No. 07-471

IN THE
Supreme Court of the United States

TRACY RATLIFF-WHITE,

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 TO BRIEF IN OPPOSITION

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INTRODUCTION

The Government's brief in opposition only underscores that a grant of certiorari is warranted here. On the first issue, the Government essentially concedes—as it must—a conflict between the First and Seventh Circuits, on the one hand, and the Eleventh Circuit, on the other, with respect to whether a defendant may be convicted under the wire-fraud statute on the ground that she reasonably could have foreseen that a fraud would involve a wire transmission *other* than one charged in the indictment. *Compare* Pet. App. 9-11a (decision below) *and United States v. Pimental*, 380 F.3d 575, 589-90 & n.7 (1st Cir. 2004) *with United States v. Smith*, 934 F.2d 270, 272-73 (11th Cir. 1991). And on the second issue, the Government essentially concedes—again, as it must—that the current distinction between a variance (which is subject to harmless-error review) and a constructive amendment (which is not) is unsound in theory and unworkable in practice. Given that, as the Seventh Circuit acknowledged below, the distinction between these two categories is at best "shadowy," Pet. App. 14a (internal quotation omitted), it makes little sense to have that distinction lead to such a sharp difference in result. Accordingly, this Court's review is warranted on both issues presented in the petition.

REASONS FOR GRANTING THE WRIT

I. The Foreseeability Issue

The Government cannot, and does not, dispute that the indictment here charged petitioner with knowingly causing two specific wire transmissions, but the prosecution failed to prove at trial that she knowingly caused either transmission. *See* Pet. App.

9a; Reply App. 1-2a. Rather, the Government insists, as did the Seventh Circuit below, that caselaw interpreting the wire-fraud statute "'does not require that a specific … wire transmission be foreseen." Opp. 11 (quoting Pet. App. 9-10a). With all respect, that argument misses the mark.

This case does not present the issue whether the Government must charge a defendant with knowingly causing a specific wire transmission. Rather, this case presents the issue whether the Government must prove that a defendant knowingly caused a specific wire transmission *where the indictment charges the defendant with knowingly causing that transmission.* An indictment, after all, serves to give the defendant notice of what the Government intends to prove at trial, and the defendant is entitled to prepare her defense by reference to the offense charged in the indictment. *See, e.g.*, *United States v. Miller*, 471 U.S. 130, 135 (1985). In addition, an indictment reflects a grand jury's judgment as to the offense for which criminal prosecution is warranted, and a defendant is entitled to be tried only for crimes for which a grand jury has indicted her. *See, e.g.*, *United States v. Stirone*, 361 U.S. 212, 217-18 (1960). Thus, where an indictment charges a defendant with knowingly causing a specific wire transmission, the Government bears the burden of proving that the defendant in fact knowingly caused that specific transmission.

Indeed, that is the precise lesson of the Eleventh Circuit's *Smith* decision. That decision held that "the government was required *by the narrowly drawn indictment* to show that mailings of accounting drafts were reasonably foreseeable, and it

did not," and so the court reversed the defendant's convictions. 934 F.2d at 273 (emphasis added). The Government concedes (with considerable understatement) that there is "some tension" between the Seventh Circuit's decision below and *Smith*, Opp. 12, 13, but tries to distinguish *Smith* on three grounds. None of those grounds is persuasive.

First, the Government argues that "the portion of *Smith* on which petitioner relies was an alternative holding at best." Opp. 13. But an alternative holding is still a holding: it sets the law of the circuit, and is binding on future panels. *See, e.g.*, *Jordan v. Secretary, Dep't of Corrections*, 485 F.3d 1351, 1356 (11th Cir. 2007) ("'[W]e are bound by alternative holdings.'") (quoting *Johnson v. DeSoto County Bd. Comm'rs*, 72 F.3d 1556, 1562 (11th Cir. 1996)). Because the Eleventh Circuit affords no legal significance to any distinction between a holding and an alternative holding, it is meaningless for the Government to characterize the relevant holding of *Smith* as an "alternative holding."

