No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred, and deepened a circuit conflict, by holding that the Government may obtain a conviction under the federal wire fraud statute by proving that a defendant reasonably could have foreseen that a fraud would involve a wire transmission *other* than one charged in the indictment.

2. Whether the Seventh Circuit erred, and deepened a circuit conflict, by holding that the Government may obtain a conviction under the federal wire fraud statute by proving that a defendant caused a wire transmission *other* than one charged in the indictment.

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INTRODUCTION

The federal wire and mail fraud statutes are among the most formidable (and often-used) weapons in a federal prosecutor's arsenal. In light of the pervasive nature of wire and mail communications in our modern society, those statutes allow prosecutors to characterize virtually any fraudulent course of conduct as a federal crime.

Precisely because of the extraordinary breadth of the federal mail and wire fraud statutes, courts must be especially vigilant to ensure that the Government turns square corners when relying on them. The decision below, however, shows no such vigilance. To the contrary, the Seventh Circuit affirmed petitioner's convictions on two counts of wire fraud even though (1) the Government did not prove that petitioner reasonably could have foreseen the particular wire transmissions charged in either count of the superseding indictment, and (2) the Government failed to prove that the particular wire transmission alleged in one of the counts ever took place. The court erred, and deepened circuit conflicts, on both scores.

First, the Seventh Circuit erred, and deepened a circuit conflict, by holding that the Government may obtain a conviction under the federal wire fraud statute by proving that a defendant reasonably could have foreseen that a fraud would involve a wire transmission *other* than one charged in the indictment. The whole point of an indictment is to put the defendant on notice of the charges against her, and she is entitled to defend herself by challenging the specific conduct charged in the indictment. The Government has discretion to

choose the predicate acts charged in an indictment, but once the Government has made that choice, it must live with it. Although the Eleventh Circuit has made precisely that point in the specific context of the federal wire and mail fraud statutes, *see United States v. Smith*, 934 F.2d 270, 272-73 (11th Cir. 1991), the First Circuit has rejected the Eleventh Circuit's analysis in the same context, *United States v. Pimental*, 380 F.3d 575, 589-90 & n.7 (1st Cir. 2004), and the Seventh Circuit in this case followed the First Circuit.

Second, the Seventh Circuit erred, and deepened a circuit conflict, by holding that the Government may obtain a conviction under the federal wire fraud statute by proving that the defendant caused a wire transmission *other* than one charged in the indictment. Again, the whole point of an indictment is to put the defendant on notice of the charges against her, and she is entitled to defend herself by challenging the specific conduct charged in the indictment. And again, the Government has discretion to choose the particular predicate acts charged in an indictment, but once the Government has made that choice, it must live with it. To be sure, a minor variance between the conduct charged in the indictment and the facts proved at trial does not warrant reversal. But the federal courts of appeals are divided on the proper standard for distinguishing between a permissible variance and an impermissible constructive amendment of an indictment. At least five Circuits—the Third, Fourth, Fifth, Sixth, and Eleventh—apply an "essential elements" test whereby the Government may not prove an essential element of a crime (like the defendant's causation of a particular wire

transmission) by reference to facts different than those charged in the indictment. *See, e.g.*, *United States v. Chambers*, 408 F.3d 237, 240-47 (5th Cir. 2005); *United States v. Randall*, 171 F.3d 195, 203-10 (4th Cir. 1999); *United States v. Keller*, 916 F.2d 628, 632-36 (11th Cir. 1990); *United States v. Ford*, 872 F.2d 1231, 1234-37 (6th Cir. 1989); *United States v. Crocker*, 568 F.2d 1049, 1060 (3d Cir. 1977). The Seventh and Ninth Circuits, in contrast, apply a far looser standard whereby the Government may prove an essential element of a crime (like causation of a particular wire transmission) by reference to facts different than those charged in the indictment as long as either (1) the facts proved at trial are not "distinctly" different from those set forth in the indictment, or (2) the crime charged in the indictment was not "substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (internal quotation omitted); *see also United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985); App. 13-14a.

At the end of the day, this case is about fundamental fairness in our criminal justice system. An indictment is not a hollow formality; it serves the vital constitutional function of allowing a criminal defendant meaningfully to prepare for trial—especially when charged under a statute as open-ended and far-reaching as the federal wire fraud statute. If the Government is free to disavow the facts charged in the indictment, and obtain a conviction based on other facts, a criminal defendant is essentially forced to defend herself against the unknown. To put that point in the context of this

case, once the Government charged petitioner with having caused and reasonably foreseen certain specific wire transmissions, petitioner was entitled to defend herself at trial by persuading the jury that she did not in fact cause or reasonably foresee those specific wire transmissions. Petitioner did not, and should not have been expected to, show that she did not cause or reasonably foresee *other* wire transmissions. Because the decision below affirmed a fundamentally flawed conviction, and deepened circuit conflicts on important and recurring issues of federal criminal law, this Court should grant the petition.

