No. _____

In the
Supreme Court of the United States

JASON LAUT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Grand Jury Clause of the Fifth Amendment demands "that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960). Because "[t]he right to have the grand jury make the charge on its own judgment is a substantial right," this Court has long held that a violation of that right is prejudicial *per se*. *Id.* at 218-19. Nonetheless, lower courts have squarely divided over whether and, if so, how a defendant must show prejudice when a constructive amendment objection was not preserved at trial. Lower courts likewise have divided on what showing is required to prove that a constructive amendment error is "plain." In the decision below, the Seventh Circuit doubled down on its outlier jurisprudence, which employs both the most demanding conception of prejudice and the most demanding conception of "plain" in the country.

The questions presented are:

1. What test, if any, should be used to determine whether a constructive amendment impacted a defendant's substantial rights under Rule 52(b).

2. What showing is required to determine whether a constructive amendment is "plain" error under Rule 52(b).

PARTIES TO THE PROCEEDING

Petitioner is Jason Laut, who was the defendant in the district court and the appellant in the Seventh Circuit.

Respondent is the United States. Respondent was the prosecution in the district court and the appellee in the Seventh Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. Court of Appeals for the Seventh Circuit and the U.S. District Court for the Southern District of Illinois:

- *United States v. Jason Laut*, Case No. 18-2843 (7th Cir.) (opinion affirming conviction issued December 6, 2019; petition for panel rehearing and rehearing en banc denied January 9, 2020; mandate issued January 17, 2020).

- *United States v. Jason Laut*, Case No. 17-CR-30001-DRH-1 (S.D. Ill.) (judgment entered August 22, 2018).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
STATEMENT OF RELATED PROCEEDINGS iii
TABLE OF AUTHORITIES vi
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 3
JURISDICTION 3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 4
A. Factual and Procedural Background 4
B. The Decision Below 7
REASONS FOR GRANTING THE PETITION 8
I. The Decision Below Deepens A Circuit Split On The Application Of The Substantial Rights Prong Of The Plain Error Test To Constructive Amendment Claims 10
II. The Seventh Circuit's Restrictive Approach To The "Plain" Prong Of The Plain Error Test Likewise Cannot Be Squared With Cases From Other Circuits Or This Court 17
III. The Questions Presented Have Considerable Practical Impact, And This Is An Excellent Vehicle To Resolve Them. 22
CONCLUSION 25

APPENDIX

Appendix A

Order, United States Court of Appeals for the Seventh Circuit, *United States v. Laut*, No. 18-2843 (December 6, 2019) App-1

Appendix B

Order, United States Court of Appeals for the Seventh Circuit, *United States v. Laut*, No. 18-2843 (Jan. 9, 2020)..... App-10

Appendix C

Judgment In A Criminal Case, United States District Court for the Southern District of Illinois, *United States v. Laut*, No. 3:17-cr-30001 (August 22, 2018)..... App-11

Appendix D

Indictment, United States District Court for the Southern District of Illinois, *United States v. Laut*, No. 3:17-cr-30001 (Jan. 18, 2017) App-23

Appendix E

Superseding Indictment, United States District Court for the Southern District of Illinois, *United States v. Laut*, No. 3:17-cr-30001 (June 21, 2017)..... App-33

Appendix F

Second Superseding Indictment, United States District Court for the Southern District of Illinois, *United States v. Laut*, No. 3:17-cr-30001 (Oct. 3, 2017)..... App-44