Second, the Government argues that "[h]ere, in contrast [to *Smith*], the court held that wire transfers were reasonably foreseeable in the execution of petitioner's scheme not simply because large organizations (like the VA) use the wires, but because petitioner's scheme entailed the use of electronic transmissions to make payments into her account." Opp. 13; *see also id.* at 13-14 ("The use of the wires was … integral to petitioner's scheme."). But *Smith* in no way turned on the nature of the specific transmissions alleged in the indictment. Rather, by its plain terms, *Smith* turned on the simple point that the Government must prove the

specific transmissions alleged in the indictment, not other transmissions. *See* 934 F.2d at 273. In *Smith*, as here, the indictment charged obscure transmissions that would not be foreseeable to reasonable people, and in both cases the Government failed to prove at trial that those transmissions were nonetheless foreseeable to the defendant. *See id.*; *see also* Pet. App. 9-11a; Reply App. 1-2a. The Eleventh Circuit, however, reversed the conviction in *Smith* on this ground, *see* 934 F.2d at 273, whereas here the Seventh Circuit affirmed petitioner's conviction, *see* Pet. App. 9-11a.

Third, the Government argues that "unlike in *Smith*, the very transaction that involved use of the wires, as proved at trial, *was* alleged in the indictment." Opp. 14 (emphasis in original); *see also id.* ("'The indictment expressly references the wire transmissions proved at trial.'") (quoting Pet. App. 17-18a; brackets omitted). That argument is disingenuous at best. The indictment here charged petitioner with "knowingly caus[ing] to be transmitted in interstate commerce" two very specific "wire communication[s]" in violation of 18 U.S.C. § 1343: [1] "payment instructions for $22,470 … from the United States Department of the Treasury, Hyattsville, Maryland to the Federal Reserve Bank in Dallas, Texas," and [2] "payment instructions for $9,150 … from the United States Department of the Treasury, Hyattsville, Maryland to the Federal Reserve Bank in Dallas, Texas." App. 36a. Accordingly, the grand jury decided that these were the two wire transmissions that warranted prosecution, and petitioner was on notice that these were the two wire transmissions against which she had to defend herself at trial. In no way, shape, or

form did the indictment put petitioner on notice that she had to defend herself against *other* wire transmissions—even other wire transmissions elsewhere referenced in the indictment—at trial. Indeed, the Government openly acknowledged below that the indictment charged petitioner *only* with knowingly causing internal Government wire transmissions, rather than any wire transmission from the Government's accounts to her bank. *See* Reply App. 1-2a.[1]

Given the Government's inability to draw any meaningful distinction between the decision below and *Smith*, it is not surprising that the First Circuit acknowledged in *Pimental* (upon which the Seventh Circuit relied below, *see* Pet. App. 10a) that "*Smith* … is indeed in tension with our analysis," and to that extent "reject[ed] its approach." 380 F.3d at 590 n.7. Given the central role of the wire-fraud and

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[1] In addition, contrary to the Government's suggestion, it does not matter whether the wire transmissions charged in the indictment are "closely related" to the wire transmissions proved at trial. Opp. 14. "Closely related," like "close enough for government work," is not the relevant legal standard, which may explain why neither the court below nor the *Smith* court endorsed any such standard in this context. In any event, there is absolutely nothing in the record to suggest that the internal Government transmissions charged in this case are "closely related" to any transmission from the Government to petitioner's bank; indeed, as noted in the petition, it appears that at least one of the internal Government transmissions charged never occurred at all. *See* Pet. 10-11. The bottom line here is that the indictment did not charge petitioner with knowingly causing a transmission from the Government's accounts to her bank, *see* Reply App. 1-2a, and the Government is bound by the indictment.

mail-fraud statutes in the federal criminal justice system, it is neither necessary nor appropriate for this Court to allow this acknowledged conflict to fester. Although the Government understandably wishes to protect its victory below, criminal defendants, prosecutors, and the lower courts should know whether the Government must prove that a defendant reasonably foresaw the particular wire transmission or mailing alleged in an indictment, or whether the Government may obtain a conviction based on *other* wire transmissions or mailings. Accordingly, this Court should grant certiorari to resolve that conflict.

II. The Variance/Constructive Amendment Issue

In addition, the Government cannot, and does not, dispute that it is untenable for the application of harmless-error analysis to turn on whether a divergence between an indictment and the proof at trial is labeled a "variance" or a "constructive amendment." *See* Opp. 20-22. Indeed, the decision below perfectly illustrates the point: the Seventh Circuit struggled to articulate a principled distinction between those two categories, and ultimately proved unable to do so. Thus, the Seventh Circuit simply wound up comparing this case to a recent Second Circuit case, *United States v. Dupre*, 462 F.3d 131 (2d Cir. 2006), and declared that if *Dupre* fell on the variance side of the line, then this case must too. *See* Pet. App. 15-23a.

