No. _____

In the Supreme Court of the United States

BRANDON PRAWL, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The Petitioner, Brandon Prawl, was indicted for one crime but convicted of a different crime and sentenced to a consecutive 60-month prison term. Does this contravene Prawl's Fifth and Sixth Amendment rights, and run afoul of this Court's constructive-amendment jurisprudence?

Related Proceedings

United States v. Prawl, 1:20-cr-334-1 (N.D.N.Y.)

United States v. Prawl, 23-6313(L), 25-400(con), 23-6314(con), 149 F.4th 176 (2d Cir. 2025)

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Petition for a Writ of Certiorari

Mr. Brandon Prawl petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit.

Opinion Below

The Second Circuit's decision is published and can be found at *United States v. Prawl*, 149 F.4th 176 (2d Cir. 2025).

Judgment

The Second Circuit's opinion issued on August 18, 2025. On September 16, 2025, the Second Circuit appointed new counsel and sua sponte granted a 30-day extension of time to file a petition for panel rehearing or rehearing en banc. On November 4, 2025, the court granted an additional extension of time to December 3, 2025, to file a petition for rehearing en banc. On November 21, 2025, Prawl timely filed a petition for rehearing. On December 16, 2025, the Second Circuit denied Prawl's petition for panel rehearing or, in the alternative, for rehearing en banc. On December 30, 2025, the Judgment Mandate issued. This petition for certiorari is timely filed. This Court has jurisdiction. 28 U.S.C. § 1254(1).

Relevant Law

U.S. Const. amend. V

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const amend. VI

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement of the Case

I. Proceedings in the District Court

Prawl sold heroin to an undercover agent four times in September 2019. *Prawl*, 149 F.4th at 182. For this, he was charged with four counts of narcotics distribution (Counts 1 through 4). *Id.* The undercover agent never saw Prawl with a firearm during any of these transactions, nor had he received any information that Prawl possessed a firearm. *Id.* at 181.

When the police raided Prawl's apartment in October 2019, they found drugs and a firearm. *Id.* Prawl was charged with possession-with-intent-to-distribute narcotics (Count 6) and possession of a firearm in furtherance of narcotics distribution (Count 5). *Id.* at 182.

The government never proved that Prawl possessed a firearm in furtherance of narcotics *distribution*, which is what Count 5 alleged.[1] Instead, the government proved that Prawl possessed a firearm in furtherance of *possession-with-intent-to-distribute* narcotics, a crime that was never charged. *Id.* at 184-86.

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[1] Count 5 alleged that Prawl possessed a firearm "[o]n or about October 4, 2019,… in furtherance of a drug trafficking crime for which he may be prosecuted…, that is Distribution of a Controlled Substance…." *Id.* at 182.

Even though the indictment specified narcotics *distribution* as the predicate offense, the district court instructed the jurors that they could convict Prawl on Count 5 if he possessed a firearm in furtherance of *possession-with-intent-to-distribute*. *Id.* at 182.[2]

II. Proceedings in the Second Circuit

The panel affirmed Prawl's conviction and consecutive 60-month prison sentence on Count 5. *Id.* at 181-82. Because Prawl failed to object to the jury instructions, and he did not assign error to the indictment issue in his appellant's brief or reply brief, the panel concluded that even if that claim "had not been abandoned, it would have failed on plain error review." *Id.* at 188.[3] Citing the four-prong test for plain error review, the

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[2] The district court instructed the jury to convict Prawl on Count 5 if it found that Prawl "committed a drug trafficking crime…, specifically, the crime charged in Count 6 of the indictment" and he "knowingly possessed the charged firearm in furtherance of the drug trafficking crime charged in Count 6 of the indictment." *Prawl*, 149 F.4th at 182. Count 6 alleged possession-with-intent-to-distribute narcotics. *Id.*

[3] The district court, the government, and defense counsel, all acting in good faith, ignored the discrepancy between the indictment and the instructions. There is no reason to suspect that the government perceived its error and sat silent. Mistakes were made all around. To say, as the panel did, that Prawl "abandoned" his Fifth and Sixth Amendment rights because he raised the constructive amendment issue only in a supplemental brief, *Prawl*, 149 F.4th at 187, elevates inconsequential proceduralism over Prawl's constitutional rights, including his Sixth

panel explained: "[W]e decline to determine whether the district court erred under the first prong, because, under the second prong, any error could not have been clear or obvious in light of our jurisprudence." *Id.* at 188 (citing *United States v. Bastian*, 770 F.3d 212, 219-20 (2d Cir. 2014)).