OPINIONS BELOW

The Seventh Circuit's decision is reported at 493 F.3d 812 and reprinted in the Appendix ("App.") at 1-28a. The district court's oral decision denying petitioner's motion for a judgment of acquittal is reprinted at App. 29-30a.

JURISDICTION

The Seventh Circuit rendered its decision on July 10, 2007. App. 1a. Because Monday, October 8, 2007—the 90th day following entry of the Seventh Circuit's decision—is a federal holiday, 5 U.S.C. § 6103, this petition is timely filed on Tuesday, October 9, 2007. *See* S. Ct. R. 30(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions are pertinent to this case:

The Fifth Amendment to the United States Constitution provides in relevant part: "No person

shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ... nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation." U.S. Const. amend. VI.

The federal wire fraud statute provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

STATEMENT OF THE CASE

A. Background

Petitioner Tracy Ratliff-White is a disabled U.S. Navy veteran who suffers from debilitating service-connected injuries, including post-traumatic stress disorder and severe personality disorder. Trial

Transcript ("Tr.") 42, 255-59. Among other things, these disorders cause her to suffer flashbacks, nightmares, insomnia, decreased appetite, weight loss, depression, dissociation, fear of being alone, agoraphobia, panic attacks, and persistent vomiting. *Id.* at 297-98.

Beginning in the early 1990s, petitioner received treatment for these disorders from the Edward Hines, Jr. Veterans Affairs Hospital near Chicago. *Id.* at 43, 292. After nearly a decade of treatment, however, petitioner's condition failed to improve; indeed, in many respects, it worsened. As one of her treating physicians testified:

> She was frequently unable to keep food down, which was also part of her post traumatic stress disorder, not being able to really swallow. She was frequently gagging. It was even difficult for her to take water. Her skin was often really dry and she was very dehydrated. She would need to get intravenous feedings in the hospital because she wasn't able to take in any fluids or food. Her weight was going down. She was quite thin. Her—she was very weak so she would fall frequently and hurt herself. And she also had a compulsive personal behavior that was rather harmful and she wasn't able to use the washroom normally.

Id. at 265.

In December 2001, the Hospital began subjecting petitioner to an extensive regimen of painkillers, sleeping medications, anti-depressants, anti-anxiety drugs, and muscle relaxants. *Id.* at 310-15. Despite the medication, a Hospital psychiatrist sought to

have petitioner civilly committed because she appeared suicidal and remained unable to care for herself. *Id.* at 306-08; *see also id.* at 590.

Given its inability to treat petitioner, the Hospital eventually decided to provide her with 24-hour home care services through the Fee Basis Service Program, which provides alternative care for veterans when the Government is not equipped to do so. *Id.* at 38-39, 41, 49-52. Unfortunately, the first two care-taking companies hired by the Hospital ceased treating petitioner after just one month. *Id.* at 53-54, 57-60. In April 2002, a third company identified by the Hospital conducted a home assessment of petitioner but declared itself unable to assist her. *Id.* at 61-62. At that point—and despite petitioner's condition—the Hospital told petitioner that she would have to locate another caregiver herself. *Id.*

Shortly thereafter, petitioner informed the Hospital that she had located a company called Compassionate Home Health Services ("CHHS") to provide her with 24-hour care. *Id.* at 62-63. CHHS, however, did not exist; it was a fictitious entity devised by petitioner and a former caregiver, Dorothy Norwood, to receive money from the Government. The Hospital agreed to hire CHHS, and later made payments to a bank in Minneapolis, where petitioner and Norwood had set up an account, to compensate CHHS for services allegedly provided to petitioner. *Id.* at 65-66, 81-82, 87-90.

B. The Indictments

On January 6, 2004, a federal grand jury indicted petitioner and Norwood on two counts of wire fraud in violation of 18 U.S.C. § 1343. App. 39-46a. A superseding indictment was returned on August 18,

2005, likewise charging petitioner and Norwood with two counts of wire fraud. App. 31-38a.

The superseding indictment alleged that petitioner and Norwood "knowingly devised, intended to devise, and participated in a scheme to defraud and obtain money from the United States ... by means of materially false and fraudulent pretenses, representations, promises, and material omissions." App. 33a. To that end, the superseding indictment asserted that CHHS was "a fictitious company that could provide no services and had no employees," App. 34a, and that petitioner and Norwood submitted time sheets reflecting dates and hours that CHHS employees purportedly spent providing services to petitioner, even though the "individuals identified on the time sheets ... were not employees of [CHHS], and ... had not provided the services reflected on the time sheets." App. 34-35a. According to the superseding indictment, these submissions ultimately led the Government to deposit about $32,100 into the bank account jointly controlled by petitioner and Norwood. App. 35a.

