Constitutional Law—First Circuit Rules Constructive Amendment of Indictment Not a Structural Error—*United States v. Brandao*, 539 F.3d 44 (1st Cir. 2008)

Courts employ plain-error analysis when reviewing unpreserved errors in a criminal trial, but apply harmless-error analysis for errors preserved through objection.[1] Although most constitutional errors are subject to harmless-error analysis, certain so-called structural errors are reversible per se.[2] In *United States v. Brandao*,[3] the United States Court of Appeals for the First Circuit considered whether the unpreserved error of a constructively amended indictment was per se reversible error or subject to plain error analysis.[4] Already the issue of a circuit split, the court joined with those circuits applying plain-error analysis, declined to recognize a constructive amendment as a structural error, and affirmed the conviction.[5]

On March 17, 1999, Angelo Brandao arranged for the murder of Dinho Fernandes by pointing out the victim and providing the weapon to Manny Monteiro, the leader of the Stonehurst gang.[6] Five years later, a federal grand jury indicted Brandao on multiple counts of RICO, VICAR, and firearms violations based on his involvement with Stonehurst and the murder of

1. *See* FED. R. CRIM. P. 52 (demarcating standard of review for preserved and unpreserved errors). Rule 52 reads, "Harmless and Plain Error. (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." *Id.*; *see also infra* notes 25-28 (explaining distinctions between harmless-error and plain-error analysis). *But cf.* Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1183-96 (1995) (arguing both harmless-error and plain-error analysis turn on defendant's guilt).

2. *See* Arizona v. Fulminante, 499 U.S. 279, 306 (1991) (stating "most constitutional errors can be harmless"); Chapman v. California, 386 U.S. 18, 23 (1967) (recognizing class of constitutional errors reversible per se, not subject to harmless-error analysis). In *Fulminante*, the Supreme Court described those constitutional errors that are reversible per se and not subject to harmless-error analysis as "structural" errors. Arizona v. Fulminante, 499 U.S. 279, 309 (1991); *see also infra* note 23 and accompanying text (discussing structural and trial error distinction). *But see* Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; A New Paradigm for Criminal Cases*, 43 CRIM. L. BULL. 955, 958 (2007) (critiquing error jurisprudence as inconsistent and "hopelessly confused"); David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1412-24 (1997) (arguing distinction between trial error and structural error ambiguous and illusory).

3. 539 F.3d 44 (1st Cir. 2008).

4. *See id.* at 46 (noting split among circuits in addressing constructive amendment of indictment).

5. *Id.* at 60 (siding with circuits not presuming prejudice and applying plain-error analysis).

6. *See id.* at 47-48 (detailing Brandao's involvement in Fernandes's murder). At Brandao's trial, testimony established that Fernandes scuffled with Brandao's cousin, continuing a dispute begun at a Brockton high school. *Id.* at 47. Later that day Brandao contacted Monteiro, who drove to Brockton with two other Stonehurst members. United States v. Brandao, 448 F. Supp. 2d 311, 314 (D. Mass. 2006), *aff'd*, 539 F.3d 44 (1st Cir. 2008). Brandao pointed out Fernandes to Monteiro and supplied him with the murder weapon. 539 F.3d at 47-48. After shooting Fernandes, Monteiro returned the gun to Brandao's house. *Id.* at 48.

Fernandes.[7] Count One of the indictment charged Brandao with conspiracy to murder Dinho Fernandes, and Count Thirty-Three of the indictment charged Brandao with the murder of Fernandes in order to increase or maintain his position within Stonehurst.[8] Although the indictment for Count One was for *conspiracy* to murder Fernandes, the jury convicted Brandao on the charge of *substantive* murder because the judge improperly instructed the jury.[9] Brandao first raised the issue of the constructively amended indictment in a post-conviction motion for acquittal.[10]