This Court elaborated:

> The operative legal question here is one of first impression for this court: whether a § 924(c)(1)(A) indictment that specifies which trafficking offense the defendant's firearm possession furthered is constructively amended when the defendant is convicted for possession in furtherance of a different trafficking predicate charged elsewhere in the indictment. *Other circuits have found a constructive amendment on similar facts. But even if we were to agree with these circuits, this conclusion is far from certain under our constructive amendment caselaw*, meaning that any error cannot be so egregious and obvious as to warrant a finding of plain error in the absence of controlling precedent.

Id. at 188-89 (emphasis added; internal citation omitted).

The panel acknowledged that the Second Circuit has "used different approaches" to determine whether an indictment was constructively amended, and thus, its decisions "sometimes appear to reach divergent results." *Id.* at 189 (citing *United States v. Milstein*, 401 F.3d 53, 65 (2d

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Amendment rights under *Strickland v. Washington*, 466 U.S. 668 (1984). Respectfully, this portion of the panel opinion is deeply unfair.

Cir. 2005) (per curiam)). One test asks whether the defendant was given notice of the core of criminality to be proven at trial, or whether there was evidence that the defendant was surprised. *Id.* at 189 (citing *United States v. D'Amelio*, 683 F.3d 412, 417 (2d Cir. 2012) and *United States v. Wozniak*, 126 F.3d 105, 111 (2d Cir. 1997)). A different analysis asks whether the conviction "rests on a different legal theory of liability than that charged in the indictment." *Id.* at 189 (citing *Milstein*, 401 F.3d at 64-65)).

Applying those metrics, the panel reasoned that:

> Count 5 charged Prawl under § 924(c) with possessing a firearm on October 4, 2019 in furtherance of heroin sales occurring on September 5, 9, 11, and 30, 2019, while the evidence and jury charge led to Prawl's conviction for possessing a firearm on October 4 in furtherance of his possession of heroin found near the gun on the same day. … [B]oth the indictment and the jury charge made clear that the most important aspect of Prawl's § 924(c) offense – his gun possession – occurred on October 4, so even if there were error, that error was not egregious and obvious.

Id. at 189.

The panel also found "no indication that Prawl was surprised by the discrepancy between the § 924(c) predicate charged in the indictment and the one specified in the evidence and jury instruction." *Id.* The panel found it notable that defense counsel proposed a jury charge that

"anticipated the government's reliance on Count 6 as the relevant trafficking predicate." *Id.* at 190.

The panel reached this conclusion even though it found "no reason to suspect a strategic motive behind Prawl's failure to raise the question before the district court," *id.* at 188 n. 5, and even though it rightly acknowledged that "constructive amendments are per se prejudicial even in the context of plain error review, thus automatically satisfying the third prong [of obvious error review]," *id.* at 188.

The Second Circuit summarily denied Prawl's petition for panel rehearing or, in the alternative, for rehearing *en banc*, saying: "The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*. It is hereby ordered that the petition is denied." *See* Appendix B.

Reasons for Granting the Writ

I. Prawl was convicted of a crime for which he was not charged.

For purposes of § 924(c)(1), the predicate offense is an element of the crime. *See e.g. United States v. Laurent*, 33 F.4th 63, 86 (2d Cir. 2022). The predicates at issue here – narcotics distribution and

possession-with-intent-to-distribute narcotics – are themselves different crimes. *United States v. Gore*, 154 F.3d 34, 45-46 (2d Cir. 1998). Thus, possession of a firearm in furtherance of narcotics distribution is a different crime than possession of a firearm in furtherance of possession-with-intent-to-distribute narcotics.[4]

Prawl was charged with possession of a firearm in furtherance of narcotics distribution. He was convicted of possession of a firearm in furtherance of possession-with-intent-to-distribute narcotics. Prawl was convicted of a crime for which he was not charged.

II. The verdict on Count 5 obviously violates Prawl's Fifth and Sixth Amendment rights.

The Fifth Amendment's right to proceed only on felony charges found by a grand jury, and the Sixth Amendment's notice requirement and protection against double-jeopardy were violated by the District Court's constructive amendment in Prawl's case. *Bastian*, 770 F.3d at

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[4] As the Second Circuit correctly explained in *Gore*, 154 F.3d at 45, "the possession with intent charge can be proved without proof of actual distribution and the distribution charge can conceivably be proved without proof of possession, which would satisfy the *Blockburger* test because each clause requires proof of a fact which the other does not." (cleaned up; citing to *United States v. Blockburger*, 284 U.S. 299, 304 (1932)).