Of particular relevance, the superseding indictment alleged that those deposits were the result of two specific wire transmissions that petitioner and Norwood "*knowingly caused* to be transmitted in interstate commerce ... for the purpose of executing ... the scheme described above." App. 36a (emphasis added).

- The first alleged wire transmission occurred "[o]n or about July 16, 2002" and consisted of "payment instructions for $22,470 ... from the United States Department of the Treasury,

Hyattsville, Maryland to the Federal Reserve Bank in Dallas, Texas." App. 35-36a.

- The second alleged wire transmission occurred "[o]n or about August 15, 2002" and consisted of "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.

The key point here is that the Government did not charge petitioner and Norwood with knowingly causing a wire transmission into their own bank account, but instead with knowingly causing an obscure wire transmission from one agency of the Federal Government to another *before* the money was deposited into their account. When the district court eventually asked the Government to explain why it had not charged petitioner with knowingly causing a wire transmission into her own account, as opposed to an *internal* wire transmission within the Government, the Government could not provide any meaningful explanation. Tr. 572-73 ("The Court: [Transferring funds into petitioner's bank account is] not the charge. You could have charged that. Actually, I didn't understand why you didn't charge that."); *id.* at 578 ("The Court: Why didn't you charge the actual transfer of the funds from [the Federal Reserve Bank in] Dallas to [petitioner's bank in] Minneapolis? Mr. Young [prosecutor]: Your Honor, we decided to charge this transaction."); *id.* ("[Y]ou 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.").

C. The Trial

Norwood pleaded guilty to the charges in the superseding indictment, and turned government witness. Petitioner, in contrast, chose to contest the charges against her, insisting that Norwood had orchestrated the fraud on the Government, and that petitioner did not cause, and reasonably could not have foreseen, the specific wire transmissions alleged in the superseding indictment.

At petitioner's trial, the Government sought to prove the charged wire transmissions through testimony by Alice Merculief, an Information Technology specialist at the Treasury Department's Financial Management Services facility in Austin, Texas, and Joseph C. Rio, the Chief of Patient Administration Services at the Hines Hospital.

Ms. Merculief began by describing the Government's ordinary procedures for processing vendor payments requested by the Department of Veterans Affairs ("VA"). Tr. 170-80. As she explained, the VA's processing center in Austin, Texas, transmits electronic payment files to a Treasury Department computer in Hyattsville, Maryland, which in turn validates the payment files and transmits payment authorization to the Federal Reserve Bank in Dallas, Texas, which then transmits the funds to the vendor's bank. *Id.* On cross-examination, however, she conceded that the records did not show that these procedures were followed with respect to the first payment charged in the superseding indictment. Tr. 188-92. Indeed, she acknowledged that the records would have looked different had the ordinary procedures been followed here. *Id.*

Mr. Rio's testimony even further undermined the Government's case with respect to the first payment charged in the superseding indictment. He testified that the ordinary procedures that Ms. Merculief had described were *not* followed in this case with respect to that payment. Instead, Rio testified that the Hospital paid CHHS

> *off line*, which allowed us to deal with our Finance Department to pay and actually send an electronic payment ... to that particular vendor and that was done ....

Id. at 93 (emphasis added); *see also id.* at 122 (conceding that the Hospital here "did *not* use the usual procedure of notifying the VA's payment center in Austin and having them send the funds" with respect to the first payment charged in the superseding indictment) (emphasis added). As Rio explained, his department "used [a] different procedure" with respect to that payment because the normal procedure would have taken too long. *Id.* at 122-23. Asked to clarify, he again testified that "we went and paid them off line," *id.* at 123, meaning that:

> we worked with *our financial Fiscal Department.* Instead of the transactions going to Austin, they were paid off line through the mechanism Fiscal has to send an electronic payment to the bank.

Id. (emphasis added). He then confirmed that "Fiscal" referred to a department of the Hospital itself—not the VA's Treasury-linked processing facility in Austin. *Id.*

Petitioner moved for a judgment of acquittal at the close of the Government's case. *Id.* at 561-63. The district court (Holderman, C.J.) heard argument and took the motion under advisement. *Id.* at 561-81. Petitioner renewed her motion at the close of all evidence. *Id.* at 607. Before the district court ruled on petitioner's motion, however, the jury convicted her on both counts of wire fraud. Petitioner again renewed her motion, but the district court denied it at petitioner's sentencing hearing. App. 30a. The district court later sentenced petitioner to 21 months' imprisonment on each count, three years' supervised release, restitution of $32,100, and a special assessment of $100 on each count, with the terms of imprisonment to run concurrently.

