No. _____

In The
Supreme Court of the United States

DANIEL D'AMELIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

JONATHAN I. EDELSTEIN
Counsel of Record
501 Fifth Avenue, Suite 514
New York, NY 10017
(212) 871-0571
jonathan.edelstein.2@gmail.com

QUESTION PRESENTED

1. Under Stirone v. United States, 361 U.S. 212 (1960) and its progeny, were the petitioner's rights under the Grand Jury Clause of the Fifth Amendment violated when the trial court's instructions permitted the jury to convict petitioner based on conduct that was not set forth in, and was indeed excluded by, the "to wit" clause of the indictment?

PARTIES TO THE PROCEEDING

The parties to the instant case are the United States of America and petitioner Daniel D'Amelio.

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United States v. D'Amelio, 683 F.3d 412 (2d Cir. 2012)

The order of the Second Circuit denying rehearing and rehearing *en banc*, dated September 24, 2012, is unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) because this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit, in a criminal case.

This petition is timely because petitioner's application to the Second Circuit for panel rehearing and rehearing *en banc* was denied on September 24, 2012. See Supreme Court Rules, §§ 13(1), 13(3). There have been no orders extending the time to petition for *certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 5:

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.

STATEMENT OF FACTS

Petitioner Daniel D'Amelio was indicted on June 15, 2007, on a single count of attempted child enticement pursuant to 18 U.S.C. § 2422. The indictment contained a single substantive paragraph, stating as follows:

> From on or about August of 2004, up to and including in or about September of 2004, in the Southern District of New York, DAN D'AMELIA [sic], a/k/a Wamarchand@aol.com, the defendant, unlawfully, willfully and knowingly, did use a facility and means of interstate commerce to persuade, induce, entice and coerce an individual who had not attained the age of 18 years to engage in sexual activity for which a person can be charged with a criminal offense, and attempted to do so, ***to wit, D'AMELIA used a computer and the Internet*** to attempt to entice, induce, coerce and persuade a minor to engage in sexual activity in violation of New York State laws. (Emphasis added).

Shortly before trial, the Government filed a

Request to Charge in which it asked that the jury be instructed on both the telephone and "a computer and the Internet" as vehicles of enticement. Petitioner objected to the proposed instruction on the basis that it constructively amended the indictment. After a colloquy, and after the Government's submission of a letter brief to which petitioner had no opportunity to respond, the district court overruled petitioner's objection. Petitioner then proceeded to trial and was convicted on the sole count of the indictment.

Thereafter, petitioner moved to vacate his conviction pursuant to Fed. R. Crim. Pro. 33, again arguing that the indictment had been constructively amended by the addition of telephone enticement to the charge against him. The district court agreed and vacated the conviction. See United States v. D'Amelio, 636 F. Supp. 2d 234 (S.D.N.Y. 2009) ("D'Amelio I").

In particular, the district court noted that the single-paragraph indictment contained specific charging language that "[spoke] only of enticing by use of the internet – not the telephone." Id. at 244. The court further noted that there were no overarching, generalized allegations – such as a broad conspiracy allegation – that might take in

behavior other than the Internet use alleged in the "to wit" clause. See id. Moreover, it noted that the "words of limitation" in the indictment were not ambiguous or flexible – in sum, that "there [was] nothing fuzzy about" them. Id. at 245.

Finally, the district court noted that it could not second-guess the grand jury, and that there was "no way to know whether a grand jury asked to vote on a more generally–worded indictment would have concluded that the telephone calls at issue in this case were sufficiently 'enticing' to be *prima facie* criminal." Id. As such, where the instructions to the jury permitted it to "convict the defendant based on conduct different from the very narrow conduct that was specified in the indictment," the charging terms thereof were altered to the point where it could not be certain whether petitioner was convicted of the same offense for which he had been indicted. Id.

The Government timely appealed the district court's decision to the Second Circuit Court of Appeals, and briefing and argument were held. On June 13, 2012 – some 26 months after oral argument – a panel of the Second Circuit (Raggi, Hall & Chin, C.JJ.) reversed the district court's decision, found that no constructive amendment had occurred, and reinstated defendant's conviction. See United States

v. D'Amelio, 683 F.3d 412 (2d Cir. 2012) ("D'Amelio II").

In sum and substance, the panel found that the "core of criminality" charged in the indictment had not been altered because the alleged telephone calls were part of the same course of conduct as the alleged Internet chats, see id. at 421-22, and that the Government's proof at trial did not modify an "essential element" of the offense because the specific method by which defendant allegedly used a facility of interstate commerce was not "essential," id. at 422-23.

The panel defined the "core of criminality" as "the essence of a crime, in general terms." stating that "the particulars of how a defendant effected the crime fall outside that purview." See id. at 418. It then went on to determine that the "essence of a crime" consists of the "complex of facts" set forth in the indictment, and that where a "single set of facts" is involved, a constructive amendment does not occur. Id. at 419. It summed up its conclusion by stating that, where a variance in proof concerns "a single course of conduct" taking place within a discrete time period, then the "core of criminality" is not changed. See id. at 420.

While acknowledging this Court's decision in Stirone v. United States, 361 U.S. 212 (1960), the Second Circuit stated that, as a matter of policy, it "construed Stirone narrowly." See D'Amelio II, 683 F.3d at 420 n.5. Thus, the panel concluded, in essence, that the charging terms of an indictment went beyond the plain language thereof to include conduct beyond the scope of the "to wit" clause but part of the same generalized course of conduct. See id. at 421-22. Moreover, in places, the panel treated the Grand Jury Clause as essentially prophylactic of criminal defendants' double jeopardy rights and/or their right to notice rather than as a limitation on the scope of prosecution that was meaningful in its own right. See id. at 417 (indicating that "flexibility in proof" was permitted so long as the defendant was given "*notice* of the *core of criminality* to be proven at trial") (emphasis in original); id. at 422-23 (discussing "essential elements" of the indictment in terms of constitutional notice and double jeopardy).

Accordingly, the court concluded that the indictment had not been constructively amended by the trial judge's instructions, and that petitioner's conviction should be reinstated. Id. at 424.

Petitioner timely moved for a panel rehearing and rehearing *en banc*, which were denied by the

Second Circuit on September 24, 2012. (A67-68). This petition followed.

ARGUMENT

POINT I

PETITIONER'S GRAND JURY CLAUSE RIGHTS WERE VIOLATED WHEN THE TRIAL COURT'S INSTRUCTIONS PERMITTED THE JURY TO CONVICT HIM BASED ON CONDUCT BEYOND THE SCOPE OF THE INDICTMENT AND INDEED EXCLUDED BY ITS PLAIN LANGUAGE

Grand juries serve a "historic role as a protective bulwark standing between an ordinary citizen and an overzealous prosecutor," see United States v. Dionisio, 410 U.S. 1, 17 (1973). The Government may decide what charges to lodge, but the people – speaking through a grand jury composed of the putative defendant's peers – determine whether there is *prima facie* evidence for those charges to go forward, and delimit the permissible scope of the prosecution. So important is the Grand Jury Clause that, in Stirone v. United States, 361 U.S. 212 (1960), this Court found a violation thereof

to be one of the few instances where *per se* reversal is required, without consideration of whether the defendant has been prejudiced. "Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error" – simply put, a person may not be validly convicted of a crime of which he was never properly charged. Id. at 218.

But that is what happened here. The Grand Jury of the Southern District of New York, fulfilling its function, heard evidence that involved both Internet use and telephone calls by petitioner, and could have indicted him for either or both, but decided to indict him for the telephone calls only. As the district court cogently noted, this may well have been because the Grand Jury did not consider the calls "sufficiently 'enticing' to be *prima facie* criminal," because indeed, the calls did not involve discussion of sexual topics or any arrangement to meet for sex.

Moreover, the Grand Jury delineated the scope of the charges by use of the phrase "to wit," which, as the district court noted, means "that is to

say" or "namely."[1] This is not an ambiguous or flexible term; instead, it is a clear phrase of limitation.

Under the Grand Jury Clause, therefore, the "to wit" clause constituted both a factual and legal boundary to the charges against petitioner – by including a "to wit" clause that limited the scope of the indictment to Internet use, the Grand Jury necessarily excluded telephone calls as a potential facility of interstate commerce through which the alleged crime was perpetrated.

To the Second Circuit, however, this explicit limitation on the charged conduct was a mere bagatelle. Using nebulous terms such as "core of criminality" – a phrase found nowhere in Stirone – and announcing a unilateral policy of construing this Court's decision "narrowly,"[2] the panel broadened the

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[1] See Webster's Third New Int'l Dictionary Unabridged, http://mwu.eb.com/mwu [accessed December 20, 2012] (2002).

[2] Research does not reveal that any other circuit court construes Stirone "narrowly" or mandates that district courts do so.

scope of the indictment to include not only the specific behavior charged by the Grant Jury but anything else that was part of the same "course of conduct" – a rubric that could include a potentially endless scope of conduct, *including conduct that the Grand Jury may have consciously rejected as a basis for prosecution*. No doubt this construction of the Grand Jury Clause was informed by the Second Circuit's view of it as merely a prophylactic for other Fifth Amendment rights rather than a protection which is meaningful in itself.

As a matter of law, such a decision is in conflict not only with Stirone but, as discussed below, with the precedent of several other circuits, which have carved out a bright-line, specific-conduct test that is far more in line with this Court's jurisprudence and the nature of the right itself. This Court should accordingly grant *certiorari* and, upon review, reverse the Second Circuit's decision.

Any analysis of the scope and meaning of the Grand Jury Clause in the context of constructive amendment must, of necessity, begin with Stirone. In that case, this Court held that even though the Government could draw an indictment charging in general terms that the defendant violated the Hobbs Act without specifying the particular type of

interstate commerce that was burdened, an indictment that *did* so specify operated as a limitation. Specifically, the Government alleged that interstate commerce was burdened by the importation of sand. Stirone, 361 U.S. at 213-14. However, the proof at trial established that the defendant burdened interstate commerce not only by importation of sand but also by interstate exportation of steel. Id. at 214. The trial court, as in the instant case, instructed the jury that it could convict if either type of commerce was burdened. Id.

On these facts, the Court concluded that the indictment had been constructively amended by the jury instructions:

> Here, as the trial court charged the jury, there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular 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. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment.

Id. at 218-19. The Court thus concluded that "the addition of charging interference with steel exports here is neither trivial, useless, nor innocuous," in that it "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." Id. at 219. "Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." Id.