Relying on the First Circuit's consistent language on the issue, Brandao argued the constructive amendment was a structural error that mandated reversal of his conviction despite failing to preserve the issue through objection.[11] After reviewing the split position among the circuits, the trial court sided with those holding a constructive amendment does not mandate per se reversal and applied plain-error analysis.[12] The court held Brandao could not make the requisite showing of prejudice because the grand jury had actually

7. 539 F.3d at 49-50 (listing charges against Brandao). The Racketeer Influenced and Corrupt Organizations Act (RICO) permits federal prosecutors to bring criminal charges against those even only tangentially involved in organized crime. *See* 18 U.S.C. § 1962 (2006). The Violent Crimes in Aid of Racketeering Act (VICAR) establishes a federal offense for violent crimes committed in connection with a RICO organization. *See* 18 U.S.C. § 1959 (2006). Stonehurst feuded with the rival Weondover gang for several years in Boston, and Brockton, Massachusetts, resulting in many deaths. *See generally* Kevin Cullen, *A Dozen Bloody Years and an Arrest: Pursuing the Case that Tore at Boston's Cape Verdeans*, BOSTON GLOBE, July 20, 2007, at 1A (tracing feud from beginning through its historical, murderous developments).

8. *See* 539 F.3d at 50 (distinguishing competing murder indictments); *see also* First Superceding Indictment at 13-14, 63-64, United States v. Brandao, 448 F. Supp. 2d 311 (D. Mass. 2006) (No. 03-10329-PBS) (constituting indictments for conspiracy to commit murder and substantive murder). The government's theory of the murder was not premised on Brandao shooting the weapon that killed Fernandes, but rather on Brandao joining with others to murder Fernandes. *See* United States v. Brandao, 448 F. Supp. 2d 311, 323 (D. Mass. 2006) (setting forth government's theory), *aff'd*, 539 F.3d 44 (1st Cir. 2008). The jury acquitted Brandao of Count Thirty Three. *See id.* at 316 (noting acquittal on substantive murder charge).

9. *See* United States v. Brandao, 448 F. Supp. 2d 311, 315-16 (D. Mass. 2006) (outlining discrepancy between jury instruction and indictment), *aff'd*, 539 F.3d 44 (1st Cir. 2008). The judge failed to instruct the jury on the element of "agreement" on the conspiracy to commit murder charge. *See id.* at 323 (comparing different instructions for substantive murder and conspiracy to commit murder). Neither party objected to the instructions for the relevant charge that the judge distributed a week before officially instructing the jury and charging them to begin deliberations. *Id.* at 315.

10. United States v. Brandao, 448 F. Supp. 2d 311, 316 (D. Mass. 2006) (noting timing of motion), *aff'd*, 539 F.3d 44 (1st Cir. 2008). A constructive amendment occurs when the terms of the indictment are effectively altered after the grand jury has passed on them. *See* United States v. Fisher, 3 F.3d 456, 462 (1st Cir. 1993) (defining constructive amendment); *see also infra* notes 16-20 and accompanying text (discussing constructive amendment of indictment).

11. United States v. Brandao, 448 F. Supp. 2d 311, 320 (D. Mass. 2006) (summarizing Brandao's argument), *aff'd*, 539 F.3d 44 (1st Cir. 2008). Language in prior First Circuit decisions referred to constructive amendments as "prejudicial *per se*" and "grounds for reversal" of a conviction. United States v. Dunn, 758 F.2d 30, 35 (1st Cir. 1985); *see also* United States v. Bucci, 525 F.3d 116, 131 (1st Cir. 2008) (reprising *Dunn*'s description of constructive amendments); United States v. Fisher, 3 F.3d 456, 463 (1st Cir. 1993) (quoting *Dunn*'s description of constructive amendments as "prejudicial *per se*" and "grounds for reversal").