D. The Appeal

Petitioner timely appealed, but the Seventh Circuit affirmed her convictions. The court first held that the Government had carried its burden of proving the element of reasonable foreseeability by showing that petitioner reasonably could have foreseen that "*some* use of the wires would follow" from her fraudulent scheme, even if that use differed from the one charged in the superseding indictment. App. 9a (emphasis added). According to the court, "[o]ur case law does not require that a *specific* mailing or wire transmission be foreseen," even if the indictment charged the defendant with foreseeing a specific mailing or wire transmission. App. 9-10a (emphasis added; citing, *inter alia*, *Pimental*, 380 F.3d at 589). Because petitioner "knew that *payments ... would be electronically transmitted to her account*," the court held, "she clearly foresaw that her fraud on the VA would result in wire

transmissions," even though those wire transmissions were not the ones charged in the superseding indictment as predicate acts under the wire fraud statute. App. 11a (emphasis added).

The Seventh Circuit then held that the Government had carried its burden of proof with respect to Count I of the superseding indictment, even though the Government concededly failed to prove that the specific wire transmission charged in that count ever occurred. *See* App. 11-23a. According to the Seventh Circuit, the divergence between the charge in the superseding indictment and the proof at trial amounted merely to a permissible "variance," not an impermissible "constructive amendment," of the indictment. App. 18a. The court conceded that "there exists only a rather shadowy distinction between amendments and variances," App. 14a (internal quotation omitted), but held that this case fell into the latter category because "the evidence at trial concerned the same elaborate scheme ... described in the indictment," App. 17a (internal quotation omitted), and the indictment referred to the ultimate deposit into petitioner's bank account (even though it did not characterize that deposit as the predicate wire transmission in either count). The Seventh Circuit then held that affirmance of petitioner's convictions was warranted because variances—in sharp contrast to constructive amendments—do not require reversal absent a specific showing of prejudice to the defendant. App. 13a, 18a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit Erred, And Deepened A Circuit Conflict, By Holding That The Government May Obtain A Conviction Under the Federal Wire Fraud Statute By Proving That A Defendant Reasonably Could Have Foreseen That A Fraud Would Involve A Wire Transmission *Other* Than One Charged In The Indictment.

The Seventh Circuit erred, and deepened an acknowledged circuit conflict, by holding that the Government may obtain a conviction under the federal wire fraud statute by proving that the defendant reasonably could have foreseen that a fraud would involve a wire transmission *other* than one charged in the indictment. That holding presents an important and recurring question under both the wire fraud statute and the cognate mail fraud statute. *See, e.g.*, *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) (noting that the federal wire and mail fraud statutes "share the same language in relevant part," and thus courts must "apply the same analysis to both sets of offenses"); Br. of the United States, *United States v. Ratliff-White*, No. 06-1960 (7th Cir. filed Sept. 9, 2006), at 25 n.7 ("The elements of the wire fraud statute parallel the mail fraud statute, except that the wire fraud statute requires the use of an interstate electronic communication as opposed to a mailing in further of the scheme to defraud.").

Especially because these are criminal statutes subject to the venerable rule of lenity, the argument here is straightforward. The federal wire and mail fraud statutes require the Government to prove that

the defendant *knowingly caused* "writings ... to be transmitted by means of wire ... communication in interstate or foreign commerce," 18 U.S.C. § 1343, or "matter ... to be delivered by mail or ... private or commercial interstate carrier," *id.* § 1341. In particular, to prove wire fraud, the Government must prove that (1) the defendant was involved in a scheme to defraud; (2) the defendant intended to defraud; (3) the defendant reasonably could have foreseen that the scheme would involve interstate wire transmissions; and (4) the scheme did in fact involve interstate wire transmissions. *See, e.g.*, *United States v. Johnson*, 450 F.3d 366, 374 (8th Cir. 2006); *see also United States v. Griffith*, 17 F.3d 865, 874 (6th Cir. 1994). From time immemorial, courts have required every element of any alleged fraud to be pleaded with particularity, *see, e.g.*, *Stearns v. Page*, 48 U.S. (7 How.) 819, 829 (1849); E. Bennett, *Story's Equity Pleading* 297 (5th ed. 1852), and in the criminal context, then proven beyond a reasonable doubt, *see, e.g.*, *In re Winship*, 397 U.S. 358, 361-64 (1970).

It thus should go without saying that an indictment under these statutes must identify a *particular* wire transmission or mailing that the defendant allegedly caused as part of a fraudulent scheme, and the Government then must prove beyond a reasonable doubt that the defendant reasonably could have foreseen that the scheme would involve that *particular* wire transmission or mailing. Any other approach would essentially obliterate the statutes' critical causation and reasonable foreseeability elements, and expand the scope of criminal liability under these statutes beyond conceivable limitation. *But see Kann v.*

United States, 323 U.S. 88, 95 (1944) ("The federal mail fraud statute does not purport to reach all frauds."); *Pasquantino v. United States*, 544 U.S. 349, 377 (2005) (Ginsburg, J. dissenting) ("[I]ncautious reading of the [wire fraud] statute could dramatically expand the reach of federal criminal law, and we have refused to apply [its] proscription exorbitantly.") (citing *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); *McNally v. United States*, 483 U.S. 350, 360 (1987)).