This holding – which hinged precisely on a disparity between the method of interference with interstate commerce that was charged in the indictment and that proven at trial – in itself puts paid to the Second Circuit's belief that the method by which a crime is committed is not part of the

essential charging terms of the indictment.[3] Moreover, Stirone also belies the circuit court's belief that the Grand Jury Clause is a prophylactic against double jeopardy or inadequate notice. Nowhere in the Stirone decision is double jeopardy even mentioned, nor does the word "notice" (or words of similar import, such as "surprise" or "prejudice") appear. If this Court had viewed the Grand Jury Clause as a mere prophylactic of those rights, then it could simply have found a prejudicial variance – the facts of Stirone presented an almost perfect opportunity to do so – and left it at that. Instead, by premising its holding on the Grand Jury Clause, and on the defendant's right to be tried for the specific conduct for which he was indicted – this Court

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[3] United States v. Whitfield, 695 F.3d 288 (4th Cir. 2012), stands for the same proposition. In Whitfield, the Fourth Circuit held that, where the defendant was charged with forced accompaniment and with killing to avoid apprehension, the indictment could not be broadened at trial to include forced accompaniment resulting in death. See id. at 307-08. Moreover, the Whitfield court limited "nonessential" terms of the indictment to those parts thereof that provided the "*context* of the defendant's actions," not those that delimited the crime itself. See id. at 308 (emphasis added).

indicated that the clause had independent meaning and that disparities were not to be lightly tolerated.

It is hardly surprising that several circuit courts have interpreted Stirone to hold that, where a trial court's instructions expand the charging terms of an indictment to include behavior not specifically alleged therein, a constructive amendment occurs. In United States v. Leichtnam, 948 F.2d 370, 379-80 (7th Cir.1991), for example, the Seventh Circuit held that a Section 924 indictment was impermissibly amended when it charged the defendant with carrying a rifle but the jury was shown two handguns, as well as the rifle. The court reached this holding despite the fact that the handguns were found in the same house as the rifle, during the course of the same search, and were thus possessed as part of the same course of conduct. See id. at 372 (describing underlying facts).

In Howard v. Daggett, 526 F.2d 1388, 1389-90 (9th Cir. 1975), the Ninth Circuit likewise reversed a conviction for interstate travel in aid of prostitution where the defendant was charged with inducing three specific women to engage in prostitution but the Government introduced proof regarding two other, unnamed women at trial. Obviously, all five women were trafficked as part of the same ongoing

scheme, but the addition of uncharged conduct was nevertheless found to be a violation of the Grand Jury Clause. And in United States v. Adams, 778 F.2d 1117, 1125 (5th Cir.1985), the Fifth Circuit found constructive amendment when indictment charged that the defendant falsely represented his name when purchasing a handgun and the jury instruction also charged that he misrepresented his residence, even though both misrepresentations were made on the same fake driver's license.

Moreover, numerous decisions in Section 924(c) cases have held that a constructive amendment occurs where the alleged possession of a weapon occurred during the course of a different offense than the one specified in the indictment, even though the charged and uncharged predicate offenses were part of the same general course of drug dealing. See United States v. Randall, 171 F.3d 195, 201-02 (4th Cir.1999); United States v. Reyes, 102 F.3d 1361, 1362-63, 1365 (5th Cir. 1996); United States v. Willoughby, 27 F.3d 263, 266 (7th Cir. 1994).[4]

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[4] The Section 924(c) cases also contradict the Second Circuit's attempt to limit constructive amendment to situations where the disparity between the indictment and the proof at trial results in the defendant being convicted of a "functionally different

The Second Circuit's "core of criminality"/"course of conduct" analysis stands in stark contrast to these holdings, and permits all sorts of mischief that the Grand Jury Clause forbids, including the reintroduction, through the back door, of conduct that the Grand Jury actually rejected as a basis for prosecution. What exactly is the "general essence" of a crime? What exactly is a "course of conduct?" Both terms are inherently subjective and vague. Moreover, the Second Circuit has held that a series of events may be part of the same course of conduct even if a lapse of months or years occurred at some point during the sequence. See United

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crime." See D'Amelio II, 683 F.3d at 423. In Randall, Reyes and Willoughby, the nature of the offense committed by the defendants – possession of a firearm in the course of a drug trafficking crime – was not made "functionally different" by the substitution of an uncharged predicate offense that took place during the same overall course of conduct. It is clear from these cases that trial proof or jury instructions which allow the jurors to convict based on *any* conduct outside the charging terms of the indictment would constitute a constructive amendment, even if the nature of the offense of conviction is not changed and even if the charged and uncharged conduct are part of the same scheme.

States v. Graziano, 391 Fed. Appx. 965, 966 (2d Cir. 2010) (alleged threats occurring two and three years before arson were "inextricably intertwined" and part of the same course of conduct), citing United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000); United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994). If an indictment which contains explicit limiting language can nevertheless be expanded to include anything that the Government can plausibly argue is part of the same course of conduct, then this would open the door to virtually unlimited deviations from the charging terms established by the grand jury.

Indeed, the unworkability of the "course of conduct" analysis is demonstrated precisely by the panel's efforts to reconcile United States v. Knuckles, 581 F.2d 305, 312 (2d Cir. 1978) with United States v. Wozniak, 126 F.3d 105 (2d Cir. 1997). In both Knuckles and Wozniak, the defendant was charged with drug trafficking in an indictment that contained a "to wit" clause limiting the charge to a certain type of drug, whereas the proof at trial indicated that he sold another type of drug. In Knuckles, the Second Circuit affirmed; in Wozniak, it reversed.

The panel in the instant case differentiated the two decisions on the basis that "Knuckles dealt with a specific transaction occurring on a specific

date," whereas Wozniak involved an ongoing conspiracy that spanned a period of time. See Decision at 14-15. But if the panel's "course of conduct" analysis is controlling, *this distinction should not matter*. If Wozniak was charged with an ongoing drug conspiracy – i.e., a course of conduct involving the sale of drugs – then additional proof involving the sale of different drugs during the same time period would not expand that course of conduct. The panel's rationale, in other words, does not provide a persuasive basis to distinguish Knuckles from Wozniak, and as such, casts further confusion on the already-muddied "core of criminality" standard rather than clarifying it.[5] Indeed, it should

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[5] It is also significant that Knuckles is not a constructive amendment case at all, and the defendant argued only that there was a variance; hence, the Second Circuit's analysis in Knuckles was focused on whether the defendant had been prejudiced rather than whether a *per se* Grand Jury Clause violation occurred. See Knuckles, 581 F.2d at 311-12. Moreover, in Knuckles, it was the defendant rather than the Government who introduced the variance in proof. See id. at 311. As such, it was entirely natural for the Knuckles court to find that "the variance did not affect[] the Government's case," id., and that any deviation from the indictment leading to conviction

be noted that the instant case is closer to the panel's description of Wozniak than to Knuckles, in that defendant D'Amelio was charged with an ongoing scheme taking place over the course of several months rather than a single discrete incident.

The panel decision in this case also stands in contrast to other decisions of the Second Circuit itself, such as United States v. Hassan, 542 F.3d 968 (2d Cir. 2008), which involved a conspiracy to import khat leaves from the Horn of Africa. Khat is not in itself a controlled substance, but can contain several controlled substances including cathinone (a Schedule I controlled substance) and cathine (a Schedule IV controlled substance). See id. at 972-73. The Government could have indicted Hassan for importing khat leaves that contained either cathinone, cathine or both, but made a "deliberate choice" to indict him for conspiring to import cathinone. See id. at 991. This Court held that the expansion of the proof at trial to include cathine constituted a constructive amendment, even though the cathine and cathinone allegations related, not merely to the same course of conduct, but to the same specific conduct. See id.

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was the defendant's fault.

The Second Circuit can thus hardly be blamed for ruefully observing that, as a result of its "core of criminality" analysis, "the cases involving constructive amendment sometimes appear to reach divergent results," see United States v. Milstein, 401 F.3d 53, 65 (2d Cir. 2005).

The panel's resolution of the second part of its analysis – i.e., whether the "essential elements" of the charge have been altered – is likewise in conflict with Stirone, the decisions of other circuits, and the Second Circuit's own precedent. As noted above, the panel determined that the essential element of the instant offense, as charged by the grand jury, was that the defendant used a facility of interstate commerce to attempt to entice a minor into sexual activity, but the specific facility he used was not an essential element. But in Milstein, another panel of the same Court held that where an indictment specifies a particular method of committing an offense that can be committed in several ways, the Government *is* limited to the theory set forth in the indictment. The Milstein court held that the defendant, who was indicted for misbranding drugs by repackaging them, could not be convicted of the misbranding offense based on proof that the drugs were not sterile. Milstein, 401 F.3d at 65-66. The court held that, because the indictment was limited

to repackaging, the Government could not broaden that theory at trial, even to include other methods of commission that are permitted by statute. Id. The Second Circuit's rationale was that a defendant has a Fifth Amendment right to be tried only for the specific offense to which he was indicted, "which cannot be taken away [by] court amendment." Id. at 65.

The D'Amelio II panel's resolution of the "essential element" issue is likewise in contradiction to Randall, Reyes and Willoughby, supra. In those cases, the elements of the charged offense included the possession of a firearm during a drug trafficking crime. Under the Second Circuit's rationale in the instant case, it should not matter which specific drug trafficking crime constituted the predicate offense, but the Fourth, Fifth and Seventh Circuits have all concluded that it does. Likewise, in Leichtnam, Howard and Adams, supra, the courts similarly held that the specific conduct by which the defendant committed an element of the offense does factor into the constructive amendment analysis, and if the indictment contains language limiting that element to specific conduct, then that language may not simply be disregarded on the ground that the "essential element" remains the same.

Nor does United States v. Dupre, 462 F.3d 131 (2d Cir. 2006), relied upon heavily by the panel in support of its interpretation of "essential element," support that interpretation.[6] In Dupre, the defendants were charged in an elaborate indictment which contained both a conspiracy charge and a substantive wire fraud count. The wire fraud charge contained a "to wit" clause listing a specific wire transfer which was not proven at trial. See id. at 140 & n.10. However, the Second Circuit found that a constructive amendment did not occur because the wire fraud that was proven fell within the four corners of the conspiracy allegation. Id. at 141. In other words, the Government's proof at trial did not add new conduct which was not charged by the grand jury, but instead related to conduct that the grand jury *did* consider and indict on, albeit in another count of the indictment. Dupre has no bearing on whether, in a *single-count* case such as this one, the essential elements of the charge are broadened by

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[6] United States v. Danielson, 199 F.3d 666 (2d Cir. 1999), also cited by the panel, is similarly inapposite because the variance of proof at trial – i.e., that the components of certain shells, rather than the finished shells, had traveled in interstate commerce – had the effect of *narrowing* rather than broadening the charging terms of the indictment.

the inclusion of conduct beyond the scope of the limiting language contained in the "to wit" clause.[7]

In sum, neither the Second Circuit's "core of criminality"/"course of conduct" analysis nor its "essential element" analysis are truly supported by the prior jurisprudence of this and other Courts, and instead add to the confusion and conflict surrounding exactly what a constructive amendment is. The result, is that trials will be fraught with uncertainty

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[7] The D'Amelio II panel also opined that "although the 'to wit' clause in D'Amelio's indictment specifies the use of the Internet, the clause preceding that language is generally framed and references the use of 'a facility and means of interstate commerce' in unspecified terms." D'Amelio II, 683 F.3d at 423. This part of the panel's holding is not only legally infirm but ungrammatical. The two clauses that the panel refers to are contained in the same sentence, and the "to wit" clause *modifies* the "facility and means of interstate commerce" clause. A modifying clause such as the "to wit" clause in the instant indictment alters and limits the meaning of the preceding language. Moreover, the term "to wit," which means "that is to say" or "namely," does not admit of flexibility; instead, it narrows the meaning of the introductory clause to the specific item or items listed after the phrase "to wit."

for defendants and the Government alike. The defendant will not be able to know what he is charged with by reading the indictment – as the Grand Jury Clause of the Fifth Amendment requires – but must instead go to trial with the knowledge that he might be convicted based on uncharged behavior, and that his conviction will be upheld as long as the Government can convince an appellate panel that such behavior is part of the same overall course of conduct. And the Government, upon learning prior to trial that the proof may vary from the indictment's charging terms, could not be certain whether it can simply go ahead with the trial or whether it must obtain a superseding indictment from another grand jury. The subjective, often contradictory jurisprudence that has surrounded the "core of criminality" and "essential elements" standards to date can give the parties no assurance that their decisions are correct, and no certainty as to what the charges in the indictment really are.