12. *See* United States v. Brandao, 448 F. Supp. 2d 311, 320-22 (D. Mass. 2006) (siding with circuits requiring specific showing of prejudice), *aff'd*, 539 F.3d 44 (1st Cir. 2008).

indicted him for murder in Count Thirty-Three.[13] Thus, the error did not affect the integrity of the proceedings and did not mandate reversal.[14] The First Circuit affirmed, joining the circuits applying error analysis to constructive amendments and not presuming prejudice because Supreme Court precedent did not warrant recognizing a new structural error.[15]

A constructive amendment occurs when the prosecutor or judge effectively alters the terms of an indictment after the grand jury has passed on them.[16] The prohibition on constructive amendments protects the defendant's Sixth Amendment right to be informed of the charges against her and the Fifth Amendment right to be tried only on offenses charged by the grand jury.[17] In *Stirone v. United States*,[18] the Supreme Court reversed the defendant's conviction when the indictment was constructively amended because he was "tried on charges that [were] not made in the indictment against him," violating his "substantial right" to the grand jury's independent judgment.[19] Echoing the language of structural errors, the Court stated that the "deprivation of such a basic right was too serious to be . . . dismissed as harmless error."[20]

A structural error, as set forth by the Supreme Court in *Arizona v. Fulminante*,[21] is a constitutional deprivation affecting the entire framework of a

13. *See* United States v. Brandao, 448 F. Supp. 2d 311, 323-24 (D. Mass. 2006) (finding jury could not have convicted absent finding of agreement), *aff'd*, 539 F.3d 44 (1st Cir. 2008); *supra* note 8 and accompanying text (describing indictments for murder of Fernandes).

14. *See* United States v. Brandao, 448 F. Supp. 2d 311, 323 (D. Mass. 2006) (finding no actual prejudice to Brandao), *aff'd*, 539 F.3d 44 (1st Cir. 2008). The trial court reasoned that because "agreement" was a necessary condition to the conviction, the jury would have found Brandao guilty of conspiracy to commit murder even without the erroneous jury instructions. *Id.* at 323-24.

15. *See* 539 F.3d at 60 (analyzing structural errors recognized by Supreme Court and reluctance to recognize new errors).

16. *See* United States v. Fisher, 3 F.3d 456, 462 (1st Cir. 1993) (defining constructive amendment of indictment); *see also* Benjamin E. Rosenberg, *The Analysis of Defective Indictments After* United States v. Cotton, 41 CRIM. L. BULL. 463, 466-70 (2005) (outlining history of defective indictments).

17. *See* U.S. CONST. amend. V (guaranteeing right to indictment by grand jury and protection from double jeopardy); U.S. CONST. amend. VI (guaranteeing right "to be informed of nature and cause" of criminal charges); *Ex parte* Bain, 121 U.S. 1, 9-10 (1887) (articulating risks of amending indictments outside of grand jury), *overruled in part by* United States v. Cotton, 535 U.S. 625, 631 (2002) (ruling defective indictment does not deprive court of jurisdiction); *see also* Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 408-12 (2006) (recalling history of grand jury indictment rights).

18. 361 U.S. 212 (1960).

19. *See* Stirone v. United States, 361 U.S. 212, 218-19 (1960) (analyzing rights protected by constructive-amendment prohibition). The Court precluded harmless-error analysis when the issue was preserved. *See id.* at 214 (noting defendant's timely objection to erroneous jury instructions); *id.* at 217 (precluding harmless-error analysis). The Court reversed the conviction in part because it was impossible to know if the grand jury would have returned an indictment on the amended charge, and the court would not speculate what the grand jury might have done. *See id.* at 219 (noting uncertainty on basis of conviction after indictment amended). *But see* Rosenberg, *supra* note 16, at 475-76 (suggesting *Stirone*, although not overruled, may no longer be good law).

20. Stirone v. United States, 361 U.S. 212, 217-18 (1960); *see supra* note 2 (noting structural errors not subject to harmless-error analysis).