These basic principles mandate reversal of petitioner's convictions. The Government charged her with two counts of wire fraud based on charges that she knowingly caused two *particular* wire transmissions: (1) a transmission of "payment instructions for $22,470" from the Treasury Department's Hyattsville mainframe to the Dallas Federal Reserve on or about July 16, 2002, App. 35-36a; and (2) the transmission of "payment instructions for $9,150" from the Treasury Department's Hyattsville mainframe to the Dallas Federal Reserve on or about August 15, 2002, App. 36a. As the district court emphasized below, the Government did *not* rely on the transmission of funds into petitioner's own bank account as the predicate wire transmission under either count of the superseding indictment. Tr. 572-73, 578.

At trial, however, the Government failed to prove that petitioner reasonably could have foreseen either of the two wire transmissions charged as statutory predicates in the superseding indictment. The Seventh Circuit freely acknowledged that the charged wire transmissions involved "admittedly obscure" internal Government procedures. App. 9a.

But that did not matter, the court declared, because "[t]o satisfy the causation element, the government need only show that the defendant knew that *some* use of the wires would follow," not necessarily the particular use of the wires charged in the indictment. *Id.* (emphasis added); *see also id.* at 9-10a ("Our case law does not require that a *specific* mailing or wire transmission be foreseen.") (emphasis added). According to the Seventh Circuit, "'[i]t is simply "use of the mail" in the course of the scheme rather than the particular mailing at issue that must be reasonably foreseeable for the causation element of a mail fraud offense to be satisfied.'" *Id.* at 10a (quoting *Pimental*, 380 F.3d at 589).

In other words, the Seventh Circuit affirmed petitioner's convictions under the wire fraud statute on the theory that she reasonably could have foreseen that her fraud would involve wire transmissions *other* than the ones identified as predicate acts in the superseding indictment—namely, the eventual electronic transmissions of funds into her own bank account. App. 11a. "Given that the defendant knew that payments to CHHS would be electronically transmitted to her account, she clearly foresaw that her fraud on the [Government] would result in wire transmissions." *Id.*

But that analysis squarely conflicts with the Eleventh Circuit's analysis in *Smith*—as the First Circuit in *Pimental* conceded. *See Pimental*, 380 F.3d at 590 n.7 (acknowledging that "*Smith* ... is indeed in tension with our analysis," and declaring that "[t]o the extent that *Smith* is inconsistent with our analysis, we reject its approach"). In *Smith*, the

Eleventh Circuit held that the Government must prove that the defendant reasonably could have foreseen the *particular* wire transmission or mailing charged in the indictment. As the *Smith* court explained, "[t]he government was required by the narrowly drawn indictment to show that mailings of accounting drafts were reasonably foreseeable, and it did not." *Smith*, 934 F.2d at 273.

Indeed, apart from the fact that the Eleventh Circuit *reversed* the defendant's convictions, 934 F.2d at 274, whereas the Seventh Circuit here *affirmed* petitioner's convictions, *Smith* is virtually on all fours with this case. Like this case, *Smith* arose from the submission of a fraudulent claim for fictitious medical expenses. *Id.* at 271. As here, the sole predicate act alleged in the indictment in *Smith* arose from the concededly obscure "internal operations [and] accounting procedures" used by the victim of the fraud—namely, the transmission of an "accounting copy" of a bank draft from the financial institution that received the draft to the central accounting department of the insurer that issued the draft. *Id.* at 272. And, as here, "[t]he most the government showed was that it was foreseeable that [some other] information concerning the claim itself would have to be sent through the mails." *Id.* at 274; *see also id.* at 273 ("[N]o evidence was introduced to show that 'reasonable people' would foresee the mailings of accounting copies of drafts that had been issued.").

In sharp contrast to the Seventh Circuit, however, the Eleventh Circuit flatly rejected the Government's suggestion that proof of those uncharged—if reasonably foreseeable—mailings

satisfied the Government's burden of proving reasonable foreseeability. Instead, the Eleventh Circuit held, the only thing that matters is whether (as the indictment in that case specifically charged) the defendant "had actual knowledge of the mailing of the accounting copy of the draft," *id.* at 272, or whether (again, as the indictment in that case specifically charged) "'reasonable people' would foresee the mailings of accounting copies of drafts that had been issued," *id.* at 273. And that was so despite the fact that certain *other* mailings were foreseeable:

> We agree that it is foreseeable that communications involving the policy, the details of the claim, or requests for the payment of the claim would be mailed. *But the substantive counts of Smith's indictment did not allege such mailings, but only mailings of accounting copies of drafts.*

Id. (internal footnote omitted; emphasis added). Thus, because the Government there (as here) introduced "no evidence that [the defendant] was familiar with the internal operations or accounting procedures" charged in the indictment, *id.* at 272, and because "[t]he fact that [the insurance company] mails accounting copies of drafts it issues is not common knowledge by any stretch of the imagination," *id.* at 273, the Eleventh Circuit reversed the convictions, *see id.* at 273-74.