TABLE OF AUTHORITIES

Cases

Douglas Oil Co. of Cal. v. Petrol Stops NW,
441 U.S. 211 (1979) 15

Henderson v. United States,
568 U.S. 266 (2013) 17, 18, 21

Johnson v. United States,
520 U.S. 461 (1997) 21

Lockyer v. Andrade,
538 U.S. 63 (2003) 18

Pierson v. United States,
140 S.Ct. 1291 (Mem) (2020) 8

Stirone v. United States,
361 U.S. 212 (1960) ..... *passim*

United States v. Anthony,
747 Fed. App'x 628 (9th Cir. 2019) 14

United States v. Bastian,
770 F.3d 212 (2d Cir. 2014) 20

United States v. Brandao,
539 F.3d 44 (1st Cir. 2008) 13

United States v. Davis.,
140 S.Ct. 1060 (2020) 21

United States v. Dipentino,
242 F.3d 1090 (9th Cir. 2001) 14

United States v. Dortch,
696 F.3d 1104 (11th Cir. 2012) 20

United States v. Fletcher,
121 F.3d 187 (5th Cir. 1997) 13

United States v. Floresca,
38 F.3d 706 (4th Cir. 1994) ..... *passim*

United States v. Gavin,
583 F.3d 542 (8th Cir. 2009) 15

United States v. Lawton,
995 F.2d 290 (D.C. Cir. 1993) 13, 20

United States v. Madden,
733 F.3d 1314 (11th Cir. 2013) 12

United States v. Miller,
891 F.3d 1220 (10th Cir. 2018) ..... *passim*

United States v. Olano,
507 U.S. 725 (1993) ..... *passim*

United States v. Pierson,
925 F.3d 913 (7th Cir. 2019) 14, 18, 23

United States v. Ramirez,
182 F.3d 544 (7th Cir. 1999) 23

United States v. Remsza,
77 F.3d 1039 (7th Cir. 1996) 14

United States v. Reyes,
102 F.3d 1361 (5th Cir. 1996) 13

United States v. Robinson,
367 F.3d 278 (5th Cir. 2004) 13

United States v. Syme,
276 F.3d 131 (3d Cir. 2002)..... 12

United States v. Thomas,
274 F.3d 655 (2d Cir. 2001)..... 11

United States v. Williams,
504 U.S. 36 (1992) 15

Constitutional Provision

U.S. Const. amend. V, cl. 1..... 1, 3, 10, 11

Statutes

18 U.S.C. §1001(a) 6
18 U.S.C. §1028A(a)(1) 6
18 U.S.C. §1343 6
18 U.S.C. §1365(a)(4) 6
18 U.S.C. §1512(b) 20
28 U.S.C. §1254(1) 3
28 U.S.C. §2254 18

Rules

Fed. R. Crim. Proc. 52(b) ..... *passim*
Supreme Court Rule 10 23

PETITION FOR WRIT OF CERTIORARI

This case provides the Court with an opportunity to resolve a persistent and acknowledged circuit split concerning the application of the plain error standard in constructive amendment cases. It also provides an opportunity to reject the Seventh Circuit's extreme approach on two key areas of the common plain error test, which have combined to make plain error review essentially impossible to satisfy in the constructive amendment context. The Court should grant certiorari to resolve both issues and realign the Seventh Circuit's outlier jurisprudence with this Court's cases.

Under Federal Rule of Criminal Procedure 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Under the familiar standard for applying that rule, an appellate court may reverse a conviction even when a defendant failed to properly preserve an objection at trial if (1) there was an error; (2) the error was plain; (3) the error affected the substantial rights of the defendant; and (4) the error seriously affected the fairness, integrity, or public reputation of the proceedings. *United States v. Olano*, 507 U.S. 725, 732-38 (1993). The decision below breaks with decisions of other circuits on both the second and the third prongs of that test.

Taking them in reverse order, the circuits are squarely divided over when a constructive amendment affects a defendant's substantial rights. In its seminal decision in *Stirone v. United States*, 361 U.S. 212 (1960), this Court held that a constructive amendment violates the Grand Jury Clause of the Fifth Amendment and is prejudicial *per se*. Following the

Court's lead, the Second and Fourth Circuits have held that a constructive amendment is prejudicial *per se* in the plain error context as well. The Third Circuit, by contrast, has held that a constructive amendment is only presumptively prejudicial. And the remaining circuits to address the question have held that the defendant must prove prejudice—albeit under varying standards. The Seventh Circuit, for its part, not only requires the defendant to prove prejudice, but by its own telling applies the most "demanding" prejudice test in the nation. The circuits are thus squarely and openly divided on this question.

The Seventh Circuit also applies one of the most demanding conceptions of what it takes for a constructive amendment to be "plain" error. In its view, so long as "no precedent squarely addresses" the precise factual circumstances at hand, the error cannot be "plain." Thus, even though the government *conceded* that it relied on an uncharged count to prove the charges in this case—a classic constructive amendment—the court concluded that any error here nonetheless was not "plain" because no case had squarely addressed whether the routine practice of giving the jury the indictment and a verdict form that tracked the charges suffices to cure that error. That extreme conception of "plain" deviates from the approach applied by many (but not all) of the circuits, thus again necessitating this Court's review.

This is an excellent case in which to resolve these circuit splits, as the plain error holding was not an alternative one, but rather was the sole basis for the Seventh Circuit's decision. It is also an excellent vehicle to resolve these issues because it is emblematic

of the Seventh Circuit's extreme approach, under which the court itself could locate only one successful plain error constructive amendment challenge under its present standard in the Circuit's history. Accordingly, the Court should grant certiorari and reverse the Seventh Circuit's decision.

OPINIONS BELOW

The Seventh Circuit's opinion is unreported but is available at 790 Fed. App'x 45 and is reproduced at App.1-9. The district court's judgment is reproduced at App.11-22.