21. 499 U.S. 279 (1991).

criminal trial.[22] A trial error occurs during the presentation of the case to the jury.[23] Regardless of the type of error, Rule 52 of the Federal Rules of Criminal Procedure governs the standard of review on appeal, turning on whether or not trial counsel properly preserved the issue through objection.[24] When an error is preserved, courts apply harmless-error analysis and must correct the error if it may have contributed to the outcome of the proceedings, thereby affecting substantial rights.[25] In *United States v. Olano*,[26] the Supreme Court explained that to correct an unpreserved error under plain-error analysis, the defendant bears the burden of proving three factors: there was an error, the error was plain, and the error affected her substantial rights.[27] Then, under the fourth prong of *Olano*, a court *may* correct the error if it affects the "fairness, integrity, or public reputation of judicial proceedings."[28]

The Supreme Court has neither explicitly held constructively amended indictments are structural errors, nor decided if any structural error automatically affects substantial rights under plain-error analysis.[29] The circuit

22. *See* Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991) (defining and explaining structural error). *But cf.* Steven M. Shepard, Note, *The Case Against Automatic Reversal of Stuctural Errors*, 117 YALE L.J. 1180 *passim* (2008) (arguing *Fulminante* framework weakens defendants' procedural safeguards and advocating new standard for identifying structural errors).

23. *See* Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991) (defining and explaining trial error).

24. *See* FED. R. CRIM. P. 52 (delineating standards for considering preserved and unpreserved errors); Johnson v. United States, 520 U.S. 461, 466 (1997) (applying Rule 52 to all errors on appeal from federal criminal convictions, whether trial or structural); *cf.* Chapman v. California, 386 U.S. 18, 23 (1967) (recognizing class of per se reversible errors, not subject to harmless-error analysis when error preserved).

25. *See* FED. R. CRIM. P. 52(a) (indicating errors affecting substantial rights "must" be regarded and corrected). In *Kotteakos v. United States*, the Supreme Court stated that when a reviewing court can say with fair assurance that an error had no substantial affect on the verdict, it can be disregarded as harmless error. *See* Kotteakos v. United States, 328 U.S. 750, 764-65 (1946) (explaining harmless-error analysis); *see also* Martha S. Davis, *Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast that Swallowed the Constitution*, 25 T. MARSHALL L. REV. 45, 50-56 (1999) (distinguishing harmless-error and plain-error analysis).

26. 507 U.S. 725 (1993).

27. United States v. Olano, 507 U.S. 725, 732-35 (1993). (explaining first three factors of plain-error analysis). Error is any deviation from a legal rule, unless waived. *Id.* at 732-33. The error must be plain at the time of appellate consideration. United States v. Johnson, 520 U.S. 461, 468 (1997). An error affects substantial rights when the defendant makes a specific showing of prejudice, such as that the error affected the outcome of the trial court proceedings. United States v. Olano, 507 U.S. 725, 734 (1993). The Supreme Court recognized a potential exception to this factor for special errors that may be corrected without a specific showing of prejudice. *See id.* at 735 (leaving open special category of errors that may be presumed prejudicial); *see also* Thomas M. Hoskinson, Note, *Criminal Procedure: Trial Integrity and the Defendant's Rights Under the Plain Error Rule 52(b)*, 37 SUFFOLK U. L. REV. 1129, 1137-38 (2004) (outlining plain-error test).

28. United States v. Olano, 507 U.S. 725, 736 (1993) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

29. S*ee also supra* note 2 (discussing structural errors and standard of review). *Compare* United States v. Cotton, 535 U.S. 625, 632-33 (2002) (holding constructive amendment did not satisfy *Olano*'s fourth prong, without addressing whether error was structural), *and* Johnson v. United States, 520 U.S. 461, 469-70 (1997) (bypassing third factor to hold constructive amendment did not satisfy fourth factor), *with* Stirone v. United States, 361 U.S. 212, 217-18 (1960) (depicting constructive amendment as structural error because not subject to harmless-error analysis). The Supreme Court, however, has recognized structural errors in only limited