Fortunately, an alternative test can be derived from Stirone and from the case law of circuits other than the Second, particularly Leichtnam, Howard and Adams. This, as noted above, is a bright-line, "specific conduct" test. If an indictment, by its language, limits the conduct underlying a certain charge, then any expansion of the charge to include

other conduct is a constructive amendment.[8] Under this test, a "to wit" clause means exactly what it says. Both the Government and the defendant know that if an indictment contains a "to wit" clause or similar limiting language, then the scope of the indictment is defined by that clause. The defendants will know what the charges against them are, and the Government will know the exact bounds of permissible proof, as well as when it must obtain a

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[8] Indeed, several decisions of the Second Circuit itself contain language supporting such a standard - for instance, the holding that a constructive amendment occurs when jury instructions change an "essential element of the charge [such that] it is uncertain whether the defendant was convicted of *conduct* that was the subject of the grand jury's indictment." United States v. Salmonese, 352 F.3d 608, 620 (2d Cir. 2003) (emphasis added). Moreover, the Second Circuit has also noted that a constructive amendment occurs where the Government "offers proof of offenses *or transactions* not even mentioned in the indictment." United States v. Friesel, 224 F.3d 107, 117 (2d Cir. 2000) (emphasis added). These formulations are entirely consistent with a "specific conduct" test – far more so, in fact, that they are consistent with the nebulous "core of criminality"/"course of conduct" standard.

superseding indictment. Furthermore, if the Government feels it is on uncertain ground as to the facts it will prove at trial, it can protect itself by simply lodging a generally-worded indictment without a "to wit" clause, which will allow a broad scope of proof without misleading the defendant as to exactly what illegal acts he is accused of committing.

Moreover, such a bright-line test would not do violence to the Grand Jury Clause as the panel's analysis does. "[A] defendant has the right to be tried only on charges contained in an indictment returned by a grand jury." Hassan, 542 F.3d at 991-92. To permit broad amendments of proof at the time of trial would allow the Government and the courts to supersede the grand jury's role in determining the boundaries of criminal charges – a role which exists precisely as a safeguard against unrestrained governmental power.

The facts before this Court are simple. The grand jury in the instant case was presented with evidence concerning the alleged telephone calls. Nevertheless, it did not include those calls in the charging terms of the indictment, but instead limited the charged conduct to the use of a computer and the Internet. It may well have done so because it did not consider the telephone calls sufficiently enticing or

did not believe that they contained sexual content. It was not for the Government or the courts to second-guess that determination; instead, defendant had "the right to have the grand jury make the charge on its own judgment." See Stirone, 361 U.S. at 219. That right, as the district court correctly found, was violated, and under the bright-line test that is outlined by the decisions of this and other Circuits, the district court's decision should be upheld. The instant petition for *certiorari* should be granted and, upon review, the decision of the Second Circuit should be reversed.

CONCLUSION

In light of the foregoing, this Court should grant *certiorari* on all issues raised in this Petition. Upon granting *certiorari*, this Court should reinstate the district court's order vacating petitioner's conviction and remand for further proceedings on the indictment.

Dated: New York, NY
December 19, 2012

JONATHAN I. EDELSTEIN

APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 13, 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: April 29, 2010 Decided: June 13, 2012)

Docket No. 09-2541-cr

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL D'AMELIO,

Defendant-Appellee.

Before: RAGGI, HALL and CHIN, *Circuit Judges.*

Defendant-Appellee Daniel D'Amelio was convicted, after a jury trial, of attempted sexual enticement of a minor, pursuant to 18 U.S.C. § 2422(b). The district court vacated the conviction and granted D'Amelio's motion for a new trial on the ground that the jury instructions constructively amended the indictment. The government appealed. We hold that the indictment was not constructively amended and therefore reverse and remand.

JESSE M. FURMAN (Randall W. Jackson *on the brief*), Assistant United States Attorneys, of counsel for Preet Bharara, United States Attorney for the Southern District of New York, *for Appellant United States of America*.

JONATHAN I. EDELSTEIN, New York, New York, *for Defendant-Appellee Daniel D'Amelio*.

HALL, Circuit Judge:

Appellant, the United States of America (the "government"), appeals from the June 1, 2009, amended decision of the Southern District of New York (McMahon, J.) that vacated Defendant–Appellee Daniel D'Amelio's conviction, after a jury trial, of one count of attempted enticement of a minor, in violation of 18 U.S.C. § 2422(b), and granted his motion for a new trial under Fed.R.Crim.P. 33. The district court held that its jury instructions resulted in a constructive amendment of the indictment because the difference between the language of the "to wit" clause of the indictment, which charged D'Amelio with using the Internet as a facility of interstate commerce in committing the crime, and the jury instructions, which permitted proof of D'Amelio's use of the Internet *and* the telephone in committing the crime, altered an essential element of the charge to such an extent that it violated the Fifth Amendment's Grand Jury Clause. On appeal, the government argues that the district court erred because the deviation between the text of the indictment and the jury charge neither affected the "core of criminality" proven at trial nor modified an "essential element" of the crime, nor did it leave D'Amelio open to be charged again for the same offense. We agree with the government's contentions and therefore reverse the district court's decision and remand for further

proceedings consistent with this opinion.

BACKGROUND

I. Facts

This case stems from contacts occurring online, on the telephone, and in person between D'Amelio, a 47–year–old architect and part-time screenwriter, and an individual with the online screen name "MaryinNYC1991" ("Mary") during August and September of 2004. "Mary's" online profile indicated that she was a twelve-year-old girl, when in reality she was created by a team of New York City Police Department ("NYPD") officers: Detective James Held posed as "Mary" during the Internet chats, and twenty-three-year-old Detective Anne Psomas posed as "Mary" during telephone conversations and in-person meetings with D'Amelio. The content of the Internet and in-person conversations between "Mary" and D'Amelio ranged from innocuous topics such as D'Amelio's work as a screenwriter to more suggestive topics such as "Mary's" sexual history and what D'Amelio enjoyed doing sexually with girls. The NYPD arrested D'Amelio as he left a New York City park with "Mary," following their second meeting.

On June 15, 2007, a grand jury returned a one-count indictment charging D'Amelio with attempted enticement of a minor for the purpose of engaging in sexual activity, in violation of 18 U.S.C. § 2422(b). The indictment contains a single substantive paragraph, which reads as follows:

> From on or about August of 2004, up to and including in or about September of 2004, in the Southern District of New York, DAN D'AMELIA [sic], a/k/a "Wamarchand@aol.com," the defendant, unlawfully, willfully, and knowingly, did use a facility and means of interstate commerce to persuade, induce, entice, and coerce an individual who had not attained the age of 18 years to engage in sexual activity for which a person can be charged with a criminal offense, and attempted to do so, *to wit, D'AMELIA [sic] used a computer and the Internet* to attempt to entice, induce, coerce, and persuade a minor to engage in sexual activity in violation of New York State laws.

J.A. 14 (emphasis added). In July 2007, eighteen months prior to trial, the government informed

D'Amelio of its intention to introduce evidence of the telephone conversations between D'Amelio and "Mary." The government subsequently provided D'Amelio with recordings of the telephone conversations and at trial introduced transcripts of the nine Internet chat sessions between D'Amelio and "Mary," copies of the e-mails D'Amelio sent to "Mary," and recordings of their six telephone calls and two meetings.

In response to the government's requested jury instructions, D'Amelio objected, inter alia, to any reference in the proposed instructions that he used a telephone to commit the offense. He asserted that the jury charge constituted an impermissible constructive amendment of the indictment, which only referred to his use of the Internet,[1] particularly since the government did not obtain "a general indictment encompassing all the methods of commission permitted by 18 U.S.C. § 2242(b)." J.A.

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[1] While the indictment refers to both "a computer and the Internet," the trial record indicates that these two facilities or means of interstate commerce may be considered interchangeable because all computer-based communications at issue, e.g., instant messages and e-mails, were transmitted via the Internet.

66. The court denied the motion, stating:

> Both the internet and telephone are, of course, facilities of interstate commerce. The question is whether by including the to wit clause, the [government] limited itself to proving that the defendant is guilty of using only the facility of interstate commerce that is specified in the to wit clause, that being the internet, or whether ... the government can argue that more than one facility of interstate commerce was used.
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> I wish the government would leave the to wit clauses out of indictments, or would include, in the to wit clauses, everything of which it has evidence. And the government certainly knew that it had evidence of telephone conversations that were material to this case.
>
> However, having read a number of cases ... I am convinced that this does not constitute a constructive amendment of the indictment, because the evidence that the government proposes to

> introduce at trial concerns the same course of conduct consisting of a series of conversations that were designed to cultivate a relationship, with, and ultimately to induce, a minor to come to a meeting for the purpose of having sex.

J.A. 276–77.

The court held that the government's reliance on communications over the telephone constituted, at most, a variance in the indictment, and that D'Amelio could not show prejudice because he had been aware for approximately eighteen months prior to trial that the government intended to introduce recordings of his and "Mary's" telephone conversations. Accordingly, the district court instructed the jury as follows:

> The third element the government must prove beyond a reasonable doubt is that the defendant used a facility or means of interstate commerce in order to attempt to persuade, induce, or entice the person he believed to be a minor to engage in sexual activity. Both the telephone and the internet qualify as facilities or means of interstate

> commerce. Therefore, you must determine whether the government has proven beyond a reasonable doubt that a communication that constitutes an attempt to persuade, induce, or entice a person to commit a sexual act, was actually transmitted by means of a telephone, or the internet, or both.