JURISDICTION

The Seventh Circuit issued its opinion on December 6, 2019, and denied rehearing en banc on January 9, 2020. On March 16, 2020, Justice Kavanaugh extended the time for filing a petition for a writ of certiorari to and including May 8, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Grand Jury Clause of the U.S. Constitution, amend V, cl. 1, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

Federal Rule of Criminal Procedure 52(b) provides:

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

A. Factual and Procedural Background

Petitioner worked for several years as a paramedic supervisor for MedStar ambulance service in southern Illinois. App.2. His duties included managing the company's scheduling and paperwork, as well as paramedic work in the field. App.2. As part of its operations, MedStar used and administered various narcotic medicines to patients, under the supervision of the local Memorial Hospital. App.2.

In each active ambulance, MedStar carried a Memorial Hospital supplied "narcotics box" that contained a number of pain relief medications, including fentanyl and morphine. App.2. Along with each narcotics box came a paper "narcotics log" that MedStar employees and supervisors used both to track the administration of specific narcotics to patients and to note when any narcotic was wasted. App.2. Whenever a narcotics box needed a refill of its medication, the paramedic would return to Memorial Hospital to exchange the used narcotics box for a new, fully stocked narcotics box. App.2. Memorial Hospital's pharmacy staff later would inspect and refill the returned narcotics box, then issue it to the next paramedic who needed a refill. App.2.

During one of Memorial Hospital's narcotics box inspections in September 2014, a pharmacist found

evidence suggesting that someone had been tampering with fentanyl vials. App.2. After conducting a more thorough investigation, Memorial Hospital discovered that 57 fentanyl vials in its inventory had in fact been tampered with. App.2-3. Memorial Hospital accordingly issued a fentanyl recall, which lasted until January 2015. App.2-3.

In January 2015, Memorial Hospital's narcotics distribution system again began to supply fentanyl with its narcotics boxes. App.3. But in May 2015, a Memorial Hospital pharmacist again discovered evidence of fentanyl tampering. This discovery led to a second recall beginning in May 2015. App.3. Upon further investigation, Memorial Hospital discovered 28 tampered fentanyl vials. App.3.

As part of its investigation of the second fentanyl tampering incident, Memorial Hospital conducted a large-scale audit of its narcotics management system, including an examination of trip detail reports, prehospital care reports, and narcotics logs. App.3. The trip detail reports recorded ambulance locations. App.3. The prehospital care reports recorded the treatment provided to individual patients by the paramedics. App.3. The narcotics logs recorded the administration of specific pain relief medications from the narcotics box. App.2. During its audit, Memorial Hospital identified certain discrepancies in petitioner's documentation. App.4.

On January 18, 2017, the government charged petitioner with 37 counts related to documentation errors from 2013 to 2015 that Memorial Hospital discovered as part of its investigation into the second fentanyl tampering incident of 2015. App.23-32.

Notably, the government did not charge petitioner with product tampering based on either the 2015 or 2014 fentanyl tampering incidents. App.23-32. Rather, the grand jury returned an indictment relating only to the documentation errors. App.23-32. Specifically, petitioner was charged with six counts of wire fraud under 18 U.S.C. §1343, 29 counts of making false statements under 18 U.S.C. §1001(a), and two counts of aggravated identity theft under 18 U.S.C. §1028A(a)(1). App.23-32.

On June 21, 2017, the grand jury returned a superseding indictment. App.33-43. Like the original indictment, the superseding indictment charged petitioner with six counts of wire fraud, 29 counts of making false statements, and two counts of aggravated identity theft. App.33-42. But the superseding indictment also included two additional charges for tampering with a consumer product under 18 U.S.C. §1365(a)(4)—one count relating to the 2014 tampering incident, and another count relating to the 2015 tampering incident. App.42-43.

On October 3, 2017, the grand jury returned a second superseding indictment. App.44-54. Like the original indictment and the superseding indictment, the second superseding indictment charged petitioner with six counts of wire fraud, 29 counts of making false statements, and two counts of aggravated identity theft. App.44-54. However, unlike the superseding indictment, the second superseding indictment included only *one* product tampering charge—relating exclusively to the 2015 fentanyl tampering incident. App.53-54. The count relating to the 2014 tampering incident had been dropped. App.53-54.

Rather than return to the grand jury to attempt to recharge the 2014 count, the government proceeded to trial with the more limited second superseding indictment. App.4. But the government nonetheless presented evidence of both the 2014 and 2015 product tampering incidents—not just in support of its documentation charges, but to prove petitioner's guilt on the 2015 tampering charge. App.4-6. The district court did not provide any limiting instructions concerning the permissible role of the 2014 tampering evidence. App.5. Instead, the court simply noted that "[t]he government must prove that the crime happened reasonably close to the dates" charged in the second superseding indictment, which it provided to the jury along with the verdict form during its deliberations. App.5-6. The jury returned a verdict of guilty on all counts. App.6.