courts are split on the proper treatment of constructive amendment on appeal.[30] Relying on *Stirone*, both the Second and Fourth Circuits treat a constructive amendment as per se prejudicial error that will always affect substantial rights.[31] The Third Circuit presumes a constructive amendment is prejudicial, subject to rebuttal by the prosecution that the error did not prejudice the defendant.[32] Conversely, the Fifth, Seventh, Ninth, and District of Columbia Circuits have applied ordinary plain-error analysis to the constructive amendment of an indictment without discussing structural error.[33] The First Circuit had repeatedly quoted dicta from its decision in *United States v. Dunn*,[34] where it described constructive amendments as "prejudicial per se" and grounds for reversal of a conviction.[35]

In *United States v. Brandao*, however, the First Circuit broke with this long-standing tradition and declined to recognize a constructively amended indictment as a structural error.[36] First, after analyzing the split among the circuits, the court noted the Supreme Court is "wary of recognizing new

cases. *See, e.g.*, Sullivan v. Louisiana, 508 U.S. 275, 282 (1993) (holding erroneous reasonable-doubt instruction to jury constitutes structural error); Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (ruling unlawful exclusion of grand jurors of defendant's race amounts to structural error); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (recognizing total deprivation of right to counsel constitutes structural error); *cf.* Neder v. United States, 527 U.S. 1, 8-9 (1999) (holding omission of essential element in jury instruction not necessarily structural error).

30. *See infra* notes 31-35 and accompanying text (analyzing split in circuits).

31. *See* United States v. Thomas, 274 F.3d 655, 670 (2d Cir. 2001) (deciding constructive amendment per se prejudicial violation of Grand Jury Clause); United States v. Floresca, 38 F.3d 706, 711-12 (4th Cir. 1994) (en banc) (adopting approach of holding constructive amendment as error per se). The Second Circuit in *Thomas* relied upon the Supreme Court's decision in *Stirone* and stated that speculation by the court on what a grand jury might have done was inappropriate because the judiciary would be initiating a criminal prosecution rather than the grand jury. United States v. Thomas, 274 F.3d 655, 670 (2d Cir. 2001). Also relying on *Stirone*, the Fourth Circuit in *Floresca* held a constructive amendment was error per se, not subject to harmless error analysis, and thus a structural error. United States v. Floresca, 38 F.3d 706, 711 (4th Cir. 1994) (en banc). Both circuits, however, applied plain-error review, finding all the factors satisfied to correct the error. *See* United States v. Thomas, 274 F.3d 655, 667-72 (2d Cir. 2001) (analyzing constructive amendment under *Olano* factors); United States v. Floresca, 38 F.3d 706, 712-14 (4th Cir. 1994) (en banc) (analyzing constructive amendment under *Olano* factors).

32. *See* United States v. Syme, 276 F.3d 131, 154 (3d Cir. 2002) (creating rebuttable presumption of prejudice regarding constructive amendments and applying presumption in *Olano*'s third prong).

33. *See* United States v. Hugs, 384 F.3d 762, 766-68 (9th Cir. 2004) (applying plain-error analysis with focus on overwhelming evidence against defendant in determining prejudice); United States v. Fletcher, 121 F.3d 187, 192-93 (5th Cir. 1997) (changing circuit jurisprudence in light of *Olano* from automatic reversal to applying plain-error analysis); United States v. Remsza, 77 F.3d 1039, 1043-44 (7th Cir. 1996) (holding constructive amendment not prejudicial because evidence "so compelling" under plain-error analysis); United States v. Lawton, 995 F.2d 290, 294-95 (D.C. Cir. 1993) (applying plain-error analysis, but holding constructive amendment broadening indictment mandated reversal under *Olano*).

34. 758 F.2d 30 (1st Cir. 1985).