Trial Tr. at 483. After two days of deliberations, the jury returned a guilty verdict.

II. The District Court's Decision on the Motion for a New Trial

Following his conviction, D'Amelio filed a motion for a judgment of acquittal or, in the alternative, a new trial pursuant to Fed.R.Crim.P. 29 and 33. D'Amelio reasserted his argument that, by charging the jury that the interstate commerce element of the offense could be satisfied by use of either the telephone or Internet, the district court constructively amended the indictment.

The district court denied D'Amelio's motion for a judgment of acquittal but reversed its earlier decision on whether the jury instructions constituted a constructive amendment to the indictment, and it

granted his motion for a new trial. *United States v. D'Amelio*, 636 F.Supp.2d 234 (S.D.N.Y.2009). The court framed the issue as follows: if the charging terms in the indictment included the "to wit" clause, then the indictment was constructively amended because the jury instructions broadened the possible bases for conviction beyond that specifically identified in the indictment, i.e. using the Internet to entice a minor to engage in sexual activity. *See id.* at 240. If, on the other hand, the charging terms were limited to the generally framed statutory language regarding the use of a facility of interstate commerce, a constructive amendment would not exist because the telephone, like the Internet, is a means of interstate commerce. *See id.*

In its analysis, the district court found that the "core criminality" in this case consisted of "enticing a little girl (or a person the defendant believed was a little girl) into a position where she could become the victim of a sexual predator," and that "[a]ll the communications relied on by the [g]overnment, whether e-mails or telephone calls, took place as part of a single course of conduct." *Id.* at 243. The district court recognized that the telephone conversations would have been admitted into evidence at trial, whether the indictment had mentioned them or not, and noted that D'Amelio had

not objected to their admission. *See id.*

But after analyzing the Second Circuit cases offered by both the government and D'Amelio, the district court determined that the indictment—"which charges the crime in narrow and specific terms rather than in broad general ones—was constructively amended by the [g]overnment's argument and by the [jury] charge," *id.* at 245, and that the jury instructions "so altered an essential element of the charge that it is not certain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment," *id.* The district court reached its conclusion "reluctantly," acknowledging that the case law was not on " 'all fours' with the cases in which constructive amendments were found." *Id.* at 245–46. The court added that it might have agreed with the government if it was "writing on a blank slate.... However, the Supreme Court and the Second Circuit have spoken, and this Court is their handmaiden. In a case where the indictment was, at the [g]overnment's behest, not 'generally framed,' [the court has] no choice but to follow their lead and confess error." *Id.* at 246.

DISCUSSION

On this appeal, we consider whether it violated the Fifth Amendment Grand Jury Clause to allow the petit jury to find D'Amelio guilty of attempted enticement of a minor based on his use of either the telephone or the Internet when a "to wit" clause in his indictment specified only the latter means of interstate commerce. The answer depends on whether the circumstances here demonstrate a constructive amendment of the indictment or a mere variance in proof. We make this determination *de novo. See United States v. McCourty*, 562 F.3d 458, 469 (2d Cir.2009). For the reasons stated herein, we find at most a variance in proof.

To prevail on a constructive amendment claim, a defendant must demonstrate that "the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir.1988) (internal quotation marks omitted) (emphasis added). In *United States v. Resendiz–Ponce*, 549 U.S. 102, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007), the Supreme Court restated the "two constitutional requirements for an indictment: 'first, [that it] contains the elements of the offense

charged and fairly informs a defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.' " *Id.* at 108, 127 S.Ct. 782 (quoting *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (alternation in original)). While this Circuit views constructive amendment as a per se violation of the Grand Jury Clause requiring reversal,[2] it has "'consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality* to be proven at trial.' " *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir.2007) (emphasis added in *Rigas*) (quoting United States v. Patino, 962 F.2d 263, 266 (2d Cir.1992)).

By contrast, "[a] variance occurs when the charging terms of the indictment are left unaltered,

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[2] On appeal, the government points to Supreme Court cases holding that most constitutional errors, including indictment defects, are subject to harmless- and plain error review, *see, e.g., United States v. Cotton*, 535 U.S. 625, 629-31 (2002), and argues that a constructive amendment determination should also be subject to such analysis. Because we hold that there was no constructive amendment of the indictment in this case, we do not address this argument.

but the evidence at trial proves facts materially different from those alleged in the indictment." *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir.2003) (internal quotation marks omitted). A variance in proof rises to a constitutional violation only if it infringes on the notice and double jeopardy protections of an indictment. *See United States v. D'Anna*, 450 F.2d 1201, 1204 (2d Cir.1971).

As this discussion indicates, the analysis of a constructive amendment and the analysis of a variance in proof differ to an extent, but the constitutional concerns underlying both are similar. The case law analyzing each issue, therefore, is instructive to our consideration of the parties' constructive amendment arguments.

On appeal, the government asserts that the deviation between the text of the indictment and jury instructions did not affect the "core of criminality" proven at trial nor did it modify an "essential element" of the crime; at most, the deviation between the indictment and proof constituted a non-prejudicial variance[3] rather than a constructive

[3] D'Amelio does not argue before this Court that the deviation constituted a prejudicial variance. In a footnote in his brief, however, he claims that he

amendment. It, for these reasons, contends that this Court's precedent compels reversal of the district court's decision.

D'Amelio counters that the district court properly concluded that the "to wit" clause in the indictment, which identified only the Internet as a facility of interstate commerce used to commit the crime, was constructively amended by the jury instructions, which listed both the Internet and telephone as facilities of interstate commerce. He claims that the indictment specifically limited the conduct that constituted the "core of criminality" and that the jury instructions expanded the basis for

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suffered prejudice as a result of certain of his telephone calls with "Mary" being introduced into evidence. He makes this argument in the context of discussing whether a defendant has to show prejudice to obtain reversal of the judgment if the indictment has been constructively amended, a question we need not answer on this appeal as explained *supra* at n.2. In any event, D'Amelio's prejudice argument is meritless. The government disclosed its intent to offer evidence of the telephone calls some eighteen months before trial. Thus, D'Amelio was in no way hampered in preparing his defense. Further, for reasons explained *infra*, D'Amelio is not at risk of double jeopardy.

conviction beyond the specific conduct charged. We disagree.

The "core of criminality" of an offense involves the essence of a crime, in general terms; the particulars of how a defendant effected the crime falls outside that purview. *See generally Martin v. Kassulke*, 970 F.2d 1539, 1543 (6th Cir.1992) (identifying the relevant question in distinguishing constructive amendment from a mere variance in proof as whether the jury was presented with "two alternative crimes or merely two alternative methods by which the one [charged] crime ... could have been committed"). While the case law does not define "core of criminality," it describes the phrase in relation to the crime at issue. For example, in *United States v. Danielson*, 199 F.3d 666 (2d Cir.1999), the defendant, a convicted felon, was charged with knowing possession of ammunition, in violation of 18 U.S.C. § 922(g). The indictment provided that the defendant "unlawfully, wilfully, and knowingly did possess ammunition in and affecting commerce, and did receive ammunition which had been shipped and transported in interstate and foreign commerce, to wit, 7 rounds of .45 calibre ammunition." *Id.* at 668 (internal quotation marks omitted). The judge charged the jury that in determining whether the defendant possessed ammunition that traveled in

interstate commerce, it could consider the statutory definition of "ammunition," which included component parts of a round. Defense counsel objected that the jury charge impermissibly broadened the indictment from its more limited "to wit" clause. On appeal, this Court rejected the defendant's constructive amendment argument, holding that "[t]he essential element of the offense charged was that [the defendant] possessed ammunition that had traveled in interstate commerce, not the precise nature of that ammunition." *Id.* at 670. The Court concluded: "Whether the government proved that shells or entire rounds had so traveled, there is no doubt that [the defendant] had notice of the 'core of criminality' to be proven at trial and that he was convicted of the offense charged in the indictment." *Id.*

D'Amelio argues that if the government defines the "core of criminality" narrowly in the indictment when it could otherwise define it generally, a constructive amendment occurs when the proof at trial is different from the narrower allegations in the indictment. As related to this case, the argument goes, the indictment could have stated merely that D'Amelio used facilities of interstate commerce to entice a minor, period; instead the indictment included the "to wit" clause, and the

grand jury chose to identify only the Internet as the facility of interstate commerce by which D'Amelio communicated with the minor. While this argument has some superficial appeal, it is ultimately unavailing.

D'Amelio's argument rests heavily on *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). In *Stirone*, the defendant was indicted for (and convicted of) unlawfully interfering with interstate commerce in violation of the Hobbs Act. The indictment charged the defendant with obstructing—by extortion and threats of labor unrest—shipments of sand that traveled in interstate commerce into Pennsylvania where the sand was being used in making concrete that was then going to be used to construct a steel mill. *Id.* at 213–14, 80 S.Ct. 270. At trial, the government introduced evidence related to the shipments of sand and the movement of those shipments in interstate commerce. The court, however, permitted the government also to introduce evidence that defendant's actions in hindering sand shipments had affected prospective steel shipments from the not-yet-constructed steel mill in Pennsylvania to other states, including Michigan and Kentucky. *Id.* at 214, 80 S.Ct. 270. Consistent with the indictment, the court instructed the jury that defendant's "guilt

could be rested ... on a finding that ... sand used to make the concrete had been shipped from another state into Pennsylvania." *Id.* (internal quotation marks omitted). But the trial court also instructed the jury that a finding of guilt could rest on the jury's determination that "concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce from Pennsylvania into other States." *Id.* (internal quotation marks omitted). The Supreme Court noted that nothing in the indictment could be read "as charging interference with movements of steel from Pennsylvania to other States." *Id.* at 217, 80 S.Ct. 270. This new factual basis for conviction was neither "trivial, useless, nor innocuous." *Id.* On that ground, the Court reversed defendant's conviction, concluding that he may have been "convicted on a charge the grand jury never made against him." *Id.* at 219, 80 S.Ct. 270.

The Court's analysis of what was in essence a constructive amendment issue[4] in *Stirone*, however,

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[4] The *Stirone* Court did not phrase its analysis in such terms. Nonetheless, it referred to the government proof and jury charge regarding the steel mill shipments as a "variance" that "destroyed the defendant's substantial right to be tried only on

does not control the outcome in this case. There is a critical difference between the procedural and substantive facts in *Stirone* and those presented here. The distinction lies in whether the jury convicted based "on a complex of facts distinctly different from that which the grand jury set forth in the indictment," *Jackson v. United States*, 359 F.2d 260, 263 (D.C.Cir.1966) (describing Stirone), or whether the indictment charged a single set of discrete facts from which the government's proof was at most a non-prejudicial variance, *United States v. Knuckles*, 581 F.2d 305, 312 (2d Cir.1978). If the latter, this Court has generally concluded that the indictment provides sufficient notice to defendants of the charge(s) lodged against them. *See, e.g., United States v. Soerbotten*, 398 Fed.Appx. 686, 688 (2d Cir.2010) (summary order); *United States v. Sindona*, 636 F.2d 792, 798–99 (2d Cir.1980);

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charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. The Court observed: "Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same." Id. However the Court characterized the issue in *Stirone*, variance cases and constructive amendment cases are both instructive on whether there has been a violation of the Grand Jury Clause.