217 ("The right to indictment…simultaneously protects a defendant's ability to prepare his defense and safeguards him from facing double jeopardy for a single crime.").

The Second Circuit's decision is wrong under this Court's caselaw. In *Stirone v. United States*, 361 U.S. 212, 213 (1960), the indictment alleged that interstate commerce was burdened by the importation of sand, in violation of the Hobb's Act. The petit jury was instructed, however, that it could convict if commerce was burdened either by the import of sand or the export of steel. *Id.* at 214. This Court held that this discrepancy "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury," and that the "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless." *Id.* at 217. This Court explained that this was so even though the government was not required to specify a Hobb's Act predicate in the indictment; indeed, the indictment could have been "drawn in general terms" without specifying the particular type of commerce that was burdened. *Id.* at 218. However, once the grand jury specified the particular type of commerce burdened, the petit jurors were not allowed

to rely on proof that another type of commerce was burdened. *Id.* ("It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might result upon a showing that commerce of one kind or another had been burdened.").

The Second Circuit's decision is wrong under long-standing Second Circuit caselaw. *But see Prawl*, 149 F.4th at 188 ("any error could not have been clear or obvious under our jurisprudence."). As the Second Circuit has instructed, it is a "clear" and "fundamental principle" that "[w]hen trial evidence or the jury charge operates to 'broaden the possible bases for conviction from that which appeared in the indictment,' the indictment has been constructively amended." *Milstein*, 401 F.3d at 65 (quoting *United States v. Miller*, 471 U.S. 130, 138 (1985)).

"To prevail on constructive amendment claim, a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct

that was the subject of the grand jury's indictment." *Milstein*, 401 F.3d at 65 (citing *United States v. Frank*, 156 F.3d 332, 337 (2d Cir. 1998)).

The error in Prawl's case is abundantly clear and obvious. He was convicted of a crime for which he was never indicted. This plainly contravenes the corpus of constructive-amendment jurisprudence. A defendant may not be "convicted on a charge that the grand jury never made against him." *Milstein*, 401 F.3d at 65 (quoting *Stirone*, 361 U.S. at 219). This is a "settled rule in the federal courts." *Russell v. United States*, 369 U.S. 749, 770 (1962); *Milstein*, 401 F.3d at 65 ("Constructive amendment is a *per se* violation of the Fifth Amendment.").

If there is no constructive amendment error in this case, where the defendant is convicted of a crime for which he was not charged, then no court will ever find circumstances under which an indictment is amended.

Contrary to the panel's suggestion, the congruence of dates, but not crimes, will not save Prawl's conviction. *Prawl*, 149 F.4th at 189.[5] The

[5] The panel wrote: "[B]oth the indictment and jury charge made clear that the most important aspect of Prawl's § 924(c) offense – his gun possession – occurred on October 4, so even if there were error, that error was not egregious and obvious." *Prawl*, 149 F.4th at 189.

date alleged in the indictment does not license the petit jury to find the defendant guilty of *any* crime that might have occurred that day. If the indictment alleged possession of a firearm in furtherance of murder on October 4, 2019, the petit jury could not convict for possession of a firearm in furtherance of sexual assault on October 4, 2019. Such a broadening of the indictment would plainly violate *Stirone*'s admonishment that a defendant may not be "convicted on a charge that the grand jury never made against him." *Stirone*, 361 U.S. at 219. Such is a "fatal error." *Id.* So, too, for Prawl.

Nor is there any doubt that Prawl was harmed. *But see Stirone*, 361 U.S. at 215 (Deprivation of the substantial right to be tried only on charges presented by the grand jury "is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."); *Bastian*, 770 F.3d at 220 n. 4 (collecting cases in support of the rule that "constructive amendments are *per se* violations of the Fifth Amendment that require reversal even without a showing of prejudice."). Prawl was sentenced to a consecutive 60-month prison term for a charge that the grand jury never brought.

III. As the panel acknowledged, other federal appellate courts have found error in analogous cases.

Other federal courts have found error where the indictment alleged a violation of 18 U.S.C. § 924(c)(1) based on a particular predicate narcotics offense, but the defendant was convicted based on a different predicate narcotics offense.