B. The Decision Below

Petitioner appealed and, with new court-appointed counsel, argued for the first time that the government constructively amended the indictment by relying on evidence of the uncharged 2014 tampering incident. The Seventh Circuit rejected that argument and affirmed. In doing so, the court did not conclude that there was no constructive amendment—which would have been difficult to do since the government acknowledged that it had presented the 2014 product tampering evidence in support of its 2015 product tampering charge. *See*, *e.g.*, CA7.Dkt.29 at 18. Instead, the court determined that even if a constructive amendment occurred, petitioner was not entitled to relief under Rule 52(b).

First, the court concluded that any error was not sufficiently "plain" because "[n]o precedent squarely addresses whether the court's provision to the jury of the indictment and a verdict form (specifying that the jury should convict based only on the actions alleged in the indictment) mitigates the potential harm from the prosecution's arguments and evidence." App.7.

Second, invoking circuit precedent that "set 'a high bar for reversal on plain-error review,' and will find it only if the conviction rests on thin evidence," the court concluded that petitioner "ha[d] not borne his burden of showing that he was prejudiced." App.7 (quoting *United States v. Pierson*, 925 F.3d 913, 925-26 (7th Cir. 2019), *vacated on other grounds by Pierson v. United States*, 140 S.Ct. 1291 (Mem) (2020)). Reasoning that there was "strong evidence" in support of the 2015 charge, the court concluded that, "even absent the putative constructive amendment, the jury almost certainly would have found Laut guilty of the 2015 tampering charge." App.8.

REASONS FOR GRANTING THE PETITION

The decision below deepens two circuit splits on how to conduct plain error review of constructive amendment claims under Rule 52(b), each of which warrants this Court's review.

First, the circuits are squarely divided on when a constructive amendment affects a defendant's substantial rights. There are currently no fewer than three conflicting approaches to that question: The Fourth and Second Circuits both treat constructive amendments as *per se* prejudicial error. In the Third Circuit, a constructive amendment gives rise to a rebuttable presumption of prejudice. In contrast, other

circuits place the burden of demonstrating prejudice on the defendant, but disagree on what that burden entails. The Seventh Circuit's approach is, by its own telling, the most "demanding": Only if the conviction rests on "thin evidence," and the defendant would not have been convicted "but for" the constructive amendment, can a constructive amendment be deemed prejudicial. This circuit split is square, it is acknowledged, and it was critical to the court's resolution of this case.

Second, the circuits are divided on what makes a constructive amendment "plain" error. In some circuits, that error is plain simply because it has long been clear that constructive amendments are unconstitutional. In others, including the Seventh Circuit, an error will not be plain unless the defendant satisfies what is essentially a habeas standard, identifying existing precedent addressing a nearly identical fact pattern. As the Seventh Circuit put it, if "no precedent squarely addresses" the specific factual circumstances of the case, then the error cannot be "plain."

That division among the circuits is reason enough to grant review. But the need for this Court's intervention is all the more pressing because the Seventh Circuit's two extreme rules combine to create a near-categorical abdication of its power to correct constructive amendments under plain error review. This is a case in point. The government all but conceded a constructive indictment, yet the court nonetheless found that the error could not be plain simply because no case had yet "squarely" addressed whether giving the jury the indictment and a verdict

form that hews to those charges suffices to "cure" a constructive indictment. If that is all it takes to evade the need to even determine whether an error is prejudicial, then it is not hard to see why the Seventh Circuit could locate only one successful plain error claim in this context in its precedent. This case thus provides an excellent vehicle to resolve two issues that have divided the circuits for decades, and to ensure that the protections of the Grand Jury Clause are uniformly enforced.

I. The Decision Below Deepens A Circuit Split On The Application Of The Substantial Rights Prong Of The Plain Error Test To Constructive Amendment Claims.

Under the familiar plain error test, a court may reverse on the basis of an error that was not preserved if (1) an error occurred, (2) the error was plain, (3) it affected the defendant's substantial rights, and (4) it seriously affected the fairness, integrity, or public reputation of the proceedings. *See Olano*, 507 U.S. at 732-38. The courts of appeals are in open and acknowledged disagreement over how to determine whether a constructive amendment affects the substantial rights of a defendant under the third prong of that test. In fact, the circuits apply no fewer than three (and arguably four) different standards for determining whether a constructive amendment was prejudicial. That clear circuit split plainly warrants this Court's review.