Knuckles, 581 F.2d at 312.

In determining whether this case involves proof at trial of a distinctly different complex set of uncharged facts, which under *Stirone* would require reversal of the conviction, or a single set of discrete facts consistent with the charge in the indictment, we are guided by a comparison between two of our cases: *United States v. Knuckles*, 581 F.2d 305 (2d Cir.1978), and *United States v. Wozniak*, 126 F.3d 105 (2d Cir.1997). In *Knuckles*, the defendants had been charged with distribution of heroin, but at trial, the evidence showed that the substance distributed was cocaine. 581 F.2d at 308–09. The trial court charged the jury that it could convict if it found either distribution of heroin or cocaine. In affirming the conviction, this Court held that the defendants were "sufficiently apprised of the charges laid against them in ... the indictment." *Id.* at 311. Equally important to this Court's holding that there was no prejudicial variance in the government's proof was the fact that a "single set of facts" was involved—the "tabling operation for a controlled substance at a particular time and place. The operative facts were the same whether the controlled substance was heroin or cocaine." *Id.* at 312. Since "the time, place, people, and object proved at trial are in all respects those alleged in ... the indictment," we

held that the defendants had notice, they could defend against the charge, and they would not be subject to double jeopardy. *Id.* at 311–12. We specifically rejected the argument that *Stirone's* holding controlled the outcome. In particular, we pointed out that in *Stirone* the Court was troubled by the fact the conviction was based "on a set of facts wholly unrelated to the facts charged," *id.* at 312, which was a marked distinction from what we characterized as the "single set of facts" present in Knuckles's case,[5] *id.*

In contradistinction to *Knuckles* is *Wozniak*, in which the defendant was charged with conspiracy to possess with intent to distribute cocaine and methamphetamines as part of a seventy-six-count superseding indictment involving eight individuals. 126 F.3d at 106. The evidence at trial connecting the defendant to the drug ring showed only his use of cocaine and marijuana and his possession with intent to distribute marijuana, but not possession with intent to distribute cocaine and

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[5] We also have had occasion to reject Stirone as standing for a "broad prohibition of any variance between pleading and proof." *See Sindona*, 636 F.2d at 798. We have "consistently construed Stirone narrowly." *Id.*

methamphetamines as charged in the indictment. *Id.* at 107–08. The district court instructed the jury that it did "not matter that a specific count of the indictment charges that a specific controlled substance was involved in that count, and the evidence indicates that, in fact, a different controlled substance was involved," and that as long as the jury found that some controlled substance was involved, that fact would be sufficient to convict. *Id.* at 108–09 (internal quotation marks omitted). This Court, while carefully limiting its holding "to the specific circumstances in this case," *id.* at 109, agreed with the defendant that he "well may have been surprised by the introduction of evidence of narcotics other than what was alleged in the indictment," *id.* at 111, and had he known that evidence of the non-charged substance would satisfactorily prove the charges, he might have "chosen a different trial strategy," *id.* at 110. On that basis, we held that the indictment had been constructively amended.

In arriving at this conclusion, the *Wozniak* Court spent a good deal of time distinguishing *Knuckles*. It concluded that *Knuckles* "dealt with a specific transaction occurring on a specific date. Therefore, the defendants were aware of the 'core of criminality' which was to be proven at trial. The exact controlled substance did not affect the

government's evidence or the ability to defend." *Id.* at 111. By contrast, we observed in *Wozniak* that the case did not involve a "single set of operative facts that would alert Wozniak that at trial he would face marijuana evidence as well as whatever cocaine evidence the government possessed." *Id.* Rather, Wozniak's codefendants were charged in a separate grand jury indictment with conspiring to possess with intent to distribute marijuana, a charge that the government opted not to pursue against Wozniak.[6] *Id.* at 109, 111. As a result, the *Wozniak* court held that *Knuckles* did not control and that the jury instructions constructively amended the indictment in violation of defendant's Fifth Amendment rights. *See id.* at 111.

Building on the comparison between *Knuckles*

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[6] Further precluding the government from substituting a marijuana conspiracy for the charged cocaine and methamphetamine conspiracy is the fact that the latter conspiracy was charged in order to trigger mandatory minimum sentences that would not have applied to the marijuana scheme. *See United States v. Gonzalez*, 420 F.3d 111, 121-31 (2d Cir. 2005) (holding that drug types and quantities triggering statutory minimums are elements of the crime that must be pleaded and proved).

and *Wozniak* and how this Court has distinguished *Stirone* to date, we conclude that *Stirone* does not control the outcome here. As was the case in *Wozniak*, in *Stirone*, the defendant "well may have been surprised by the introduction," *Wozniak*, 126 F.3d at 111, of different and unrelated proof adduced at trial. In *Stirone*, the differences between the indictment and proof were extreme. On the one hand, the indictment charged interference with the importation of actual, past sand shipments into Pennsylvania. *Stirone*, 361 U.S. at 213–214, 80 S.Ct. 270. The variance in proof at trial, however, included proof of interference with the exportation of future steel shipments from "a nonexistent steel mill" out of Pennsylvania into other states. *Id.* at 219, 80 S.Ct. 270. Although not phrased in these terms, the "core of criminality" in *Stirone* was clearly the interference with shipments of materials used in the mixing of concrete (e.g., sand) wrought by the defendant's threats of labor unrest. *Id.* at 213–14, 80 S.Ct. 270 (citing the indictment). This was the basis for federal jurisdiction under the Hobbs Act as charged by the grand jury. The proof the government introduced and the jury considered regarding speculative steel shipments out of the plant that was yet to be built fell completely outside that core of criminality charged by the grand jury. Moreover, the government's proof and the jury's instructions

supported a theory of effect on interstate commerce under the Hobbs Act that was distinctly different from the one charged. While the *Stirone* Court said "when one particular kind of commerce is charged to have been burdened[,] a conviction must rest on that charge and not another," 361 U.S. at 218, 80 S.Ct. 270, the Court cabined that pronouncement by noting that the "fatal error" was the entirely speculative inquiry "whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with," *id.* at 219, 80 S.Ct. 270. As subsequent circuit case law has interpreted Stirone's holding, *see, e.g., Knuckles*, 581 F.2d at 312, *Stirone's* outcome would have been different if, in addition to interference with shipments of sand, the additional proof at defendant's trial had included interference with gravel and cement shipments, i.e., past shipments of other materials necessary for the victim's production of ready-mixed concrete. As in *Knuckles*, such a variance would not have altered the core of criminality in *Stirone*.

Stirone, therefore, is distinguishable from the case before us because the distinctly different sets of facts and theories presented and charged to the jury in *Stirone* that prompted the Court's reversal are not present here. In the case before us, the district court

found that the charged offense took place "as part of a single course of conduct." *D'Amelio*, 636 F.Supp.2d at 243. That course of conduct by *D'Amelio* took place within the discrete time period of August 2004 through September 2004. The course of conduct had a single, ultimate purpose (its "core of criminality")—to entice "Mary," whom D'Amelio believed was 12 years old, "into a position where she could become the victim of a sexual predator." Id. The district court implicitly recognized, and we agree, that the "core of criminality" for this crime did not encompass a specific facility and a specific means of interstate commerce employed by D'Amelio in connection with the crime. The court aptly noted that all of the communications relied upon by the government, "whether e-mails or telephone calls, took place as part of a single course of conduct—one designed, under the [g]overnment's theory of the case, to gain the trust of [Mary] and convince her to meet [D'Amelio] in person, so he could lure her into a secluded place for the purpose of engaging in sexual conduct." *Id.* Moreover, there is no evidence, much less any argument, that D'Amelio was "surprised" by evidence of telephone conversations introduced against him. While not dispositive, this is further indication that the phone calls were encompassed in the "core of criminality" charged in the indictment and could be considered as proof of use of "any

facility or means of interstate ... commerce." 18 U.S.C. § 2422(b); *see Patino*, 962 F.2d at 265–66.

Having concluded that the indictment gave D'Amelio sufficient notice of the core criminal conduct for which he was charged, we now address whether the variance in proof "altered ... [or] modif[ied] essential elements of the offense charged" to the point there is a "substantial likelihood that [D'Amelio] may have been convicted of an offense other than that charged in the indictment." *Mollica*, 849 F.2d at 729 (internal quotation marks omitted).

The government's proof at trial did not modify an "essential element" of the alleged crime. The essential element at issue is D'Amelio's use of a "facility or means of interstate ... commerce," 18 U.S.C. § 2422(b), not the particular means that were used. Neither the indictment nor proof at trial showed that D'Amelio committed this crime by means of, for example, use of force, which would have modified an "essential element" of the crime.[7]

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[7] The government argues that the interstate commerce element is the premise for federal jurisdiction, and not an "essential element" of the offense, by citing other statutes that contain a "means and facility of interstate commerce" element.

Whether D'Amelio used the Internet or a telephone makes no difference under the relevant statute, *see id.*, and "affect[ed] neither the [g]overnment's case nor the sentence imposed." *Knuckles*, 581 F.2d at 311.

In so concluding, we draw a parallel with other constructive amendment cases where courts have held that the specific means used by a defendant to effect his or her crime does not constitute an "essential element" of the offense and, therefore, proof of specific means apart from those charged in the indictment does not constructively amend the indictment. In *United States v. Dupre*, 462 F.3d 131 (2d Cir.2006), the defendants were charged with wire fraud and conspiracy to commit wire fraud. The indictment included some preliminary, generally framed clauses that tracked the language of the charging statute, followed by a "to wit" clause alleging a specific fraudulent transaction. *See id.* at 140 n. 10. The specific wire transfer mentioned in the "to wit" clause was not proven at trial, but others were. *Id.* at 140. This Court held the indictment was not constructively amended by the proof at trial, because "the evidence at trial concerned the same elaborate scheme to defraud investors as was described in the indictment." *Id.* at 140–41. The Court emphasized

that the starting and ending dates of the conspiracy, stated in the indictment, corresponded to the conspiracy proven at trial, and that the evidence demonstrated that defendants engaged in the fraudulent scheme described in the indictment. *Id.* at 140. It held there was no constructive amendment. *Id.* at 140–41. There was instead a variance which was not fatal to the prosecution because the "description of the scheme in the indictment" had "put defendants on notice that the prosecution aimed to prove that defendants conspired in the Southern District of New York to fraudulently induce investors to transfer money by wire to defendants" during the relevant time period. *Id.* at 141. In other words, the essential elements of the wire fraud crime involved wire transfers, not specific wire transfers. *See id.* at 142–43; *see also Patino*, 962 F.2d at 266 (citing, with approval, *United States v. Robison*, 904 F.2d 365, 369 (6th Cir.1990), in which the Sixth Circuit upheld an 18 U.S.C. § 924(c) conviction where the indictment charged use of a .357 Magnum but the proof showed use of a shotgun, because the specific type of firearm used by the conspirator was not an essential element of the crime); *Danielson*, 199 F.3d at 670.