The Government now tries to reconcile the welter of lower-court cases in this area, and argues that "the circuits generally apply the same standard" to distinguish between a variance and a constructive

amendment. Opp. 15-16. As noted in the petition, however, the circuits have repeatedly cried out for help in articulating and applying that very distinction. *See* Pet. 23 (citing cases stating that "it is far from clear what distinguishes a permissible variance … from an impermissible constructive amendment," and calling that distinction "shadowy," "sketchy," "blurred," and "confus[ing]").

Indeed, the decision below is nothing if not a cry for help in this area. As the Seventh Circuit explained, the distinction between a variance and a constructive amendment, although "shadowy" in principle, "achieves a crystal clear difference in result": a variance is subject to harmless-error review whereas a constructive amendment is not. Pet. App. 14a (internal quotation omitted). That situation is untenable: either the distinction should be clarified, or the consequences of the distinction should be rationalized. It makes no sense to have a distinction that is at best "shadowy" lead to a dramatic difference in result.

The Government not only does not deny this point; the Government affirmatively endorses it. In particular, the Government argues that any attempt to distinguish between a variance and a constructive amendment is misguided because "even assuming, *arguendo*, that an error occurred, it should be found harmless whether that error is characterized as a 'constructive amendment' or a 'variance.'" Opp. 20. In other words, according to the Government, *any* divergence between an indictment and the facts proved at trial should be subject to harmless-error review. *See id.* at 21 ("[H]armless-error analysis should be applied to *any* error resulting from a

divergence between the facts specified in the indictment and the facts presented by the government at trial.") (emphasis added).

In essence, the Government invites this Court to overrule its decision in *Stirone*. "To the extent that lower courts have held that a 'constructive amendment' is not amenable to harmless-error analysis, they have relied principally on this Court's decision in *Stirone* …, which held that automatic reversal was warranted when the government proved an element at trial based on a factual theory that deviated from the factual theory advanced in the indictment." Opp. 20-21. But *Stirone*, in the Government's view, is a relic of a bygone era "before this Court's comprehensive adoption of constitutional harmless-error analysis in *Chapman v. California*, 386 U.S. 18, 22 (1967)." *Id.* at 21. "Because *Stirone* was decided in an era in which constitutional errors generally required per se reversal, that decision does not control the analysis in this case." *Id.*

Needless to say, the question whether *Stirone* should be overruled warrants this Court's review. Indeed, *only* this Court is in a position to address that question, because *only* this Court has the power to decide *Stirone*'s fate. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Exp.*, 490 U.S. 477, 484 (1989). Wholly aside from the merits, thus, the brief in opposition only confirms that this Court's review is warranted.

And on the merits, the problem for the Government is that, even in the post-*Chapman* world, not all constitutional errors are subject to harmless-error review. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 306-12 (1991)

(distinguishing between "trial" errors, which generally are subject to harmless-error review, and "structural" errors, which are not). Contrary to the Government's suggestion, the violation of a criminal defendant's constitutional rights not to be tried "unless on a presentation or indictment of a Grand Jury," U.S. Const. amend. V, and "to be informed of the nature and cause of the accusation," U.S. Const. amend. VI, is a structural error impervious to harmless-error review. Given that the whole point of those rights is to allow a defendant to prepare her defense by reference to the charges approved by a grand jury in an indictment, the harm from a violation of those rights cannot be isolated or quantified. It is not a mere "trial error," like the erroneous admission or exclusion of a particular piece of evidence or an improper instruction, the impact of which "may …be quantitatively assessed" in the overall context of the trial. *Fulminante*, 499 U.S. at 307-08. Rather, by its very nature, such an error "affect[s] the framework within the trial proceeds," and is not "simply an error in the trial process itself." *Id.* at 310.