1. Had petitioner been convicted in the Fourth or Second Circuits, he would have had *no burden* to demonstrate prejudice at all. Under this Court's decision in *Stirone*, a constructive amendment is

prejudicial *per se*. 361 U.S. at 215. Following that clear holding, the Fourth Circuit has concluded that "constructive amendments of a federal indictment are error *per se*" under plain error review as well. *United States v. Floresca*, 38 F.3d 706, 714 (4th Cir. 1994). While the Fourth Circuit acknowledged that, under *Olano*, most forms of trial error require some showing of prejudice, it noted that *Olano* specifically left open whether "'[t]here may be a special category of forfeited errors that can be corrected *regardless* of their effect on the outcome.'" *Id.* at 713 (quoting *Olano*, 507 U.S. at 735). Since *Stirone* held "that the error occasioned by constructive amendments can *never* be harmless," the Fourth Circuit concluded that "it follows that such errors *must* affect substantial rights," and that "interpreting *Olano* to require a showing of prejudice in *every* case [would] essentially overrule[] *Stirone*." *Id.*

Similarly, the Second Circuit, sitting *en banc*, has held that "[a] constructive amendment is a *per se* prejudicial violation of the Grand Jury Clause of the Constitution." *United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001). Like the Fourth Circuit, the Second Circuit focused principally on *Stirone*, emphasizing that the "rule that a constructive amendment is *per se* prejudicial is grounded in the recognition that '[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.'" *Id.* (quoting *Stirone*, 361 U.S. at 218) (emphasis omitted). Thus, while the Second Circuit still applies the four-prong plain error test to analyze whether a conviction tainted by a constructive

amendment should be reversed, the third prong is necessarily satisfied once an error is shown. *See id.* at 667-71.

2. While the Third Circuit does not treat a constructive amendment as prejudicial *per se*, it employs a defendant-friendly standard, placing the burden on the government to rebut a presumption of prejudice. In its seminal case on the issue, the Third Circuit explained "that some serious errors should be presumed prejudicial in the plain error context even if they do not constitute structural errors and find that constructive amendments fall into that category." *United States v. Syme*, 276 F.3d 131, 154 (3d Cir. 2002). The court noted that sometimes in the constructive amendment context, "it is nearly impossible for [the defendant] to demonstrate that he was convicted on [the improper theory], rather than on one of the other theories of guilt pleaded in that count (i.e., that the constructive amendment altered the outcome on that count)." *Id.* The court thus found it appropriate to "apply in the plain error context a rebuttable presumption that constructive amendments are prejudicial (and thus that they satisfy the third prong of plain error review)." *Id.*

3. The other circuit courts that have examined the issue have held that the defendant bears at least some burden of demonstrating prejudice in the unpreserved constructive amendment context. But they vary widely on the nature of that burden.

For example, the Eleventh Circuit will find prejudice if it "cannot say 'with certainty' that with the constructive amendment, [the defendant] was convicted solely on the charge made in the

indictment." *United States v. Madden*, 733 F.3d 1314, 1323 (11th Cir. 2013). And while the Tenth Circuit requires the defendant show "a *probability* [of prejudice] sufficient to undermine confidence in the outcome," it has emphasized that "[a] reasonable probability ... should not be confused with … a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018). *Id.* If "the jury might very well have based its verdict" on the uncharged conduct, that is enough to warrant reversal. *Id.*

Similarly, the D.C. Circuit will find prejudice if there is a "distinct possibility" that the jury's verdict rested on an improper charge. *United States v. Lawton*, 995 F.2d 290, 294-95 (D.C. Cir. 1993). And while the Fifth Circuit places the burden on the defendant, it has emphasized that its approach is "not meant to imply that overwhelming evidence of guilt is sufficient, by itself, to sustain a conviction under the plain error standard." *United States v. Reyes*, 102 F.3d 1361, 1364-66 (5th Cir. 1996); *see also United States v. Fletcher*, 121 F.3d 187, 191-94 (5th Cir. 1997) (finding no prejudice when constructive amendment "*could not have affected* the outcome of the trial" (emphasis added)), *abrogated on other grounds as recognized by United States v. Robinson*, 367 F.3d 278, 286 n. 11 (5th Cir. 2004).

In the First Circuit, "[i]t is the defendant who bears the burden of demonstrating a reasonable probability that, but for the error, the result of the proceeding would have been different." *United States*

v. Brandao, 539 F.3d 44, 58 (1st Cir. 2008). And although the Ninth Circuit does not appear to have decided the issue directly, and has left open the possibility that "a constructive amendment always requires reversal, even under plain error review," *United States v. Dipentino*, 242 F.3d 1090, 1095-96 (9th Cir. 2001), recent cases have applied some form of prejudice analysis, albeit a fairly limited one. *See*, *e.g.*, *United States v. Anthony*, 747 Fed. App'x 628, 628 (Mem) (9th Cir. 2019) (finding no prejudice where "there was no evidence or argument at trial" that might have led the jury to "convict for uncharged conduct"); *Dipentino*, 242 F.3d at 1095-96 (finding prejudice because "the jury *could* have" convicted on uncharged conduct (emphasis added)).