In this case, the essential elements of the enticement crime involved communications conveyed

by facilities of interstate commerce, not the specific interstate commerce facilities used to achieve these communications. See 18 U.S.C. § 2422(b). Indeed, because enticement frequently depends on a sexual predator's securing a victim's trust, multiple communications are the norm rather than the exception. Thus, the indictment charged that the enticement occurred over a period of time defined by dates specified in the indictment. And well in advance of trial, the government provided the defendant with notice of the communications on which it would rely to prove the charged crime at trial. Thus, although the "to wit" clause in D'Amelio's indictment specifies use of the Internet, the clause preceding that language is generally framed and references the use of "a facility and means of interstate commerce" in unspecified terms. Because the telephone is a "facility and means of interstate commerce," *see, e.g., United States v. Giordano*, 442 F.3d 30, 39 (2d Cir.2006), it was not fatal to D'Amelio's conviction that the jury was instructed that both the telephone and Internet qualify as facilities of interstate commerce. We conclude, therefore, that this "essential element" of the crime was the use of a facility or means of interstate commerce, not the particular means used. In sum, where the indictment charged a single course of conduct and the deviation from the interstate

commerce facilities alleged in the "to wit" clause did not permit conviction for a functionally different crime, it cannot be said that the deviation in evidence "broaden[ed] the possible basis for conviction beyond that contained in the indictment." *Patino*, 962 F.2d at 266.

Having concluded that D'Amelio received constitutional notice, we also hold that D'Amelio will not suffer any risk of double jeopardy. The indictment named "[D'Amelio], the date and place of the crime, and the crime alleged. Read in conjunction with the charge to the jury, there can be no doubt that [D'Amelio has] been once in jeopardy," *Knuckles*, 581 F.2d at 311–12, for participation in a scheme to entice a person under eighteen, via a facility of interstate commerce, in the Southern District of New York, from August to September 2004.

The cases the district court relied upon to buttress its conclusion that the indictment was constructively amended (and relied upon by D'Amelio on appeal) are distinguishable because in those cases either the deviation between the indictment and the proof at trial was significant or the jury convicted the defendant of a functionally different crime. *See, e.g., United States v. Hassan*, 578 F.3d 108, 133–34 (2d

Cir.2008) (finding jury charge erroneous because it permitted jury to convict defendant of an offense different from the one charged in the indictment and carrying different penalties); *United States v. Milstein*, 401 F.3d 53, 64–66 (2d Cir.2005) (indictment charged defendant with distributing misbranded drugs in interstate commerce with fraudulent intent; at trial, government presented evidence establishing guilt based on completely different theory of misbranding; Court held that defendant was not put on notice that the government would introduce evidence supporting a different method of misbranding and held that the indictment was constructively amended).

In light of the above, we hold that the government provided D'Amelio with notice of the "core of criminality" of the charge to be proven at trial—attempted enticement of a minor—and that the district court's instructions to the jury that both the telephone and Internet were facilities of interstate commerce did not "so alter[ ] an essential element of the charge" as to amount to a constructive amendment. *Salmonese*, 352 F.3d at 620 (internal quotation marks and citation omitted). Furthermore, we hold that the allegations in the indictment and the proof and jury instructions "substantially correspond" with each other, as they involve a single

course of conduct. *Danielson*, 199 F.3d at 670 (internal quotation marks omitted). It therefore follows that *D'Amelio* was convicted of conduct that was the subject of the grand jury's indictment, and there was no constructive amendment of the indictment. *See Salmonese*, 352 F.3d at 620–21.

As a final observation, we agree with the district court that this particular litigation could have been avoided had the government been more careful in wording its indictment.

CONCLUSION

Because we hold that there was no constructive amendment of the indictment in this case, we reverse the district court's decision and remand the case for further proceedings consistent with this opinion.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JUNE 1, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
_____x

UNITED STATES OF AMERICA,

07CR548 (CM)

- against -

DANIEL D'AMELIA,[1]

Defendant.
_____x

DECISION ON DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND/OR A NEW TRIAL PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE 29 AND 33

McMahon, J.

After being convicted by a jury of one count of

[1] Defendant was indicted under the name Daniel D'Amelia. However, defendant's true name is Daniel D'Amelio.

attempted enticement of a minor, in violation of 18 U.S.C. § 2422(b), defendant Daniel D'Amelio moves for judgment of acquittal and/or a new trial, pursuant to Fed.R.Crim.P. 29(c) and 33. The defendant argues that he is entitled to a new trial pursuant to Rule 33 because the court's jury instructions, which were as requested by the Government, resulted in a constructive amendment of the indictment. Alternatively, defendant argues that the conviction should be vacated and the indictment dismissed pursuant to Rule 29(c) because 18 U.S.C. § 2422 was unconstitutionally overbroad as applied to him.

The motion for a judgment of acquittal is denied. The motion for a new trial, however, is granted.

Background

In the summer of 2004, Daniel D'Amelio, a screenwriter, began contacting an individual using the screenname "MaryinNYC1991" in an America Online ("AOL") chatroom. (Tr. 41–44).[2] D'Amelio had

[2] "Tr." refers to the trial transcript of this case; "GX" refers to the Government exhibits introduced into evidence.

a number of internet and telephone conversations with "Mary" between August 6 and September 13, 2004, when he was arrested. (Tr. 44–87; 270–99). Those conversations ranged over many subjects-from a screenplay on which D'Amelio was working to the defendant's grief at the death of his cat, Eddie. Sexual matters were also discussed; D'Amelio asked "Mary" about, among other things, her relationship with a boyfriend, whether she had ever had an orgasm, and what was the wildest thing she had done. D'Amelio also told "Mary" what he likes to do sexually with girls.

"Mary's" online personal profile identified her as twelve years old. (Tr. 44). In fact, she was the creation of a team of undercover New York City police officers. On the internet, "Mary" was played by Officer James Held. Over the telephone and in person, she was Detective Anne Psomas, who was 23 years old. (Tr. 41–46).

All of the contacts between defendant and "Mary"—whether over the internet or the telephone—were taped.

The defendant met with "Mary" in Washington Square Park on two separate occasions. (Tr. 87). He was arrested by the New York City Police

Department during the second meeting, on September 13, 2004. At the time of the arrest, defendant and the undercover were leaving the park, ostensibly headed to a movie theatre. (Tr. 60–61).

D'Amelio's case was originally handled by the Manhattan District Attorney's Office; eventually it shifted to the United States Attorney and, on June 15, 2007, a grand jury in the Southern District of New York returned a one count indictment against him. Defendant was arraigned before Magistrate Judge Gabriel Gorenstein on June 28, 2007, and he pleaded not guilty.

The indictment contains a single substantive paragraph, which reads as follows:

> From on or about August of 2004, up to and including in or about September of 2004, in the Southern District of New York, DAN D'AMELIA [sic], a/k/a Wamarchand@aol.com, the defendant, unlawfully, willfully and knowingly, did use a facility and means of interstate commerce to persuade, induce, entice and coerce an individual who had not attained the age of 18 years to engage in sexual activity for which a person can

> be charged with a criminal offense, and attempted to do so, to wit, D'AMELIA [sic] used a computer and the Internet to attempt to entice, induce, coerce and persuade a minor to engage in sexual activity in violation of New York States laws.

It is the "to wit" clause that gives rise to the instant motion for a new trial.

On July 22, 2007, the Government produced Rule 16 discovery to the defendant. The discovery included print-outs of all of the chats between the defendant and MaryinNYC1991, and audio tapes and compact discs containing recordings of the telephone calls between the defendant and "Mary." (See July 22, 2007 Discovery Letter, Exhibit A to Govt. Response to Rules 29/33 Motion). Defendant and "Mary" discussed meeting online but the actual meetings were arranged over the telephone.

Neither the defendant nor the Government made any pretrial motions.

The case was set for trial on January 26, 2009. Because of a conflict in the schedule of the judge who was originally assigned to the case, the case was

reassigned to me on January 16, 2009—ten days before the trial, in a case that was already 19 months past indictment.

Pursuant to instructions from my predecessor, the defendant had submitted objections to the Government's proposed jury charges on January 21. Defendant objected to the proposed charge that would have allowed the jury to convict the defendant if the Government proved beyond a reasonable doubt that he used either the internet or the telephone (or both) to entice the person he thought was a minor into sexual contact. D'Amelio argued that this worked a constructive amendment of the indictment, because the "to wit" clause identifies only the internet—not the telephone—as the means of committing the offense.

Concerned that this issue might affect the opening statements, the court raised it with the parties at our pre-trial conference, on January 22. The Government was not prepared to respond but volunteered to file something. The court did not receive that response until the morning of January 27—after the voir dire had concluded, and with opening statements about to be made.

On the basis of some admittedly (and

unfortunately) hasty research, the court agreed with the view propounded by the Government, and ruled on the record that (1) reliance on the telephone conversations would at most constitute a variance, rather than a constructive amendment, because both the internet and the telephone were facilities of interstate commerce; and (2) the defendant suffered no prejudiced from this particular variance, since he had obtained the tapes and transcripts of the telephone conversations months earlier and had ample time to prepare his defense accordingly.

The case was tried in accordance with that ruling, and the court charged the jury (over defendant's objection) as follows:

> The third element the government must prove beyond a reasonable doubt is that the defendant used a facility or means of interstate commerce in order to attempt to persuade, induce, or entice the person he believed to be a minor to engage in sexual activity. Both the telephone and the internet qualify as facilities or means of interstate commerce. Therefore, you must determine whether the government has proven beyond a reasonable doubt that

> a communication that constitutes an attempt to persuade, induce, or entice a person to commit a sexual act, was actually transmitted by means of a telephone, or the internet, or both.

(Tr. at 483). On February 4, 2009, after two days of deliberations, the jury found defendant guilty of the lone count in the indictment.

Rule 33 of the Federal Rules of Criminal Procedure

Fed. R. Crim. P. 33(a) provides, "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." This Court is imbued with "broad discretion ... to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Ferguson, 246 F.3d 129, 133 (2d Cir.2001). The Court's broad discretion empowers it to grant relief based not only on the sufficiency vel non of the evidence at trial but on any other circumstance that might render the trial "essentially unfair," including trial errors. See United States v. Muyet, 994 F.Supp. 501, 520 (S.D.N.Y.1998) (citing United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S.Ct. 965, 100 L.Ed.

1331 (1956)). Where Rule 33 relief is sought based on trial errors, the standard of review before this Court is the same as on appeal. See United States v. Zagari, 111 F.3d 307, 319–20 (2d Cir.1997) (applying appellate standard to the denial of a Rule 33 Brady motion).