The conflict between the Eleventh Circuit's decision in *Smith*, on the one hand, and the First Circuit's decision in *Pimental* and the decision below, on the other hand, warrants this Court's review. *See also United States v. Morales-Rodriguez*, 467 F.3d 1,

8 (1st Cir. 2006) (following *Pimental*); *United States v. Bortnovsky*, 879 F.2d 30, 38-39 & n.15 (2d Cir. 1989) (noting that "causation ... has been so liberally construed as to suggest that it requires only that the use of the mail itself, rather than a particular mailing, be reasonably foreseeable," but finding it unnecessary to resolve in that case "whether [it] should be so broadly construed").

Given the ubiquitous role of the wire and mail fraud statutes in our federal criminal justice system, this Court should clarify the law on this point. Indeed, few statutes are as frequently deployed as these, and few have such far-reaching effect. *See, e.g.*, John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of a White-Collar Crime*, 21 Am. Crim. L. Rev. 1, 3 (1983) ("At its current pace of expansion, the mail fraud statute seems destined to provide the federal prosecutor with what Archimedes long sought—a simple fulcrum from which one can move the world."); Jed S. Rakoff, *The Federal Mail Fraud Statute*, 18 Duq. L. Rev. 771, 783 (1980) (describing the mail fraud statute, from a prosecutor's perspective, as "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love."); *see also* Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2005 Annual Report of the Director* 91, 225 (2006) (showing that federal prosecutors filed more than 10,000 mail and wire fraud cases between 1996 and 2005).

The bottom line here is that the forgiving approach to the wire and mail fraud statutes adopted by the First Circuit in *Pimental* and the Seventh

Circuit in this case threatens to eviscerate the Government's burden of pleading and proof under those statutes, and hence virtually ensures convictions based on uncharged predicate wire transmissions or mailings. *But cf. Stirone v. United States*, 361 U.S. 212, 218 (1960) ("[W]hen 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 rest upon a showing that commerce of one kind or another had been burdened."). This Court should now resolve this conflict and bring these statutes back within proper bounds.

II. The Seventh Circuit Erred, And Deepened A Circuit Conflict, By Holding That The Government May Obtain A Conviction Under The Federal Wire Fraud Statute By Proving That A Defendant Caused A Wire Transmission *Other* Than One Charged In The Indictment.

The Seventh Circuit also erred, and deepened a circuit conflict, by holding that the Government may obtain a conviction under the federal wire fraud statute by proving that a defendant caused a wire transmission *other* than one charged in the indictment. As noted above, Count I of the superseding indictment here charged petitioner, "[o]n or about July 16, 2002," with "knowingly caus[ing] to be transmitted in interstate commerce ... by means of wire communication ... payment instructions for $22,470 ... from the United States Department of the Treasury, Hyattsville, Maryland to the Federal Reserve Bank in Dallas, Texas." App.

35-36a. But petitioner proved at trial that this alleged wire transmission never took place. Although a wire communication from Maryland to Texas was the *ordinary* way for the Government to process payments to vendors like CHHS, the ordinary procedures concededly were not followed with respect to the payment at issue in Count I of the superseding indictment. Rather, as the Seventh Circuit explained, "a deviation [from ordinary procedures] occurred on July 16, 2002, when ... the [Government] transferred funds to [petitioner's] account using a poorly understood 'off line' process." App. 11a.

Despite the Government's failure to prove that petitioner caused the specific wire transmission charged in Count I of the superseding indictment, the Seventh Circuit nonetheless affirmed petitioner's conviction on that count. *See* App. 12-23a. Such affirmance was warranted, the Seventh Circuit declared, because the Government proved at trial that petitioner had knowingly caused a wire transmission of funds into her *own* bank account—even though that was not the predicate wire transmission alleged in Count I of the superseding indictment. *See* App. 12a, 16-17a. According to the Seventh Circuit, that divergence between the facts charged in the superseding indictment and the facts proved at trial was merely a permissible "variance" from, rather than an impermissible "constructive amendment" of, the superseding indictment. *See* App. 16-23a.