At the other end of the spectrum, the Seventh Circuit has "set 'a high bar for reversal on plain-error review,' and will find it only if the conviction rests on thin evidence." App.7. "[T]he amendment must constitute a mistake so serious that but for it the [defendant] probably would have been acquitted in order for [the Court] to reverse" *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir. 1996). As the Seventh Circuit has recognized, that standard not only breaks with the *per se* prejudice rule of the Second and Fourth Circuits and the presumptive prejudice rule of the Third Circuit, but is more "demanding" even then the standards applied by most circuits on its side of the split. *Pierson*, 925 F.3d at 925. In fact, by its own estimate, only one defendant has met that high bar—and that was more than two decades ago. *See id.* (citing *United States v. Ramirez*, 182 F.3d 544 (7th Cir. 1999)). The only other circuit that is even arguably as demanding is the Eighth, which likewise

will not find prejudice unless there is a "reasonable probability [the defendant] would have been acquitted" but for the error. *United States v. Gavin*, 583 F.3d 542, 547 (8th Cir. 2009).

4. The open and acknowledged division among the lower courts is reason enough to grant certiorari. But this Court's review is all the more critical because the Seventh Circuit's position is incorrect. Certainly, Rule 52(b) and *Olano* both instruct that plain error review is reserved for those errors that affect a defendant's substantial rights. But this Court has squarely held that "[t]he 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." *Stirone*, 361 U.S. at 218-19.

As the Court has explained, our grand jury system "assure[s] that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co. of Cal. v. Petrol Stops NW*, 441 U.S. 211, 219 (1979). Thus, it does not "lie[ ] within the province of a court [or the prosecutor] to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes." *Stirone*, 361 U.S. at 216. Rather, the grand jury "serv[es] as a kind of buffer or referee between the government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992). Accordingly, it is the act of compelling the "defendant to be tried on charges that are not made in the indictment against him" itself—not the resulting conviction—that violates a

defendant's substantial rights. *Stirone*, 361 U.S. at 217.

The Seventh Circuit's approach cannot be reconciled with those principles, for it forces the defendant to prove that he was prejudiced by the *conviction* when the trial itself is the constitutional violation. If the inquiry were to focus only on whether the defendant would have been convicted anyway, then "the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." *Id.* at 216.

Worse still, the Seventh Circuit's exceedingly "demanding" standard makes it exceptionally difficult to make that misplaced showing. While plain error review often requires some showing of prejudice, Rule 52(b) has never been understood to require a showing that the defendant is actually innocent of the offense. To the contrary, *Olano* itself recognized that "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." 507 U.S. at 736-37. The Seventh Circuit's seeming demand that a defendant demonstrate that he would not have been convicted of *any* offense but for the constructive amendment thus conflicts not only with *Stirone*'s approach to constructive amendments, but also with *Olano*'s approach to plain error. That likely explains why even those circuits that *agree* with the Seventh Circuit that constructive amendments are not prejudicial *per se* do

not employ the Seventh Circuit's exceedingly demanding "thin evidence" but-for cause approach.

Ultimately, however, which circuit has the best rule is a question that can be left for the merits. What matters most at this juncture is that there is no denying that the circuits are in open and acknowledged conflict on what the rule should be. The approach taken by the Second and Fourth Circuits more closely comports with *Stirone*'s admonition that the "substantial right to be tried only on charges presented in an indictment returned by a grand jury ... [is] a basic right far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone*, 361 U.S. at 217. But whatever the right rule is, it should be a uniform one. Accordingly, the Court should grant certiorari to decide how the substantial rights prong of the plain error test applies to constructive amendment claims.

II. The Seventh Circuit's Restrictive Approach To The "Plain" Prong Of The Plain Error Test Likewise Cannot Be Squared With Cases From Other Circuits Or This Court.

Compounding its unusually pro-government rule for analyzing whether a constructive amendment was prejudicial, the Seventh Circuit also employs an exceedingly burdensome standard for demonstrating that a constructive amendment error is "plain."

1. When a legal rule is settled by the time of appeal, an error in applying that rule is "plain" for purposes of Rule 52(b). *Henderson v. United States*, 568 U.S. 266, 279 (2013). It has been settled law since at least this Court's decision in *Stirone* that a constructive amendment is a reversible error. *See*

Stirone, 361 U.S. 212. Thus, when the government or the district court constructively amends the operative indictment, the error is "plain" for the purposes of *Olano* and Rule 52(b). *See Henderson*, 568 U.S. at 279.