18 U.S.C. § 2422(b) Is Not Unconstitutionally Overbroad As Applied in this Case

The defendant argues that the application of Section 2422(b) is, "under the unique circumstances of the instant case, overbroad as applied." This argument is completely foreclosed by the Second Circuit's decision in United States v. Gagliardi, 506 F.3d 140 (2d Cir.2007), the relevant facts of which are indistinguishable from those in this case.

Gagliardi was prosecuted as a result of a government-informant sting that occurred in an internet chat forum called "I Love Older Men." Id. at 143. The Court of Appeals held:

> [T]he statute punishes the act of enticing or attempting to entice a minor when it is knowingly done; it does not implicate speech. Moreover, when fantasy speech is directed toward an adult believed to be a minor, it is, in

> effect, the vehicle through which a pedophile attempts to ensnare a victim, *cf.* Meek, 366 F.3d [705] at 721 [(9th Cir.2004)], and we have held, unremarkably, that " '[s]peech is not protected by the First Amendment when it is the very vehicle of the crime itself,' " United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir.1990) (citation omitted); see also Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."). By Gagliardi's own admission in his brief, "there is no First Amendment right to persuade minors to engage in illegal sex acts," Appellant's Br. at 38; see also Tykarsky, 446 F.3d [458] at 473 [(3d Cir.2006)]; there is likewise no First Amendment right to persuade one whom the accused believes to be a minor to engage in criminal sexual conduct.

Id. at 148.

The defendant's as-applied challenge to Section 2422(b) would have merit only if the jury had

accepted his claim that he actually believed that "Mary" was an adult. But it did not. The jury was charged that it could only convict defendant if the Government proved beyond a reasonable doubt that D'Amelio actually believed "Mary" to be a minor. The verdict necessarily means that the jury rejected defendant's testimony on that subject, and that the Government proved beyond a reasonable doubt that defendant believed he was interacting with a child.

Defendant's motion for a judgment of acquittal on constitutional grounds is, therefore, denied.

The Jury Charge Worked a Constructive Amendment of the Indictment

"A defendant has the right to be tried only on charges contained in an indictment returned by a grand jury." Hassan, 542 F.3d at 991–92, quoting United States v. Wozniak, 126 F.3d 105, 109 (2d Cir.1997). When the 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. United States v. Miller, 471 U.S. 130, 138, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). Put another way, a Fifth Amendment violation occurs where the jury charge "alters 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." United States v. Salmonese, 352 F.3d 608, 620 (2d Cir.2003). Constructive amendment is a per se violation of the Fifth Amendment, even if the defendant has suffered no prejudice. Hassan, 542 F.3d at 992; United States v. Roshko, 969 F.2d 1, 5–6 (2d Cir.1992).

The Second Circuit distinguishes constructive amendments from variances. "A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." United States v. Salmonese, 352 F.3d 608, 621 (2d Cir.2003). If a "generally framed indictment encompasses the specific legal theory or evidence used at trial," then a variance rather than a constructive amendment will be found. See id. at 620. A variance is not a per se Fifth Amendment violation; it only becomes a violation when the defendant is prejudiced by the variance, as when disclosure is late. United States v. Dupre, 462 F.3d 131 (2d Cir.2006).

The motion before the Court asserts that the indictment was not "generally framed," because it included a "to wit" clause that identified one, and

only one, specific "facility of interstate commerce" that was used to commit the crime charged. Defendant argues that, having so framed the indictment, the Government could only win its conviction by proving beyond a reasonable doubt that the defendant used the specified means—the internet—to entice the minor into having sex. By instructing the jury that it could convict him if he used either the Internet or the telephone system to attempt to entice a minor, defendant argues that the Government (which requested the instruction), and ultimately the Court, changed the "charging terms" in the indictment, "broaden[ing] the possible basis for conviction beyond that contained in the indictment." The defendant does not argue that the charge misstated the law—only that, by specifying the internet but not the telephone as the means of commission of the offense, the indictment compelled the court to charge the jury that only evidence of using the internet to entice the purported minor would support a conviction.

If the "charging terms" in the indictment include the "to wit" clause, then defendant is correct, and the charge as delivered was erroneous. If, however, the "charging terms" are limited to the statutory language about "use of a facility of interstate commerce," the Government is correct,

because the telephone, like the internet, is a "means of interstate commerce." United States v. Giordano, 442 F.3d 30, 39 (2d Cir.2006). Defendant does not challenge the Court's conclusion that he was not prejudiced if this was in fact a variance, nor could he mount a successful challenge in this regard; he received tapes of the telephone calls that were introduced into evidence 18 months prior to trial.

Defendant relies principally on four cases in support of his argument that the "charging terms" include the "to wit" clause.

First and foremost among them is Stirone v. United States, 361 U.S. 212, 213–14, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). The defendant in that case was indicted for a Hobbs Act violation. The indictment charged that Stirone had unlawfully obstructed, delayed and affected interstate commerce between the several states by extorting a man named Rider, who had a contract to supply ready-mixed concrete for the construction of a steel plant in Allentown, Pennsylvania. Rider imported sand to use in the preparation of the concrete from outside Pennsylvania, and the indictment specifically alleged that "the movement of the aforesaid materials and supplies in such commerce [i.e., the sand]" was the basis for the interstate commerce element of the

crime. At trial, over a defense objection on relevance grounds, the Government introduced evidence that steel manufactured at the plant that was built using Rider's concrete traveled in interstate commerce. The court charged the jury that the interstate commerce element of the Hobbs Act could be satisfied if the Government proved beyond a reasonable doubt either that the sand had been shipped into Pennsylvania from out of state or that Rider's concrete was used to build a mill that would manufacture articles of steel to be shipped in interstate commerce. After Stirone's conviction, he challenged the Government's evidence and the instruction as a constructive amendment of his indictment.

The Supreme Court agreed with Stirone that the indictment had been constructively amended, concluding:

> The indictment here cannot fairly be read as charging interference with movements of steel from Pennsylvania to other States.... The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can

> know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said that, a new basis for conviction having been added, Stirone was convicted solely on the charge made in the indictment the grand jury returned.... Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

Id. at 217, 80 S.Ct. 270. The high court identified the "fatal error" in the case as the mention of a specific type of interstate commerce in the indictment:

> 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 rest upon a showing

> that commerce of one kind or another has been burdened.

Id. at 218–19, 80 S.Ct. 270.

In United States v. Milstein, 401 F.3d 53 (2d Cir.2005), the defendant was charged with inter alia: distributing misbranded drugs in interstate commerce with fraudulent intent, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2) (Count Three). Count Three of the indictment alleged that "Forgery or falsification of any part of the packaging material, including the instructional inserts, lot numbers or expiration dates, renders the drug misbranded under federal law," and that Milstein and others "regularly distributed [the modified drugs] that had been repackaged using forged materials." It further alleged that "They sold these re-packaged drugs as if they were the original product from the licensed manufacturers, thus distributing misbranded drugs." Milstein, 401 F.3d at 64. Nonetheless, the jury was instructed that defendant could be found guilty of violating the statute if he falsified the packaging or adulterated the drugs themselves.

The defendant appealed his conviction, and the Second Circuit reversed, ruling that Milstein could not be convicted of the misbranding offense

based on proof that the drugs were not sterile. Id. Because the indictment was limited to repackaging, the Government could not broaden that theory at trial—even to include other methods of commission that violate the statute under which defendant was charged. Id. The court's rationale was that the defendant had been indicted for forging the packaging and he had a Fifth Amendment right to be tried only for the specific offense to which he was indicted, "which cannot be taken away [by] court amendment." Id. at 65.

In United States v. Wozniak, 126 F.3d 105 (2d Cir.1997), the defendant was charged with one count of conspiracy to possess with intent to distribute a controlled substance containing cocaine and methamphetamine, one count of possession with intent to distribute cocaine, and three counts of using a communication device to facilitate a conspiracy to distribute cocaine and methamphetamine, The Government presented some evidence about cocaine at trial, but most of its proof related to the distribution of marijuana. The trial court instructed the jury that it could find guilt on the basis of transactions involving any illegal controlled substance. The Government argued that this was at most a variance, but the Court of Appeals held that the indictment had been constructively amended:

> The indictment could have charged Wozniak generally with offenses involving controlled substances in violation of 21 U.S.C. § 841(a)(1) without mention of any specific drug. Had all the counts of the indictment not specified cocaine and methamphetamine, the conviction based solely on marijuana evidence might stand. If the indictment had been drawn in general terms and Wozniak was in doubt about the controlled substance alleged, he could have sought a bill of particulars pursuant to Fed.R.Crim.P. 7(f) setting forth the specific allegations of the offense charged. Also, the indictment did not contain a catch-all provision that would allow a conviction for Wozniak's involvement with any illegal substance.

Id. at 109–10. Rejecting the Government's argument that "the precise controlled substance is not a material element of a narcotics conspiracy," the court held that the four corners of the indictment "stated no single set of operative facts that would alert Wozniak that at trial he would face marijuana evidence as well as whatever cocaine evidence the

government possessed." Id. at 110. The court placed great weight on the fact that Wozniak had not been named In a separate but related indictment predicated entirely on the conspiracy to distribute marijuana that was the subject of the proof at trial. Id. at 109.

Finally, in United States v. Hassan, 542 F.3d 968 (2d Cir.2008), the Second Circuit held that an indictment which specifically charged the defendant with trafficking in cathinone, a Schedule 1 controlled substance, could not be broadened at trial to include trafficking in another drug, cathine, even though both cathinone and cathine are components of the khat leaves. Hassan, 542 F.3d at 992. Citing Wozniak, the court noted that the Government "could have charged this case as one involving either cathinone or cathine, or both," but that it instead "made the deliberate choice to indict Hassan with conspiring to import and possess cathinone." id. at 971.

In opposing defendant's motion, the Government distinguishes these cases from D'Amelio's. It distinguishes Stirone and Milstein by arguing that the alternative theories introduced into evidence at trial—the shipment of steel from the mill rather than the use of imported sand to make

concrete, and the contamination of the drugs contained inside the packaging rather than the forging of the packaging materials themselves—were completely different from and wholly unrelated to the conduct specified in the indictment. In addition to noting that in its opinion the panel that decided Wozniak limited the holding to the precise facts of that case (of which the most important was the existence of the second indictment charging others, but not defendant, with the marijuana conspiracy proved at Wozniak's trial, see Wozniak, 126 F.3d at 111), the Government distinguishes both it and Hassan on the ground that the defendants in those cases were indicted for participating in conspiracies to import a particular drug, while the proof at trial involved entirely different conspiracies to import different drugs.

