet. 18-19) that the court of appeals "did not deny that the conduct described in the indictment * * * was narrower than the conduct proved at trial." It instead found the opposite. That factbound

determination does not warrant this Court's review. See Sup. Ct. R. 10; United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). And that determination differentiates this case from Stirone v. United States, thus undermining petitioner's assertion (Pet. 20-21) of a conflict. In Stirone, the Court found a constitutional violation where the indictment alleged obstruction of interstate commerce, in violation of 18 U.S.C. 1951, through interference with a concrete supplier's shipments of sand into Pennsylvania, but the jury was permitted to find guilt because the sand was used to make concrete to build a plant to ship steel out of Pennsylvania. 361 U.S. at 213-214; see id. at 219. Petitioner's effort to analogize this case to Stirone is simply a disagreement with the court of appeals' case-specific assessment of the indictment, the evidence, and the jury instructions.

3. Petitioner contends (Pet. 12-18) that the standard governing constructive-amendment claims employed by the Ninth Circuit here (and the First, Sixth, and Eighth Circuits in other cases) conflicts with the standards articulated by the Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits. But petitioner fails to show that the outcome in his case would differ under what he calls the "majority position."

In United States v. Wozniak, 126 F.3d 105 (1997), for example, the Second Circuit found a constructive amendment occurred "where the indictment expressly alleged [crimes based on] only cocaine

and methamphetamine transactions" but "[a]t trial, * * * most of the evidence consisted of [the] distribution and use of marijuana." Id. at 106-107. The court reasoned that the indictment "stated no single set of operative facts that would alert [the defendant] that at trial he would face marijuana evidence as well as whatever cocaine evidence the government possessed." Id. at 111. In this case, in contrast, the court found that the indictment, particularly in conjunction with related documents, was "broad enough to encompass [petitioner's] failure to return, not just his initial escape." Pet. App. A5. The Second Circuit's case-specific decision in Wozniak would accordingly not compel a different result here. See Wozniak, 126 F.3d at 111 (distinguishing a case where there was not a constructive amendment, even though the indictment charged the illegal distribution of heroin and the evidence involved cocaine, because other key aspects of the crime were alleged); see also United States v. Dove, 884 F.3d 138, 147 (2d Cir. 2018) (noting that Wozniak was based on its "specific circumstances").

Similarly, in United States v. Hoover, 467 F.3d 496, 502 (2006), the Fifth Circuit found a constructive amendment where the government, in a prosecution for making a false statement in violation of 18 U.S.C. 1001, had "specifically charge[d] the manner in which the defendant's statement [was] false," but the jury was permitted to find guilt if the defendant "knew that his statement was false for any reason." That decision would not require the

Fifth Circuit to find a constructive amendment here, where the lower court found that the charges were not narrower than the conduct proved at trial. See Pet. App. A5. The other cases petitioner cites (Pet. 15-17) likewise arose in different factual circumstances and involved different criminal statutes, allegations, and facts; none address the circumstances of this case--namely, an indictment that alone, and especially when combined with the government's response to the bill of particulars, alleges the continuing offense of escape.[1] None suggest that any of those jurisdictions would have viewed this case differently from the court of appeals.

---

[1] See United States v. Farr, 536 F.3d 1174, 1184 (10th Cir. 2008) (finding constructive amendment where the indictment charged a "specific tax evaded[] [y]et, the evidence and jury instructions * * * introduced * * * an alternative way in which the crime could have occurred"); United States v. McKee, 506 F.3d 225, 230 (3d Cir. 2007) (finding a constructive amendment occurred in a tax case when "the government introduced evidence that books and records were falsified and information was withheld from the [defendants'] accountant, [but] that conduct was never charged in the indictment" and the jury instruction used those acts as examples of tax evasion); United States v. Narog, 372 F.3d 1243, 1249 (11th Cir. 2004) ("By including [the phrase 'that is, methamphetamine'] in the indictment, the government essentially charged a subset of the statutory crime [involving production of a controlled substance]" but the jury instruction broadened it to include "any controlled substance."); United States v. Leichtnam, 948 F.2d 370, 379 (7th Cir. 1991) (indicting defendant for using a rifle, but introducing evidence of other firearms and instructing the jury it could convict if the defendant "had used 'a firearm,'" is a constructive amendment); see also Dove, 884 F.3d at 147-149 (holding no constructive amendment of a charge of conspiracy to distribute heroin and cocaine occurred); cf. United States v. Syme, 276 F.3d 131, 150-151 (3d Cir.) (noting the government confessed error as to certain counts that failed to allege a particular theory of fraud, but finding no constructive amendments as to other counts), cert. denied 537 U.S. 1050 (2002).

Petitioner more broadly asserts (Pet. 17-18) that general "uncertainty in this area" warrants this Court's intervention. But, as discussed above, he identifies no sound basis for concluding that any court would be confused about whether a constructive amendment occurred here. In any event, although not every circuit may articulate the constructive-amendment standard in precisely the same way, they all agree that not every divergence between allegations and proof is a constructive amendment; that the question is one of degree; and that a constructive amendment occurs only when the circumstances permit conviction on a significantly different set of facts or for a different offense.[2]

[2] See, e.g., Pet. App. A4 (stating that "[i]ndictments set the outer bounds of conduct for which the defendant can be convicted" and that "if an indictment specifies that the defendant committed a particular offense in a particular time or place, he cannot be convicted based on evidence that he committed a different offense at a different time or place"; United States v. Haldorson, 941 F.3d 284, 297 (7th Cir. 2019) (explaining that constructive amendment "occurs when either the government * * * , the court * * * , or both, broadens the possible bases for conviction beyond those presented by the grand jury"), cert. denied, 140 S. Ct. 1235 (2020); Farr, 536 F.3d at 1180 (explaining that "[i]n assessing a claim of an impermissible constructive amendment, our ultimate inquiry is whether the crime for which the defendant was convicted at trial was charged in the indictment" and "to decide that question, we therefore compare the indictment with the district court proceedings to discern if those proceedings broadened the possible bases for conviction beyond those found in the operative charging document"); United States v. Burfoot, 899 F.3d 326, 338 (4th Cir. 2018) (explaining that constructive amendment occurs "when the court 'broadens the possible bases for conviction beyond those presented by the grand jury,'" or, "[i]n other words, * * * when the indictment is effectively altered 'to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment'") (citations omitted); United States v. Centeno, 793 F.3d 378, 389-390 (3d Cir. 2015) (explaining that constructive amendment occurs

Slight variations in how the circuits phrase their constructive-amendment analysis do not suggest any meaningful differences in the application of that analysis, or justify review by this Court in this case. See Black v. Cutter Labs., 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

MATTHEW R. GALEOTTI
Acting Assistant
Attorney General

ANDREW W. LAING
Attorney

NOVEMBER 2025

---

when "the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged"); United States v. Madden, 733 F.3d 1314, 1318 (11th Cir. 2013) ("A constructive amendment 'occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment.'").