Instead of following that straightforward rule, the Seventh Circuit analyzes the "plain" inquiry under a standard akin to habeas or qualified immunity analysis: It will not find an error "plain" unless some "precedent squarely addresses" the specific factual circumstances of the particular case. App.7; *see also Pierson*, 925 F.3d at 922-24; *compare*, *e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (interpreting 28 U.S.C. §2254 to permit relief only when facts "are materially indistinguishable from a decision of this Court and [the state court] nevertheless arrive[d] at a result different from [this Court's] precedent"). Applying that habeas-like standard here, the court declared it irrelevant whether a constructive amendment occurred because "no precedent squarely addresses whether the court's provision to the jury of the indictment and a verdict form (specifying that the jury should convict based only on the actions alleged in the indictment) mitigates the potential harm from the prosecution's arguments and evidence." App.7.

Here, too, the Seventh Circuit's approach breaks with the approach employed by several other circuits. In many other circuits, all that matters for purposes of determining whether a constructive amendment error is plain is that it has long been settled law that a constructive amendment is unconstitutional.

The Tenth Circuit's decision in *Miller* is illustrative. There, the defendant, a small-town doctor, was convicted of charges related to "health-

care fraud, money laundering, and distributing a controlled substance outside the usual course of professional treatment, as well as one count of making a false statement in an application he submitted to the Drug Enforcement Administration." *Miller* 892 F.3d at 1225. The defendant argued on appeal that the false statement charge had been constructively amended at trial. *Id.* at 1231. The false statement charge was "based on a specific false statement." *Id.* at 1232. "At trial, however, the government's witnesses testified that Defendant had also made a second false statement ... [and] also introduced into trial an unredacted copy of Defendant's responses to all of the questions on the DEA application, with no indication that Defendant's response to Question 3 was the only statement at issue in th[at] case." *Id.*

The Tenth Circuit concluded that this constituted a constructive amendment, and also concluded that this error was plain. In doing so, the court explained that "it is settled law in th[e] circuit, as elsewhere, that the language employed by the government in its indictments becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars." *Id.* at 1235 (citation and internal quotations omitted). And the court found the failure to comport with that constitutional rule "plain" error simply "because this constructive amendment was contrary to that "settled law." *Id.* It did not ask whether any other case involved a sufficiently on-point application of the constructive amendment rule.

The Fourth Circuit's decision in *Floresca* is much the same. There, the constructive amendment arose because the indictment alleged a violation of the first paragraph of 18 U.S.C. §1512(b), but the district court erroneously instructed the jury, without objection, on paragraph 3 of that statute. 38 F.3d at 709. Without analyzing whether any "precedent squarely addresse[d]" the issue, the Fourth Circuit found the constructive amendment error plain simply "because it [was] plain that th[e] grand jury *did not*" indict the defendant on the third paragraph. *Id.* at 712. Likewise, the D.C. Circuit applied a similar methodology in *Lawton*. *See* 995 F.2d at 294 (noting that the law on constructive amendments had been consistent "[f]or more than a century," and finding error plain where jury instructions "clearly outlined a substantially broader field of potential criminality" than that set out in the indictment).

On the other side of the divide, the Second and Eleventh Circuits share the Seventh Circuit's view that an error is not "plain" unless some earlier precedent "squarely addressed" the precise issue at hand. *See, e.g.*, *United States v. Bastian*, 770 F.3d 212, 220-22 (2d Cir. 2014); *United States v. Dortch*, 696 F.3d 1104, 1114 (11th Cir. 2012). Indeed, the Second Circuit has made clear that even on-point decisions from other circuits do not suffice; the precedent must come either from this Court or from the governing circuit. *Bastian*, 770 F.3d at 221. On this prong too, then, the circuits are in disagreement about how plain error review applies to a constructive amendment. And here too, the Seventh Circuit is on the highly restrictive side of the line, essentially requiring specifically on-point precedent to find an error "plain."

2. The Seventh Circuit's restrictive approach cannot be reconciled with this Court's cases, which focus not on whether the district court *should have known* that there was an error, but on whether the error is plain to the reviewing court. *See, e.g.*, *Henderson*, 568 U.S. at 279; *Johnson v. United States*, 520 U.S. 461, 467-68 (1997). Requiring on-point precedent declaring the same type of error "plain" would produce the same unfair results that those cases sought to avoid. After all, by the Seventh Circuit's logic, two defendants could contemporaneously be subjected to a virtually identical unpreserved error, yet only the defendant whose appeal was decided second could get relief under Rule 52(b), simply owing to the happenstance of who got to the court of appeals first.