Thus, while petitioner agrees with the Government that the current distinction between a permissible variance and an impermissible constructive amendment is untenable, petitioner respectfully submits that the Government draws precisely the wrong conclusion. Rather than overruling *Stirone*, this Court should reaffirm that decision, and repudiate the many lower-court decisions (like the decision below) that have chipped away at that case by characterizing divergences between the charges in an indictment and the proof at trial as mere harmless variances.

Indeed, if anything, this case proves how far the lower courts have strayed from *Stirone*, not to mention that decision's constitutional underpinnings in the Fifth and Sixth Amendments. The Seventh Circuit affirmed petitioner's conviction with respect to one count of wire fraud even while conceding that the wire transmission charged in the indictment as the basis for that count never occurred. *See* Pet. App. 11-23a. It is hard to think of a more striking example of an error in derogation of a defendant's constitutional rights not to be tried "unless on a presentation or indictment of a Grand Jury," and "to be informed of the nature and cause of the accusation" against her. U.S. Const. amends. V, VI. Petitioner was entitled to defend herself at trial by proving that the wire transmission charged by the grand jury in Count I of the indictment never occurred, and in fact did so. Yet the Government nonetheless obtained a conviction on that count based on a *different* wire transmission, and the Seventh Circuit affirmed that conviction by dismissing the error as a harmless variance. Putting aside all labels, that cannot be the law.[2]

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[2] The Government inexplicably contends that the "entire" petition is devoted to the question whether there was any constitutional error, and that "petitioner does not address whether any error that occurred would be amenable to harmless-error analysis." Opp. 21. To the contrary, petitioner explained that the whole point of the current distinction between a variance and a constructive amendment is that "whereas a variance is generally permissible absent proof of prejudice to the defendant, a constructive amendment is *per se* prejudicial and hence categorically impermissible." Pet. 23. Indeed, the whole point of the second question presented in the petition is that the Seventh Circuit erred by dismissing the

The lower courts' inability to articulate and apply a principled and consistent distinction between a variance and a constructive amendment, *see* Pet. 22-27, only underscores the fundamental instability underlying this area of the law. Either *Stirone* means what it says, and the Government may not obtain a conviction based on facts different from those alleged in the indictment, or *Stirone* must go. Regardless of how that issue is ultimately resolved, it is an issue that warrants this Court's review. Accordingly, this Court should grant certiorari to resolve this issue too.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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divergence between the charges in the indictment and the proof at trial as a harmless error. *See id.* at i, 23, 26-30.

REPLY APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	No. 04 CR 10-1
v	)	
	)	Chicago, Illinois
TRACY RATLIFF-WHITE,	)	Sept. 9, 2005
	)	9:30 a.m.
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
[EXCERPTS, PP. 572-73, 578-79]

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THE COURT: Where was there evidence that [Ratliff-White] would understood about the wire transfers?

MR. YOUNG [Assistant U.S. Attorney]: Ms. Norwood testified that they went to the bank because they understood they had to receive the payments by direct deposit.

THE COURT: But that's not the charge. You could have charged that. Actually, I didn't understand why you didn't charge that.

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THE COURT: Why didn't you charge the actual transfer of the funds from [the Government's account in] Dallas to [petitioner's bank in] Minneapolis?

MR. YOUNG: Your Honor, we decided to charge this transaction [*i.e.*, the internal transfer of funds between Government accounts prior to the transfer of funds from the Government's account in Dallas to petitioner's bank in Minneapolis].

THE COURT: I understand that, that's the transaction that's charged, you have decided to charge, but it would seem to me it would be more foreseeable for her to understand that the funds would be coming into the TCF Bank headquarters [in Minneapolis]. She has got—if there was knowledge on her part that TCF is actually short for Twin Cities Financial, which was the name of it before it became TCF when it branched out and came to Illinois and started setting up in Jewel stores, if there was that knowledge, then she would think okay, something is going to happen—it would be foreseeable to her that something may happen up in Minneapolis, the headquarters of Twin Cities Financial, that will affect this little small space of bank in the front of the Jewel store in Aurora. But you didn't charge that transaction. And so my question was why did not—why didn't you charge that transaction? That, it would seem to me, would be more reasonably foreseeable to her.

MR. YOUNG: Your Honor, this [internal Government transfer of funds] was the first, we believed this to be the first transaction processed and we thought this was the most appropriate wire to charge and we thought it was equally foreseeable as with the deposit or the transfer to TCF Bank, ACH Minneapolis.