35. *See* United States v. Dunn, 758 F.2d 30, 35 (1st Cir. 1985) (describing constructive amendments as "prejudicial per se" and grounds to reverse conviction); *see also* United States v. Bucci, 525 F.3d 116, 131 (1st Cir. 2008) (reprising *Dunn*'s description of constructive amendments); United States v. Fisher, 3 F.3d 456, 463 (1st Cir. 1993) (reiterating constructive amendments "prejudicial per se" and "grounds for reversal").

36. *See* 539 F.3d at 60 (agreeing with circuits applying plain error analysis); *see also supra* note 33 and accompanying text (summarizing circuits applying plain-error analysis to constructively amended indictments).

structural errors or . . . establishing per se outcomes under plain error review."[37] Second, the court pointed out that a constructive amendment is a broad term that can cover many different types of errors that may not always be prejudicial.[38] Third, the court distinguished *Stirone* because there the defendant made a timely objection to the amended indictment, which fell under the purview of harmless-error review.[39] As the Supreme Court had not expanded structural errors to include constructive amendments when presented with the issue, the First Circuit declined to do so.[40]

The First Circuit's analysis of Supreme Court precedent on structural errors was correct.[41] The Supreme Court has never included constructive amendments when listing recognized structural errors and has expressly declined the opportunity to do so.[42] While *Stirone* utilizes language that would indicate a constructive amendment is indeed a structural error, the case predates the Court's decision in *Arizona v. Fulminante*.[43] *Fulminante* redefined structural error, and today's Court would more likely hold a constructive amendment an error in the presentation of the trial, rather than an error in the framework of the trial.[44]

Although not a structural error, a constructive amendment violates substantial constitutional and procedural rights of the defendant.[45] A criminal indictment not only informs the defendant of the charges against her, but also limits her liability to offenses resulting only from the independent judgment of her fellow citizens.[46] When a court speculates on what a grand jury might have

37. 539 F.3d at 60 (discussing Supreme Court precedent).

38. *See id*. at 60-61 (identifying varieties of constructive amendments).

39. *See id*. at 61 (distinguishing present case from precedent based on preservation of error).

40. *See id.* at 61-62 (distinguishing Supreme Court precedent); *cf.* Neder v. United States, 527 U.S. 1, 9 (1999) (determining omission of essential element in jury instruction not necessarily structural error).

41. *See* 539 F.3d at 60-61 (analyzing structural-error jurisprudence of Supreme Court and noting Court's reluctance to recognize new structural errors); *see also supra* note 29 (noting error similar to constructive amendment not recognized as structural error).

42. *See* United States v. Cotton, 535 U.S. 625, 632-34 (2002) (declining to recognize constructive amendment as structural error); Johnson v. United States, 520 U.S. 461, 468-69 (1997) (listing structural errors, but not including constructive amendment); Rosenberg, *supra* note 16, at 474-75 (concluding constructive amendment not structural error based on Supreme Court jurisprudence); *see also supra* note 29 (highlighting structural errors recognized by Supreme Court).

43. *Compare* Stirone v. United States, 361 U.S. 212, 217-19 (1960) (describing grand jury right as substantial, dismissal as harmless error inappropriate), *with* Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991) (identifying new framework for harmless error analysis).

44. *See* Arizona v. Fulminante, 499 U.S. 279, 306 (1991) (describing most constitutional errors as harmless); Edwards, *supra* note 1, at 1173-83 (arguing Court expanding harmless-error doctrine and limiting per se reversible errors); Rosenberg, *supra* note 16, at 483 (commenting on Supreme Court weakening rights protected by Indictment Clause); Shepard, *supra* note 22, at 1185-1205 (highlighting inherent doctrinal consequences of Court's structural-error jurisprudence).

45. *See* Stirone v. United States, 361 U.S. 212, 217-19 (1960); United States v. Thomas, 274 F.3d 655, 670 (2d Cir. 2001) (declaring constructive amendment "per se prejudicial violation of the Grand Jury Clause").