To its credit, the Seventh Circuit acknowledged that the distinction between a permissible variance and an impermissible constructive amendment is

"shadowy." App. 14a (internal quotation omitted). Indeed, if anything, that is an understatement: few issues have generated as much confusion in the lower courts in recent years as that distinction. *See, e.g.*, *Haines v. Risley*, 412 F.3d 285, 291 (1st Cir. 2005) ("Save at either end of the spectrum, it is far from clear what distinguishes a permissible variance (as between facts charged and facts proved) from an impermissible constructive amendment."); *United States v. Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002) ("[T]he distinction between a variance and a constructive amendment is sketchy."); *United States v. Antonakeas*, 255 F.3d 714, 722 (9th Cir. 2001) ("The distinction between an amendment to an indictment and a variance is blurred."); *United States v. Stuckey*, 220 F.3d 976, 981 (8th Cir. 2000) ("The distinction between a constructive amendment and a variance is clear in theory, but often blurred in application."); *United States v. Weiss*, 752 F.2d 777, 787 (2d Cir. 1985) ("There is considerable confusion as to what constitutes a constructive amendment of an indictment as opposed to a variance of an amendment."). As the Seventh Circuit also noted, however, this distinction "achieves a crystal clear difference in result," App. 14a: whereas a variance is generally permissible absent proof of prejudice to the defendant, a constructive amendment is *per se* prejudicial and hence categorically impermissible, *see id.; see also United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985) (citing 3 Charles A. Wright *et al.*, *Federal Practice & Procedure* § 516 (1982)).

Given that the distinction between a variance and a constructive amendment leads to such a stark difference in result, the distinction itself should not remain "shadowy." App. 14a (internal quotation

omitted). Rather, it is high time for this Court to clarify the appropriate approach to distinguishing between these two categories. Because this Court has not spoken to this issue in more than two decades, the federal courts of appeals have developed different approaches to the matter. In particular, most circuits follow one of two basic approaches.

The first approach, generally known as the "essential elements" test, has been embraced by at least five circuits—the Third, Fourth, Fifth, Sixth, and Eleventh. *See, e.g.*, *Chambers*, 408 F.3d at 240-47; *Randall*, 171 F.3d at 203-10; *Keller*, 916 F.2d at 632-36; *Ford*, 872 F.2d at 1234-37; *Crocker*, 568 F.2d at 1060. Under this approach, a divergence between the facts charged in the indictment and the facts proved at trial is an impermissible constructive amendment, as opposed to a permissible variance, if the divergence involves facts upon which the Government relied to prove an essential element of the offense. *See, e.g.*, *Chambers*, 408 F.3d at 240-47; *Randall*, 171 F.3d at 203-10; *Keller*, 916 F.2d at 632-36; *Ford*, 872 F.2d at 1236; *Crocker*, 568 F.2d at 1060.

Application of this approach in this case would mandate reversal of petitioner's conviction on Count I, because the causation of a wire transmission is an essential element of the wire fraud crime. *See, e.g.*, *Carpenter*, 484 U.S. at 28 (noting "the requirement that [the wires or mail] be used to execute the scheme at issue"). Because the Government established an essential element of Count I based on facts concededly different from those charged in the superseding indictment, *see* App. 18a, the conviction on Count I cannot stand

under the "essential elements" test. *See, e.g.*, *Chambers*, 408 F.3d at 240-47 (reversing conviction where "[t]he government ... proved an essential element of the section 922(g)(1) possession offense—that the possession was 'in or affecting commerce'—on the basis of a set of facts different from the particular facts alleged in the indictment in respect to that element."); *Smith*, 934 F.2d at 273 ("[T]he government was required by the narrowly drawn indictment to show that mailings of accounting drafts were reasonably foreseeable, and it did not."); *Ford*, 872 F.2d at 1236 ("We hold that the essential element of possession was so modified at Ford's trial as to amount to a constructive amendment of Count III of the indictment."); *Crocker*, 568 F.2d at 1060 (recognizing that it is unlawful to "modify the facts which the grand jury charged as an essential element of the substantive offense," and holding that "when a grand jury has specifically charged the manner in which testimony is untruthful, permitting the government to prove that it is untruthful in an entirely different manner amounts to a constructive amendment of the indictment rather than a mere variance"); *see also United States v. Adams*, 778 F.2d 1117, 1124 (5th Cir. 1985) ("The grand jury chose to indict Adams for use of a driver's license that was false as to name. Had it desired to indict Adams for use of a driver's license that was false as to residence, it could have [done so]. [But it did not, and the Government's reliance on] evidence concerning residence allowed the construction of a factual basis that effectively modified an essential element charged. As such, the indictment was constructively amended and reversal is automatic.") (citation and internal quotation omitted).