The Seventh Circuit's approach is also in considerable tension with this Court's recent decision in *United States v. Davis*. There, the Court summarily reversed the Fifth Circuit's "practice of refusing to review certain unpreserved factual arguments for plain error." 140 S.Ct. 1060, 1061 (2020). Yet while the Seventh Circuit purports to apply plain error review, it will not find an error plain unless some existing "precedent squarely addresses" it. App.7. That is just another way of effectively (and impermissibly) "shield[ing] … from plain-error review" any case that turns on factual distinctions, 140 S. Ct. at 1061-62, for the government will prevail any time it can come up with *any* novel and colorable argument to defend the district court, as the error will not be "plain" simply because the court has not previously addressed it.

This is a case in point. Here, the government *conceded* that evidence from the separate, dropped, 2014 product tampering incident was used to prove the 2015 crime. *See*, *e.g.*, CA7.Dkt.29 at 18. There is thus *no dispute* that the government relied on uncharged conduct for an impermissible purpose. The court nonetheless deemed any error insufficiently "plain" on the ground that no earlier decision had squarely addressed whether giving the jury the indictment and a verdict form "specifying that the jury should convict based only on the actions alleged in the indictment" *cures* a constructive amendment. App.7. In other words, the purportedly "novel" factual circumstance the Seventh Circuit refused to find sufficiently covered by existing precedent was simply the common practice of providing the indictment and verdict form to the jury during deliberations. App.7. If that is enough to make a constructive amendment too "novel" to be "plain" error, then it is hard to see how any criminal defendant would *ever* be able to demonstrate plain error in a constructive amendment case.

III. The Questions Presented Have Considerable Practical Impact, And This Is An Excellent Vehicle To Resolve Them.

The circuit splits on the questions presented are reason enough to grant review. Had petitioner been tried and convicted in Maryland, North Carolina, South Carolina, Virginia, or West Virginia—rather than Illinois—he almost certainly would have received a new trial on the product tampering charge. *See Floresca*, 38 F.3d at 712. Likewise, had he been convicted in several other circuits, he would have been

far more likely to have had his conviction reversed. Resolution of circuit splits like these ones, which lead to the disparate application of constitutional rights to similarly situated defendants, are at the core of this Court's certiorari jurisdiction. *See* Supreme Court Rule 10.

The Seventh Circuit's outlier approach on two key aspects of the plain error analysis in constructive amendment cases reinforces the need for this Court's review. After all, the Seventh Circuit was able to identity only *one* defendant who has been able to meet its demanding standard in a constructive amendment case. *See Ramirez*, 182 F.3d 544. And in that decades-old case, the Seventh Circuit did not even apply its current, more restrictive approach to the "plain" prong. *Id.* It is unclear if, under the approach articulated in the decision below and in the *Pierson* case decided just a few months earlier, any defendant could *ever* get a conviction overturned under Rule 52(b) that was tainted by a constructive amendment. *See* App.7; *Pierson*, 925 F.3d at 922-24. The Seventh Circuit's exceedingly rigid approach to examining constructive amendments on plain error review exacerbates the circuit conflicts, as other courts have recognized that, if anything, a *more* defendant-friendly rule should apply in this context. *See*, *e.g.*, *Miller*, 891 F.3d at 1231 (explaining that the Tenth Circuit "appl[ies] th[e *Olano*] rule less rigidly when reviewing a potential constitutional error" like a constructive amendment).

The Seventh Circuit's approach is untenable. As the Fourth Circuit has emphasized, "[p]lainly and simply, 'a court cannot permit a defendant to be tried

on charges that are not made in the indictment against him.'" *Floresca*, 38 F.3d at 711 (quoting *Stirone*, 361 U.S. at 217). It is not up to the prosecutor or the district court to decide that additional bases for conviction might prove a compelling or legitimate reason for convicting a defendant when the actual charges in the operative indictment were more narrowly drawn. And "it is 'utterly meaningless' to posit that any rational grand jury *could* or *would* have indicted [on the additional charge], because it is plain that the grand jury *did not*, and, absent waiver, a constitutional verdict cannot be had on an unindicted offense." *Id.* at 712.

This is an excellent case in which to resolve the questions presented. The government conceded, both in its opposition and again during oral argument, that it used evidence from the separate, dropped 2014 product tampering incident to prove essential elements of the 2015 crime. By doing so, the government constructively amended the superseding indictment. That error was plain, it was prejudicial, and it should not be allowed to stand. *See, e.g.*, *Stirone*, 361 U.S. 215-16; *Miller*, 471 U.S. at 138-39; *Floresca*, 38 F.3d at 711-12. The Seventh Circuit concluded otherwise only because it employs the most onerous plain error standard in the nation. This Court should grant certiorari to resolve the division among the circuits and align the Seventh Circuit's outlier approach with the Constitution and this Court's precedent interpreting it.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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