In *United States v. Randall*, 171 F.3d 195, 198 (4th Cir. 1999), the indictment alleged a § 924(c)(1) violation based on distribution, but the jury instructions permitted a conviction based on possession-with-intent-to-distribute. The Fourth Circuit explained that "proof of a predicate offense is an essential element of a § 924(c) offense," and "if the government specifies in the indictment a particular type of § 924(c) predicate offense, *e.g.* distribution, the government is required to prove the essential elements of the predicate offense (or, at a minimum, a lesser included offense of the predicate offense.)." *Id.* at 205, 208-9. This is true even though the government is under no obligation to specify a predicate offense in a § 924(c) charge. *Id.* at 208. The court also observed that "possession with intent to distribute and distribution are necessarily two different offenses." *Id.* at 209. The court concluded:

> [T]he district court was not allowed through its jury instructions, to broaden the bases of conviction to include the different § 924(c) predicate offense of possession with intent to distribute. *Such a constructive amendment must be corrected on appeal, even though [both defendants] failed to preserve the issue by objection.*

Id. at 210 (internal citation omitted; emphasis added).

In *United States v. Reyes*, 102 F.3d 1361, 1364 (5th Cir. 1996), the indictment alleged a § 924(c)(1) violation based on possession-with-intent-to-distribute narcotics, but the jury instructions permitted a conviction based on conspiracy to possess-with-intent-to-distribute narcotics. The Fifth Circuit concluded that "a predicate offense is an essential element of a conviction under § 924(c)(1)." *Id.* at 1365. The court also acknowledged that "a conspiracy to possess with the intent to distribute marijuana has different elements than does the substantive offense of possession with the intent to distribute." *Id.* at 1365. Thus, the court concluded that "the district court constructively amended the indictment by modifying an essential element of the charged offense when it instructed the jury that it could convict Reyes under § 924(c)(1) based upon proof that he was guilty of a conspiracy rather than a substantive offense." *Id.* However, due to highly fact-bound and

"unusual circumstances presented by [the] case," the Court decided to affirm Reyes's conviction. *Id.* at 1366.

In *United States v. Willoughby*, 27 F.3d 263, 265-66 (7th Cir. 1994), the indictment alleged a § 924(c)(1) violation based on distribution, but the court entered a conviction based on possession-with-intent-to-distribute. The Seventh Circuit observed that "even if an adequate § 924(c) charge need not indicate by name a particular drug trafficking offense…the government narrowed the legitimate scope of the weapons charge to Willoughby's use of a firearm in connection with the distribution of cocaine, not the mere possession with intent to distribute cocaine or 'drug trafficking' generally." *Id.* at 266. Thus, "[a] conviction relying upon a link between the gun and the latter described conduct would constitute an impermissible broadening of the indictment, for its basis was necessarily excluded from the charge as phrased." *Id.* The problem was "more than a simple matter of semantics unrelated to the substance of the offense charged" because "[d]istribution and possession with intent to distribute are two separate trafficking offenses, two separate crimes…." *Id.* The court vacated Willoughby's conviction because it fell "outside the scope of the indictment." *Id.* at 267.

Likewise, in *United States v. Ramirez*, 182 F.3d 544, 546 (7th Cir. 1999), the government confessed error because the indictment charged a § 924(c)(1) violation based on distribution, but the jury instructions permitted a conviction based on conspiring to possess or possessing-with-intent-to-distribute. The defendant failed to object, and the Seventh Circuit observed that "[a] constructive amendment will rise to the level of plain error justifying reversal when it amounts to a mistake so serious that but for it the defendant probably would have been acquitted." *Id.* at 547 (internal citation omitted). Because there was no evidence in the record to support the crime as charged, the court concluded, "[w]e believe that the error at issue here is of that gravity." *Id.* The court vacated the defendants' convictions. *Id.* at 548. So, too, for Prawl. Because the government never attempted to prove that Prawl possessed a firearm in furtherance of narcotics distribution, there is no evidence on this record to support that charge.

Conclusion

Certiorari is appropriate to realign the panel decision with controlling Supreme Court caselaw, and to undo the division that the panel decision has caused among the federal appellate courts. The

district court clearly and egregiously errs by entering a conviction for a crime that was never charged, and for which the government presented no proof, and respectfully, the Second Circuit erred by failing to say so.

Respectfully submitted,

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