46. *See supra* notes 17-19 and accompanying text (discussing rights protected by prohibition on constructive amendments).

done, it "work[s] the harm the Grand Jury Clause [was] intended to prevent" by allowing the judiciary to begin a criminal prosecution.[47] This harm did not exist in *Brandao*, however, because of the competing murder indictments.[48] In light of the case's peculiar facts, the First Circuit correctly affirmed Brandao's conviction.[49]

Though correct in affirming the conviction, the First Circuit weakened the rights of criminal defendants.[50] Although always in dicta, the First Circuit had consistently referred to constructive amendments as "per se prejudicial" and "grounds for reversal of conviction."[51] The First Circuit should have affirmed and followed this language, following circuits treating constructive amendments as prejudicial per se or presumptively prejudicial.[52] Because correcting plain error is discretionary, the court could have still affirmed the conviction because the error did not affect the integrity or fairness of the proceedings.[53] This was the approach taken by the Supreme Court in *Johnson v. United States*, where the Court declined to address whether a constructive amendment was a structural error or affected substantial rights.[54] The First Circuit should have followed the Supreme Court's example and did not need to abandon its precedent to properly affirm Brandao's conviction under plain-error review.[55]

In *United States v. Brandao*, the First Circuit considered the proper treatment of a constructively amended indictment on appeal. The court refused to recognize a new structural error based on Supreme Court jurisprudence, but

47. United States v. Thomas, 274 F.3d 655, 670 (2d Cir. 2001) (noting purpose of Grand Jury Clause); *see* Stirone v. United States, 361 U.S. 212, 218 (1960) (explaining grand jury right guarantees defendant charged by peers, not prosecutor or judge).

48. *See* 539 F.3d at 62 (noting Brandao indicted in separate count for charge on which he was convicted); United States v. Brandao, 448 F. Supp. 2d 311, 319 (D. Mass. 2006) (noting charge not based on unindicted offense), *aff'd*, 539 F.3d 44 (1st Cir. 2008); *see also supra* note 8 and accompanying text (discussing competing RICO and VICAR indictments for Fernandes's murder).

49. *See* 539 F.3d at 63 (reasoning Brandao's conviction on constructively amended indictment not prejudicial).

50. *Compare* United States v. Bucci, 525 F.3d 116, 131 (1st Cir. 2008) (describing constructive amendment as "prejudicial per se"), *with* 539 F.3d at 60 (announcing circuit will no longer presume prejudice).

51. United States v. Bucci, 525 F.3d 116, 131 (1st Cir. 2008); *see supra* note 35 and accompanying text (discussing First Circuit precedent).

52. *See supra* note 35 and accompanying text (highlighting First Circuit precedent); *supra* notes 31-32 and accompanying text (detailing circuits presuming prejudice).

53. *See* United States v. Cotton, 535 U.S. 625, 632-33 (2002) (holding constructive amendment did not affect integrity of proceedings and therefore does not warrant correction); *supra* note 28 and accompanying text (highlighting court's discretion to correct error under plain-error analysis).

54. *See* Johnson v. United States, 520 U.S. 461, 469-70 (1997) (bypassing third factor to hold constructive amendment did not satisfy fourth factor); *id.* at 470 (deciding discretionary correction not warranted under these facts).

55. *Compare* 539 F.3d at 59 (treating prior decisions describing constructive amendments as prejudicial per se as dicta), *and id.* at 60 (announcing First Circuit will no longer presume prejudice in constructive amendment cases), *with* Johnson v. United States, 520 U.S. 461, 469-70 (1997) (deciding discretionary correction not warranted under these facts).

correctly affirmed the defendant's conviction. Brandao himself did not suffer any prejudice because he was actually indicted on the amended charge. Such an error does not affect substantial rights nor implicate the integrity of the judicial proceedings. In relying on *Olano*'s third prong instead of the fourth, however, the First Circuit weakened the protection against constructive amendments for future defendants.

Kimberly L. Patwardhan