The second approach to distinguishing between a variance and a constructive amendment, in contrast, is far looser than the first one. Under the second approach, which has been formally adopted by the Seventh and Ninth Circuits, and adopted in practice by the Second Circuit, the Government may prove an essential element of the offense (like causation of a particular wire transmission) by reference to facts other than those charged in the indictment as long as either (1) the facts proved at trial are not "distinctly different" from those set forth in the indictment, or (2) the crime charged in the indictment was not "substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." *Adamson*, 291 F.3d at 615; *see also Kuna*, 760 F.2d at 817; App. 13-14a; *cf. United States v. Dupre*, 462 F.3d 131, 140-41 (2d Cir. 2006).

Application of that approach in this case, as the decision below shows, allowed the Seventh Circuit to affirm petitioner's conviction on Count I of the indictment "because the evidence at trial concerned the same elaborate scheme to defraud the United States as was described in the indictment." App. 17a (internal quotation and brackets omitted). The Seventh Circuit paid no heed to the fact that the divergence between the facts charged in Count I of the superseding indictment and the facts proved at trial involved an essential element of the wire fraud crime. Rather, the court essentially adopted a "close-enough-for-government-work" approach, holding that "the grand jury would have indicted for the crime actually proved because it did," App. 18a (internal quotation and citation omitted), even though Count I specifically charged petitioner with

knowingly causing a wire transmission from Maryland to Texas that (as petitioner proved at trial) never took place.

This Court should grant review to resolve this circuit conflict over the proper standard for distinguishing a permissible variance from an impermissible constructive amendment. Given the stark difference in result flowing from that distinction, it is hard to overstate the importance of this point to the effective administration of federal criminal justice. It has been more than two decades since this Court last visited this issue, in *United States v. Miller*, 471 U.S. 130, 138 (1985), and the confusion among the lower courts shows that this Court's attention is overdue.

Indeed, the Seventh Circuit's cavalier approach to a divergence between the facts alleged in an indictment and proven at trial undermines not one but two federal constitutional rights: "a defendant's Fifth Amendment right to be informed of the nature and cause of the accusation against her and her Sixth Amendment right to indictment by a grand jury." App. 13a; *see generally* U.S. Const. amend. V; U.S. Const. amend. VI; *United States v. Cruikshank*, 92 U.S. 542, 557-58 (1875). These constitutional rights undergird the "elementary principle of criminal pleading, that ... it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars." *Cruikshank*, 92 U.S. at 558 (quotation omitted). That is why an indictment must allege all the elements of the charged crime, *see, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998);

United States v. Cook, 84 U.S. (17 Wall.) 168, 174 (1872): the Government may not convict a defendant of a crime without giving her notice of sufficient information to mount an effective defense, *see e.g.*, *Cruikshank*, 92 U.S. at 558. Only the grand jury may broaden the charges in the indictment. *See, e.g.*, *Stirone*, 361 U.S. at 215-16. These constitutional guarantees would not be worth much if the Government could obtain a conviction, as it did here, based on facts other than those charged in the indictment. *See, e.g.*, *United States v. Carll*, 105 U.S. 611, 612 (1881) (indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished").

This case provides a particularly good vehicle for addressing this issue, because there is no dispute that the Government failed to prove an essential element of the offense, the knowing causation of a wire transmission, by reference to the facts charged in the indictment. Indeed, the Seventh Circuit's forgiving approach to a divergence between the facts charged in the indictment and the facts proved at trial is particularly problematic in the context of the open-ended wire fraud statute. As Judge Newman presciently warned more than two decades ago:

> In recent years, [the lower courts have] tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal or civil law. That "inexorable expansion," *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting in part),

> has been questionable on its own terms, but whether we have rewritten the federal fraud statutes or only permitted prosecutors to apply the imprecise terms of these statutes in imaginative ways, there can be little doubt that the modern scope of federal fraud statutes now covers an extremely broad range of conduct. The current breadth of these statutes makes it especially important that in fraud prosecutions courts vigilantly enforce the Fifth Amendment requirement that a person be tried only on the charges contained in the indictment returned by the grand jury. A criminal statute of broad scope creates some risk that conduct will be punishable even though the perpetrator may have doubted in good faith that his actions fell within the coverage of the statute. To that apparently tolerable risk is added a wholly unacceptable and unconstitutional risk when the prosecutor describes one type of actionable conduct in the indictment and then convicts the defendant for significantly different conduct.

Weiss, 752 F.2d at 791 (Newman, J., dissenting).

This case provides a perfect example of the "wholly unacceptable and unconstitutional risk" foreseen by Judge Newman, *id.*, where a defendant is forced to defend herself against prosecution under an open-ended statute by reference to facts other than those charged in the indictment. Given the manifest confusion in the lower courts over the proper standard for distinguishing between a permissible variance and an impermissible constructive

amendment, this issue too warrants this Court's review.

CONCLUSION

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

Respectfully submitted,

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