The Government's proposed distinction is not without resonance.[3] A conspiracy to distribute cocaine is not the same thing as a conspiracy to distribute marijuana; and adulterating drugs is decidedly different from forging the packaging into which drugs are placed. There was no reason for the Government to introduce evidence about where steel

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[3] Indeed, it resonated with the Court when I considered the matter at the outset of the trial.

manufactured in the Allentown facility would be taken once it was finished in order to prove what the indictment specified in Stirone, or to elicit testimony about adulteration of the drugs in Milstein in order to prove that the packaging in that case had been falsified. In Wozniak and Hassan, evidence of uncharged conspiracies was not directly material to proving the conspiracies actually charged; in Wozniak the grand jury had not indicted Wozniak, but had indicted others, for the marijuana scheme that was the subject of much of the testimony at his trial. In short, the evidence that supported the Government's alternative, expanded theories was really not germane to the "core criminality" charged in those cases.

In this case, by contrast, the core criminality is enticing a little girl (or a person the defendant believed was a little girl) into a position where she could become the victim of a sexual predator. All the communications relied on by the Government, whether e-mails or telephone calls, took place as part of a single course of conduct—one designed, under the Government's theory of the case, to gain the trust of a child and convince her to meet the defendant in person, so he could lure her into a secluded place for the purpose of engaging in sexual conduct. The telephone conversations would inevitably have been

admitted into evidence at D'Amelio's trial, if only to complete the narrative, whether the indictment mentioned them or not. And indeed, defendant did not object to their admission. This cannot be said of any of the four cases discussed above.

The Government also argues that the facts of this case are closer to those in five other Second Circuit cases, where no constructive amendment was found: United States v. Dupre, 462 F.3d 131 (2d Cir.2006); United States v. Rigas, 490 F.3d 208 (2d Cir.2007); United States v. Danielson, 199 F.3d 666 (2d Cir.1999); United States v. Patino, 962 F.2d 263 (2d Cir.1992) and United States v. Knuckles, 581 F.2d 305 (2d Cir.1978).[4] That argument rests on shaky ground.

In Dupre, the defendants were charged in an elaborate indictment that contained both a conspiracy to commit wire fraud charge and a substantive wire fraud count. The substantive wire

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[4] The Government also cites an even more recent Second Circuit opinion, United States v. Ionia Management S.A., – F.3d –, 2009 WL 1116966 (2d Cir. 2009), but that case's summary recital of the contours of the law on constructive amendment adds nothing to the Circuit's jurisprudence on this subject.

fraud count in the indictment contained a "to wit" clause, which listed a specific wire transfer that was not proven at trial. See Dupre, 462 F.3d at 140 & n. 10. The Second Circuit found that there was at most a variance, not a constructive amendment, because the wire fraud that was proven fell within the four corners of the broader conspiracy allegation:

> We conclude that the prosecution did not constructively amend Count Two because the evidence at trial concerned the same elaborate scheme to defraud investors as was described in the indictment. The starting and ending dates of the conspiracy noted in the indictment correspond to the conspiracy proven at trial, and the evidence at trial demonstrated that defendants misled investors into believing that defendants would eventually be able to obtain the "frozen funds purportedly belonging to the family of former Filipino president Ferdinand Marcos" described in the indictment.

Id. at 141.

In Rigas, the defendants were charged with

numerous counts of bank fraud and securities fraud as well as an overarching conspiracy. Counts 22 and 23 of the indictment, which charged bank fraud, accused the defendants of "falsely representing that the borrowers on two credit agreements ... were in compliance with certain material terms of those credit agreements." Rigas, 490 F.3d at 227. However, "the charging paragraphs for Counts Twenty–Two and Twenty–Three [also] incorporated by reference the allegations contained in paragraphs 1–197 and 204–05," which contained extensive description of the manner and means of the alleged scheme and of the various fraudulent acts by which it was carried out. See id.

On appeal from a conviction on all counts, the defendants "contend[ed] that the only bank fraud theory properly set forth in the Superseding Indictment was that 'post-closing adjustments' to financial information resulted in bank fraud" and that their convictions were based on a different theory which was pled in another section of the indictment. Id. The Second Circuit, however, found that the paragraph cited by the defense was "not the only paragraph in the indictment that addresses bank fraud," that other paragraphs "suggest[ed] that the specific allegations of bank fraud are merely exemplary," and that the charging paragraph

referenced another allegation that described the bank fraud conspiracy in general terms. Id. at 229. As such, the court found that the totality of the indictment gave the defendants sufficient notice of the core of criminality of which they were accused. See id. at 229–30.

Defendant persuasively asserts that Dupre and Rigas are inapposite, because they stand only for the proposition that no constructive amendment will be found where the alternative factual theory on which the Government relies is described elsewhere in the indictment and/or falls within the four corners of a more generalized conspiracy allegation. In this case, one cannot look elsewhere in the indictment for additional factual allegations that can be read by incorporation into the charge against defendant. The indictment in this case is exactly one paragraph long, and it speaks only of enticing by use of the internet—not the telephone. The crime could not be more specifically (as opposed to generally) charged.

The other three cases on which the Government relies are entirely inapposite.

In Danielson, the defendant was charged in a single-count indictment with being a felon in possession of ammunition. Danielson, 199 F.3d 666.

The indictment alleged that the ammunition at issue consisted of "7 rounds of .45 calibre ammunition" that had been transported in interstate and/or foreign commerce. See id. at 668. Judge Patterson charged the jury that in determining whether Danielson had possessed ammunition that had traveled in interstate commerce, the jury could consider the term "ammunition" as it is defined for purposes of § 922(g): "Any ammunition or cartridge cases, primers, bullets or propellent powder designed for use in any firearm." 18 U.S.C. § 921(a)(17)(A). The defendant argued on appeal that, because the indictment alleged possession of exactly seven rounds, the trial court's charge on "the statutory definition of ammunition, which is framed in the disjunctive to include the component parts of a round, constituted an impermissible broadening of the indictment." Id. at 669. The Second Circuit disagreed, holding that where the indictment was narrowed rather than broadened no constructive amendment occurred. See id. Here, there can be no suggestion that the indictment was narrowed.

In Patino, the indictment charged the defendants with using "a firearm" in connection with a kidnaping scheme "on or about" a certain date. Patino, 962 F.2d at 264. Evidence was adduced at trial that, approximately a week after the specified

date, the defendants possessed different guns used in connection with the same kidnaping scheme. Id. at 265. In finding that a conviction based on these weapons did not constitute a constructive amendment, the Second Circuit noted two things: first, that the indictment did not specify any particular firearm; and second, that under long-standing precedent, the term "on or about" is not a phrase of limitation. Id. at 266, citing United States v. Nersesian, 824 F.2d 1294, 1323 (2d Cir.1987). Because the term is inherently fuzzy, the indictment properly encompassed the possession of weapons on dates that were sufficiently close to the charged date to be "about" that date. See id.

The instant indictment, in contrast, did contain words of limitation: specifically, "to wit: a computer and the Internet." There is nothing fuzzy about "to wit:" it means "that is to say" or "namely."[5] If the indictment in the instant case had used language such as "including but not limited to" or "such as," then it would have been closer to the indictment in Patino. It did not.

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[5] See Webster's Third New Int'l Dictionary Unabridged, http://mwu.eb.com/mwu [accessed May 29, 2009] (2002).

Finally, in United States v. Knuckles, 581 F.2d 305 (2d Cir.1978), defendant—indicted for conspiracy to possess and distribute heroin—argued that the court constructively amended the indictment to allow conviction for conspiracy to possess and distribute cocaine. The fact pattern would seem indistinguishable from Wozniak and Hassan, yet the Court of Appeals reached a different result. But in Knuckles, the defense, not the Government, introduced the variance in proof. The Government hewed steadfastly to the allegations set forth in the indictment—i.e., that there was a "heroin processing and packaging operation only in the late summer and early autumn of 1976." The court noted, "the defense, not the prosecution, [ ] introduced the evidence of cocaine during their cross-examination of Government witnesses." Id. at 311. It was not surprising, therefore, that the Court of Appeals concluded that "the variance did not affect[ ] the Government's case." Knuckles was also a conspiracy case, charging conspiracy to distribute both Schedule I and Schedule 11 drugs (encompassing both heroin and cocaine), so the reasoning of the more recent discussion in Dupre and Rigas would be equally applicable to it.

The Government's cases are, in short, very different from this one, and are far from compelling

as precedent. The cases cited by defendant, however, compel the conclusion that this particular one paragraph indictment—which charges the crime in narrow and specific terms rather than in broad general ones—was constructively amended by the Government's argument[6] and by the charge. As was true in Stirone, the grand jury indicted D'Amelio on a very specific theory—use of a computer and the internet to entice a minor. Had the Government either (1) limited itself to the statutory language, or (2) broadened the unnecessary "to wit" clause to include a reference to the telephone calls, we would not be in this pickle today. But it did not, and the jury was told that it could convict the defendant based on conduct different from the very narrow conduct that was specified in the indictment. That so altered an essential element of the charge that it is not certain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment. United States v. Salmonese, 352 F.3d 608, 620 (2d Cir.2003). There is simply no way to

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[6] I do not say "by the proof" because, as noted above, the telephonic evidence would have come in regardless of the Court's determination about the scope of the indictment. The Government's opening, and especially its closing argument, however, would have been decidedly different.

know whether a grand jury asked to vote on a more generally–worded indictment would have concluded that the telephone calls at issue in this case were sufficiently "enticing" to be *prima facie* criminal.

The Court reaches this conclusion reluctantly. As discussed earlier, this case, which involves a single course of conduct encompassing both internet and telephonic communications, this case is not on "all fours" with the cases in which constructive amendments were found. And I might well agree with the Government if I were writing on a blank slate. The jury convicted the defendant of "using a facility of interstate commerce" to entice a minor. The internet and the telephone are both facilities of interstate commerce. Whether defendant used one or the other or both (and this jury heard evidence about both), the jury concluded that defendant used some facility of interstate commerce to entice his intended victim. That is all that 18 U.S.C. § 2242(b), as drafted by Congress, requires. The defendant had ample notice of the Government's reliance on his telephone calls with "Mary," and his defense addressed them, so he suffered no prejudice at the trial.

However, the Supreme Court and the Second Circuit have spoken, and this Court is their

handmaiden. In a case where the indictment was, at the Government's behest, not "generally framed," I have no choice but to follow their lead and confess error.

Accordingly, defendant's conviction must be vacated.

Vacatur does not require a judgment of acquittal. There is ample evidence of enticement in the internet chats. Defendant's motion for a new trial is granted.

The Court will conference the case on June 10 at 10:00, which was the date and time set for sentencing. At that time we will reschedule the trial.

Dated: May 29, 2009

/s/ Colleen McMahon
U.S.D.J.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 24, 2012

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of September, two thousand twelve,

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UNITED STATES OF AMERICA,

Appellant,

v.

Daniel D'Amelio,

Defendant-Appellee.

ORDER

Docket Number:
09-2541-cr

Appellee Daniel D'Amelio, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. 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.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk