No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL LITTLE,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioner, a green card holder who returned to the United Kingdom in 1983 but later resided temporarily and conducted some business in the United States, was tried on charges of (i) helping U.S. family members avoid income and estate taxes on inheritance repatriated from overseas trusts, (ii) subsequently abetting declarations that repatriated sums were gifts rather than trust distributions, (iii) failing to declare personal "foreign" FBAR accounts and file U.S. 1040 tax returns.

1. Whether the indictment was constructively amended to add additional undeclared "overseas" accounts not among those specifically identified on the ground that the Second Circuit allows such amendments deemed outside the "core of criminality," in clear conflict with *Stirone v. United States,* 361 U.S. 212, 218 (1960) and multiple circuits forbidding amendment of specified allegations?

2. Whether an overseas green card holder could "willfully" fail to report "foreign" accounts to the IRS when during the relevant time period such obligation only applied to a "United States resident" and was only amended to apply to "lawful permanent residents" barely in advance of the filing deadline?

3. Whether a conscious avoidance instruction on tax counts is appropriate on the mere basis that a defendant challenged at trial that he had actual knowledge that his conduct violated the law but without proof that he took deliberate steps to avoid such knowledge as required by multiple circuits and this Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011)?

STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

The names of all parties to this petition appear in the caption of the case on the cover page. The parties have no parent or subsidiary companies and do not issue stock. The proceedings directly related to this case are as follows:

- *United States v. Little,* No. 12-cr-0647 (PKC), U.S. District Court for the Southern District of New York. Judgments entered November 20, 2018 and February 11, 2019.
- *United States v. Little,* Nos. 18-3622-cr and 19-445-cr, U.S. Court of Appeals for the Second Circuit. Judgments entered September 30, 2020 and November 19, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions and Rules

No. _____

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OPINIONS BELOW

The September 30, 2020 summary order of the court of appeals affirming the judgment of the district court, except to remand regarding restitution, may be found at *United States v. Little,* 828 Fed.Appx. 34 (2d Cir. 2020), and is reproduced at Appendix A. The November 19, 2020 order of the court of appeals denying the petition for rehearing or rehearing *en banc* is reproduced at Appendix F. *United States v. Little,* 18-3622; 19-445 (2d Cir. November 19, 2020). The May 3, 2017 memorandum and order of the district court denying defendant's motion to dismiss may be found at *United States v. Little,* 2017 WL 1743837 (S.D.N.Y. 2017) and is reproduced at Appendix B. The June 23, 2017 memorandum and order of the

district court denying defendant's motion to reconsider the May 3, 2017 memorandum and order is reproduced at Appendix C. *United States v. Little,* 12-cr-0647 (PKC)(S.D.N.Y. June 23, 2017). The November 1, 2018 opinion and order of the district court denying defendant's post-trial motions for judgment of acquittal or a new trial may be found at *United States v. Little,* 2018 WL 5668874, (S.D.N.Y. 2018) and is reproduced at Appendix D. The November 14, 2018 opinion and order of the district court denying defendant's motion to reconsider the November 1, 2018 opinion and order may be found at *United States v. Little,* 2018 WL 5961291, (S.D.N.Y. 2018) and is reproduced at Appendix E.[1]

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2020. App. A. The order denying the petition for rehearing or rehearing *en banc* was entered on November 19, 2020. App. F. This Court has jurisdiction under 28 U.S.C. § 1254. *See* Order of this Court of March 19, 2020 extending the deadline to file petitions for a writ of certiorari to 150 days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution guarantees that "[n]o person shall be held to answer for a[n] ... infamous crime, unless on a presentment or indictment of a Grand Jury…" U.S. Const. amend. V

The Sixth Amendment guarantees a defendant's right "to be informed of the nature and cause of the accusation" against him or her. U.S. Const. amend. VI

[1] Occasional references are made to the Second Circuit appendix ("A__"), the trial transcript ("Tr.__") and filings in the district court ("DD#__").

Effective June 24, 2011, 31 C.F.R. § 1010. 350 provides in pertinent part:

(a) In general. Each United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U.S.C. 5314 to be filed by such persons. The form prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD–F 90–22.1), or any successor form. See paragraphs (g)(1) and (g)(2) of this section for a special rule for persons with a financial interest in 25 or more accounts, or signature or other authority over 25 or more accounts.

(b) United States person. For purposes of this section, the term "United States person" means—

* * *

(2) A resident of the United States. A resident of the United States is an individual who is a resident alien under 26 U.S.C. 7701(b) and the regulations thereunder but using the definition of "United States" provided in 31 CFR 1010.100(hhh) rather than the definition of "United States" in 26 CFR 301.7701(b)–1(c)(2)(ii);

* * *

STATEMENT OF THE CASE

A. District Court Proceedings

In 2001, petitioner Michael Little, a British trader, responded to the deathbed request of American international trader Harry Seggerman to take care of his wife Anne with moneys in an overseas fund which Little managed with Harry. He advised a Swiss lawyer for the Seggermans and participated in arrangements to get the funds to Anne. Because Anne, as a surviving spouse, was entitled to inherit tax free, there is no claim that payments to her were illegal. Four of the Seggerman children, rather, who could not inherit tax free, were charged separately with repatriating different overseas funds from their father without declaring income or estate taxes. Little was tried for assisting them on disputed evidence since they dealt almost exclusively with the Swiss lawyer, and two testified to Little's absence at the portion of the joint meeting that related to payments to the children (as opposed to payments to Anne, Little's focus). App.A at 2; App.D at 3.

Despite heavy focus at the month-long trial, only the three-pronged conspiracy charge in Count Nine of the 19-count indictment, actually involved alleged illegal assistance to the Seggerman children. 18 U.S.C. § 371.[2] As noted,

[2] Count Nine was a three-pronged conspiracy focused on the 2001 charges of assisting the Seggerman children to avoid estate and income taxes, charging in three objects to (i) defraud the United States, in violation of 18 U.S.C. § 371; (ii) allow Seggerman family members to subscribe to false income tax and estate tax returns in violation of 26 U.S.C. § 7206(1); (3) assist in material falsities in income and estate tax returns as to foreign bank accounts and the total value of the estate in violation of 26 U.S.C. § 7206(2). Count One broadly charging obstructing administration of revenue laws in violation of 26 U.S.C. § 7212(a) was intended to also embrace the 2001 allegations, but was narrowed to the false Form 3520 filing

Little disputed helping the children avoid taxes, as opposed to assisting their mother Anne who inherited tax free. On appeal, Little argued that Count Nine was constructively amended by jury instructions and government argument risking a jury verdict as to the wholly different allegations in Counts 10-19 concerning the accuracy of disclosure forms filed on behalf of Anne Seggerman in 2010-2012. This allowed the jury to disregard the weak case on 17-year old evidence for assisting the Seggerman children. App.A at 3-4; App.D at 3-4,7-9.

Count Eight charged that for tax years 2007-2010 he failed to file an FBAR form disclosing "foreign" accounts at Barclay's bank in the Guernsey Islands under 31 U.S.C. §§ 5314,5322(a). Little objected at trial and argued on appeal that this count too was constructively amended allowing failure to disclose accounts at Coutts Bank to be considered by the jury, despite the specified reference only to Barclays in the indictment. Little also challenged the application of FBAR charges to a green card holder living overseas, in light of the lack of notice in the law, which was only clarified and made effective to green card holders barely before a 2010 return would have been due. App.B at 10-11; App.D at 12-13.

As to the Form 3520 charges (Counts 1, 10-19[3]), the government claimed that in 2010-2012 Little abetted false disclosure of prior payments to Anne as "gifts" rather than "trust distributions" as the government claimed. At trial, Little cited

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issues after this Court's decision in *Marinello v. United States,* 138 S.Ct. 1101 (2018) requiring interference with specific IRS proceedings.

[3] Counts 10-19 charged aiding and assisting the preparation of false IRS Forms 3520 in violation of 26 U.S.C. § 7206(2).

the complexity of communications among lawyers and accountants over the nature of the payments, and statements by U.S. counsel that the payments could be regarded as gifts. On appeal, Little also emphasized that the trust vs gift (by a trust) issue was too complex and debatable to conclude that defendant acted willfully and in bad faith. App.A at 5-6; App.D at 4-5,9-11.

The government also charged in Counts Two-Seven that Little, who had ceased permanent residence in the U.S. as of 1983 but continued to hold a green card, willfully failed to file personal 1040 returns as to income earned in the United States during the years in misdemeanor violation of 26 U.S.C. § 7203. The income primarily involved unrelated legal work during 2005-2008 when Little was in New York to oversee litigation for a UK company he partly owned. Before trial, Little argued that as applied to him, these charges were unconstitutionally vague. App.B at 1-14; App.C. at 1-2. Little stressed on appeal that the charges were indecipherable and inapplicable under the byzantine tax code, regulation and US-UK Tax Treaty provisions, because Little, while technically holding a green card, had long since relocated to the UK in 1983, and after 2008 had no US residence. App.A at 2,4-5; App.D at 11-13.

B. Decision of the Court of Appeals

As pressed here, the decision below rejected constructive amendment arguments as to Counts Eight and Nine. As to Count Eight, the decision acknowledges that the indictment limited the FBAR charge to "to wit, at least one … account at Barclay's Bank, located in Guernsey, Channel Islands," the court of

appeals upheld expansion to another bank, reasoning that, "[s]uch a discrepancy, however, does not rise to the level of constructive amendment because 'to wit' clauses do not modify essential elements of the offense." App.A at 4. On Count Nine, appellant argued that the jury charge and government argument invited conviction on the wholly different Counts 10-19 concerning 3520 returns filed in 2010-2012. The court of appeals acknowledged that the court instructed the jury that "the third object [of the conspiracy charged in Count Nine] is going to be charged separately in Counts Ten though Nineteen [the 3520 charges]." App.A. at 3. The court held, however, that it was "neither clear nor obvious" that the refence was to the underlying charges on Counts 10-19 as opposed to the legal elements on a false tax return charge. App.A at 3.

With respect to the willful failure to file and FBAR counts, the decision below consolidates to a simple argument about willfulness dozens of pages of argument under IRS statutes, regulations and the US-UK Tax Treaty in the context of the seminal requirement of willfulness and good faith reliance in tax cases as well as Constitutional standards of vagueness and lenity. The court of appeals essentially held that US tax laws apply to all green card holders even if they have long since left the US, and that Little acted willfully because he was a sophisticated international trader and British barrister. The court of appeals held that the obligation to file an FBAR applies even to green card holders overseas, even though the applicable regulations only applied to a "United States resident" and was only amended to explicitly include green card holders just before the last return by

petitioner would have been due. App.A. at 4-6.

The court also rejected plain error arguments that the jury instructions improperly included three conscious avoidance charges allowing the jury to convict without the predicate of actual deliberate avoidance of knowledge that this Court and virtually all circuits require. The court below justified the instruction on the mere basis that petitioner disputed the element of knowledge, despite the absence of evidence that petitioner actually consciously avoided knowledge. App.A. at 6-7.

The court of appeals rejected other arguments not addressed here, but did remand as to restitution based on US-UK Treaty agreement narrowing the applicable time period. App.A. at 7-8.

REASONS FOR GRANTING THE PETITION

I. The Court Should Address Longstanding Conflict and Confusion Concerning the Constructive Amendment Doctrine.

This Court has not offered meaningful guidance on the doctrine of constructive amendment of the indictment since *Stirone v. United States,* 361 U.S. 212, 218 (1960), and the decision below suggests why guidance is necessary. In clear conflict with several other circuits, the court below holds that specification of charges in an indictment, here the identification of a bank the accounts of which were not disclosed to the IRS, is not binding and the jury was free to convict on the basis of a different bank unmentioned in the indictment. On another count, the jury instructions and argument by the government invited the jury to convict on an alternative legal theory and allegations not presented in the indictment. Both rulings take place in the context of circuit disagreement whether prejudice must be shown on constructive amendment claims, and whether it matters if ordinary or plain error review applies, an issue identified but not decided by this Court in *United States v. Cotton,* 535 U.S. 625 (2002).

A. Constructive Amendment Under *Stirone*

1. "[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). This command originates both in the Fifth Amendment guarantee that "[n]o person shall be held to answer for a[n] ... infamous crime, unless on a presentment or indictment of a Grand Jury," U.S. Const. amend. V, and the Sixth Amendment's assurance of a defendant's right "to be informed of the nature and

cause of the accusation" against him or her, *id.* amend. VI As *Stirone* summarized, 361 U.S. at 216-17, quoting *Ex parte Bain*, 121 U.S. 1 (1887):

> If it lies within the province of a court 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, 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. [121 U.S. at 10]
> ***
> [A]fter the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney …. [121 U.S. at 13]

In *Stirone* the indictment specifically charged obstruction by extortion of interstate shipments of sand. *Id.* at 213-14. Despite the specific reference to sand shipments, the district court allowed the government to offer evidence and argument that interference with steel shipments was also a valid basis for conviction. *Id.* at 214. This Court held that the alteration "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury" and that "[d]eprivation 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.* at 217. The Court added importantly that specific allegations in an indictment do not allow for substitution:

> 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 had been burdened. [*Id.* at 218].

B. Contrary to *Stirone* and in Conflict With Other Circuits the Court of Appeals Allowed the Government To Amend Specified Allegations in the Indictment.

1. The court of appeals affirmed two counts, Counts Eight and Nine, on grounds directly contrary to *Stirone*. Count Eight alleged failure to disclose that Little "had a financial interest in, and signature and other authority over, a bank, securities, and other financial accounts in a foreign country, to wit, at least one foreign bank, securities, and other financial account at Barclay's Bank, located in Guernsey, Channel Islands...." Superseding Indictment, DD#48 at ¶24 (A85). In addition to the Barclay's accounts, however, the government was permitted, over objection, to enlarge the scope of Count Eight to include Coutts Bank in the United Kingdom. The district court allowed it agreeing with government counsel that "to wit" in the indictment was meant to convey an example or illustration only, and did not limit the accounts embraced by Count 8. Tr.1213-15.[4]

The court of appeals did not endorse the notion that "to wit" means "for example," nor could it. According to Black's Law Dictionary (5th Ed.) and multiple other authorities, "to wit" means "[t]hat is to say; namely" and simply signals what was meant by the preceding phrase. Here, the phrase meant that the accounts in question referred to Barclays only. *See United States v. Herrera*, 313 F.3d 882,890 5th Cir. 2002)(citing Black's definition).[5]

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[4] When initially delivering the charge, the court described the count as only related to Barclays. A136/Tr.2161. However, citing the prior overruling of petitioner's objection, the court revised the charge and allowed it to embrace any accounts, not simply the Barclay accounts. A147-50/Tr.2172-75

[5]Though the indictment states, "to wit, at least one…account at Barclay's Bank…." Little had multiple Barclays accounts. Tr.1458(citing GX1500).

The court of appeals, rather, invoked a principle – at odds with *Stirone* – that "[s]uch a discrepancy, however, does not rise to the level of constructive amendment because 'to wit' clauses do not modify essential elements of the offense." App.A. at 4 (citing *United States v. D'Amelio*, 683 F.3d 412,422 (2d Cir. 2012)). In *D'Amelio* "to wit" referred to use of the internet to facilitate enticement of a minor, but at trial the jury instructions allowed the jury to convict on the basis of use of the telephone too. The court of appeals held that the jurisdictional predicate did not alter the "core of criminality" of enticement charged in the indictment. This "core of criminality" exception to the constructive amendment doctrine appears in multiple Second Circuit decisions. *See*, *e.g., United States v. Daugerdas,* 837 F.3d 212, 225 (2d Cir. 2016); *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007); *United States v. Berger,* 224 F.3d 107, 117 (2d Cir.2000); *United States v. Rosenthal*, 9 F.3d 1016 (2d Cir. 1993). The court below also acknowledges, however, "divergent results" in its constructive amendment jurisprudence. *Rigas*, 490 F.3d at 228 (quoting *United States v. Milstein*, 401 F.3d 53,65 (2d Cir. 2005)).

Any notion that use of the words "to wit" or amendment of specific indictment language as not altering "the core of criminality" would see to invite the very constructive amendment of indictments that *Stirone* and *Bain* before it condemn. The identity of the bank – Barclays or Coutts – that petitioner allegedly failed to disclose is no less consequential than the identity of the materials obstructed in commerce – sand or steel – in *Stirone*. Both amend an indictment returned by the grand jury.

2. The decisions of other courts of appeal follow *Stirone* and do not abide exceptions to the constructive amendment doctrine based on strange interpretations of the words "to wit" or amorphous invocations of "core of criminality." A prominent example is the Tenth Circuit's decision in *United States v. Farr*, 536 F.3d 1174 (10th Cir. 2008)(Gorsuch, J.). There, then Judge Gorsuch authored the Tenth Circuit's reversal of a conviction due to constructive amendment of the indictment in a tax case. The indictment in that case charged defendant with failure to pay quarterly corporate employment taxes, but the court permitted the jury to convict on a related theory of failure to pay a trust fund recovery penalty assessed against defendant personally for failing to cause payment of the employment taxes. Commenting that the admonitions of *Stirone*, "remain no less binding upon us today," *id.* at 1180, the court held that having charged a general crime and specified how it was committed, the "the government was not free to prove any other tax liability at trial." *Id.* at 1181. *See also United States v. Miller*, 891 F.3d 1220, 1234 (10th Cir. 2018)("constructive amendment occurs when the indictment alleges a violation of the law based on a specific set of facts, but the evidence and instructions then suggest that the jury may find the defendant guilty based on a different, even if related, set of facts.")

The decision below conflicts with other circuit decisions as well. For example, in *United States v. Willoughby*, 27 F.3d 263 (7th Cir. 1994) the Seventh Circuit reversed a conviction for constructive amendment of the indictment where the defendant was charged with use of a firearm "during and in relation to a drug

trafficking crime, *to wit:* the distribution of cocaine ..." *id.* at 266 (emphasis added) but the jury was permitted to convict on a theory of possession with intent to distribute. As the court emphasized, "'To wit' is an expression of limitation which, as our cases indicate, makes what follows an essential part of the charged offense." "A conviction relying upon a link between the gun and the latter described conduct would constitute an impermissible broadening of the indictment, for its basis was necessarily excluded from the charge as phrased." *Id.*

Decisions of other courts of appeal reach the same result. *See United States v. Ward*, 747 F.3d 1184 (9th Cir. 2014)(constructive amendment where indictment specified two victims but argument and instructions allowed conviction as to other victims); *United States v. Narog*, 373 F.3d 1243 (11th Cir. 2004)(narrowing indictment to specific controlled substance precluded theory involving other substance); *United States v. Choy*, 309 F.3d 602 (9th Cir. 2002)(constructive amendment on plain error review where indictment alleged bribery via checks but jury permitted to convict based on official's being given computers to use); *United States v. Hitt*, 249 F.3d 1010 (D.C. Cir. 2001)(indictment articulating goal of conspiracy to obtain export licenses did not permit theory that goal also to subsequently divert machine tools in violation of license; dissenting judge relies on Second Circuit "core of criminality" test); *United States v. Leichtman*, 948 F.2d 370 (7th Cir. 1991)(indictment specified Mossberg firearm but argument and instructions allowed conviction as to any of three firearms); *United States v. Randall*, 171 F.3d 195 (4th Cir. 1999)(change of theory from distribution as in

indictment to possession with intent to distribute as argued to jury constructively amended indictment);; *United States v. Weissman*, 899 F.2d 1111 (11th Cir. 1990)(RICO specification of specific crime family as enterprise did not allow conviction as to alternate enterprise).

These decisions reject the idea that when an indictment charges an offense with specific particulars, that courts are free to alter those specifics at trial. This Court should address this conflict and whether *Stirone* remains good law.

C. Count Nine Also Reflects the Need for Review.

Count Nine also warrants review, and affords an opportunity to address additional conflict over the standard of review as well as whether prejudice is mandated on a constructive amendment claim reviewed as a matter of plain error.

1. On the issues as to Count Nine, the court of appeals required a showing of "a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." App.A. at 3 (quoting *United States v. D'Amelio*, 683 F.3d 412,416 (2d Cir. 2012)).[6] This standard is commonly cited, particularly in the Second and Sixth Circuits. *See, e.g., United States v. Bradley*, 917 F.3d 493, 502 (6th Cir. 2019). The Eight Circuit arguably requires an even more burdensome showing of a "substantial likelihood that the defendant was convicted of an uncharged offense." *United States v. Thomas*, 791 F.3d 889, 896 (8th

[6] The Second Circuit has also articulated a standard whether there is "an unacceptable risk that the jury might convict the defendant of a crime materially different from the one alleged in the indictment." *United States v. Mucciante,* 21 F.3d 1228,1233 (2d Cir.1994).

Cir. 2015) (citation omitted).

Other courts, however, ask whether upon comparing the indictment to the district court proceedings whether those proceedings "broadened the possible bases for conviction beyond those found in the operative charging document." This is the formulation adopted by then Judge Gorsuch in *Farr,* 536 F.3d at 1180. The Eleventh Circuit asks whether "the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." *United States v. Madden*, 733 F.3d 1314, 1318 (11th Cir. 2013)(quoting *United States v. Keller,* 916 F.2d 628, 634 (11th Cir.1990)). *See also United States v. Haldorson*, 941 F.3d 284, 297 (7th Cir. 2019)("broadens the possible bases for conviction…")(quoting *United States v. Cusimano*, 148 F.3d 824, 829 (7th Cir. 1998)).

The Fourth Circuit has said that constructive amendment "occurs when the court 'broadens the possible bases for conviction beyond those presented by the grand jury.'" *United States v. Burfoot*, 896 F.3d 326, 338 (4th Cir. 2018)(quoting *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994)) while adding inconsistently, "In other words, there's a constructive amendment when the indictment is effectively altered 'to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment.'" *Id.* (quoting *United States v. Randall*, 171 F.3d 195, 203 (4th Cir.

1999). *See also United States v. Centeno*, 793 F.3d 378, 389-90 (3d Cir. 2015).[7]

To the extent that courts are requiring some degree of probability that a jury convicted based on a theory the indictment did not allow, those courts would seem to be incorporating prejudice into their standard of review. That would be inconsistent with *Stirone*'s determination that prejudice need *not* be shown to establish a constructive amendment claim. *Stirone* does not frame its standard in terms of the likelihood that the jury convicted on an improper theory. Rather, it states affirmatively that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." 361 U.S. at 217. This alone "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury" and is "far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.*

2. Moreover, with respect to Count Nine, the plain error standard applies because there was concededly no objection. This poses the additional question whether prejudice must be shown under prong three of the plain error test, an issue that this Court identified but did not reach in *United States v. Cotton,* 535 U.S. 625 (2002)(denying plain error relief under prong four but not reaching issue whether prejudice under *Stirone* must be reached on prong three). The First Circuit, for example, requires a showing of prejudice on plain error review of a constructive

[7] In this case, the Third Circuit simultaneously cites the "substantial likelihood" test *and* a "broadening the possible bases for conviction" test. The court below, which admits to inconsistencies, also referenced the "broadening the basis" formulation in *United States v. Bastian*, 770 F.3d 212 (2d Cir. 2014).

amendment claim. *See United States v. Brandao*, 539 F.3d 44, 61-62 (1st Cir. 2008). *See also United States v. Syme*, 276 F.3d 131, 152 (3d Cir. 2002)(requiring prejudice); *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir. 1996)(same). The court below, and other circuits, do not require prejudice in this setting. *See, e.g., United States v. Thomas,* 274 F.3d 655, 670 (2d Cir.2001) (en banc)

3. The record below underscores that these conflicting standards of review contributed to a decision that warrants review. Appellant urged that the charge and argument on the second and third objects of the conspiracy charged in Count Nine – which only related to the 2001 allegations of helping the Seggerman children avoid income and estate taxes -- unacceptably risked conviction based on the 2010-2012 conduct charged in Counts 10-19 concerning the accuracy of 3520 returns as to the source of payments to Anne Seggerman.[8]

Pointed references to Counts 10-19 were improperly included in the Count Nine charge. In the charge on prong three, the district court directed the jury to "the *crime* charged in Counts Ten through Nineteen" and that this was the "unlawful *object*" of the conspiracy. (emphasis added).[9] In the charge on the second

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[8] Count Nine was a three-prong conspiracy. The first object was to broadly defraud the United States by impeding collection of taxes in violation of 18 U.S.C. § 371. The second was to allow Seggerman family members to "subscribe to false U.S. Individual Income Tax Returns, Forms 1040 and a United States Estate Tax return" in violation of 26 U.S.C. § 7206(1) The third was to assist in material falsities in 1040 and estate tax returns as to foreign bank accounts and the total value of the estate in violation of 26 U.S.C. § 7206(2).

[9] In full:

"Now, the third alleged object of the conspiracy. That's that the defendant and others agreed to violate the law that makes it a crime to aid and assist the preparation of filing of false tax returns -- the crime charged in Counts Ten

object of the conspiracy, while not cross-referencing Counts 10-19 by name, the charge explicitly referenced the factual dispute in those counts:

> A tax return may also be false as a result of a falsification of the nature or source of funds reported on that return, such as *falsely claiming transfers of funds were gifts when in fact they were not*. A155/Tr.2180 [emphasis added]

The reference to gifts was the very factual issue – consuming days of testimony -- posed in Counts 10-19 which charged petitioner with abetting disclosures as "gifts" which were actually trust distributions.

The court of appeals apparently accepted the government's argument that the trial court meant to refer to the legal elements to be explained in connection with Counts 10-19. App.A. at 3-4. But if the standard is whether the proceedings broadened the grounds for conviction as numerous courts hold, plainly when the jury was told that the third *object* of the conspiracy was "the *crime* charged in Counts Ten through Nineteen" (emphasis added) the grounds for conviction were unquestionably broadened. To expect the jury to have taken this as a reference only to legal elements is at best questionable.

For these reasons, the referenced multiple conflicts among the circuits on the standards of review impact this case and warrant review by this Court.

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through Nineteen. So, in other words, the third object is going to be charged separately in Counts Ten through Nineteen, and I'm going to give you instructions on Counts Ten through Nineteen. So that's the unlawful object. It suffices for present purposes to tell you that this crime occurs when a person willfully advises or assists in the preparation of a false tax return. You should apply the instructions for Counts Ten through Nineteen when considering whether the government proved this third object of the conspiracy." [A156/Tr.2181]

II. The Court Should Review the Court of Appeals "Willfulness" Ruling as it Involves Conflict and Open Questions About the Standards Under Which U.S. Tax Law Reaches Foreign Residents Still Holding a Green Card.

The decision below resolves in a few short paragraphs, as a simple challenge as to willfulness, extended discussion of the merits by both parties on willful failure to file, Counts 2-7,8. App.A. at 4-6. Among many issues not addressed in the decision, petitioner asks the Court to review the conclusion that a foreign resident such as Little who had left the US in 1983 was subject to willful failure to file and FBAR charges because he continued to hold a green card.

Petitioner, having secured a green card by prior marriage, left the United States in 1983 and returned to the UK. Although permitted to continue to hold his green card under the law at that time, he was in every way a UK citizen and taxpayer. That status continued unabated even though in the years 2005-2008 he resided for periods of time in New York City, having come to oversee litigation of a UK company and earning some income in other US-based litigation.

In *Cheek v. United States.*, 498 U.S. 192, 201 (1991) this Court held that "[w]illfulness,… requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." "Good-faith belief" that the tax law was not violated mandates acquittal, "however unreasonable a court might deem such a belief." *Id.* at 202. Despite the critical significance of these standards, the court of appeals deemed all willfulness challenges to the many counts subject to rejection because petitioner was a "sophisticated professional" and therefore could be

assumed to have willfully violated known tax obligations even while residing in the UK. That decision essentially to hold all "sophisticated" foreign resident green card holders to the complexities of the U.S. tax code warrants this Court's review.

A. FBAR

With respect to the FBAR charge, Count Eight, the court of appeals would subject all green card holders worldwide to felony prosecution and conviction for failure to disclose "foreign" accounts no matter the circumstances. Little testified without contradiction that he had never heard of it. Tr.1905. Little had left the United States in 1983 and his last tax return was filed in 1985. At the time there was no FBAR requirement nor was there any reason to believe he subsequently was placed on notice. The government introduced no evidence of such knowledge, forcing the court of appeals to conclude superficially that Little must have known because he was an international businessman with legal training –a conclusion based on speculation and status, not evidence. App.A. at 5-6.

During the tax years in question, 2007-2010, the requirement to file FBAR's under 31 U.S.C. § 5314 was applicable to a "United States resident" which was then undefined causing both the district court and the government to argue that a "reasonable" person would figure out this included overseas green card holders. *See* App.B. at 10 (detailing regulations). But *Cheek* requires a willful violation not a reasonable supposition.

As a matter of due process and the rule of lenity, the criminal sanction requires better notice than an assumption that individuals overseas can infer

from other laws to whom the statute refers. As Justice Holmes wrote in *McBoyle v. United States,* 283 U.S. 25, 26 (1931), "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." With respect to the inference from other laws that the law must apply to green card holders, critically, "the statute should not be extended…simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *Id.* In addition, federal Courts presume that a statute does not have extraterritorial reach absent a clear statement from Congress.*E.g. Morrison v. National Australia Bank,* 561 U.S. 247 (2010). Requiring a nonresident and noncitizen to disclose a "foreign" bank account simply because he holds a green card flagrantly crosses that line. The United Kingdom, it should be noted, does not impose any such obligation on its citizens, so Little was hardly on notice.

Alternatively, the government argued below that 31 C.F.R. § 1010.350(b) was amended to apply to "lawful permanent residents" (green card holders) just before the June 30, 2011 filing deadline for 2010 returns, the last year applicable to the charge in question. But the government itself conceded that this amendment was not effective until *June 24, 2011,* a mere six days before the filing deadline. *See* Government Brief on Appeal at 61 n.10. The decision below thus would allow court of appeals would allow a felony conviction based on the supposition that *overseas*

green card holders monitor obscure regulatory developments in the US just before the deadline. This is the height of US tax arrogance, contrary to due process, the rule of lenity and the proscription against extraterritorial application of US law without the requisite clear statement. *See* Brief on Appeal at 59-63; Government Brief at 60-66; Reply at 23-26 (citing applicable statutes and regulations).

B. Willful Failure to File

On the willful failure to file charges (Counts Two-Seven) the government in a bill of particulars specified that Little was required to file 1040 returns because he did not contemporaneously seek protection under the US-UK Treaty by filing a 1040NR. But Little, despite retaining his green card, had expatriated under 26 U.S.C. § 877(e)(2) when he returned to the UK in 1983. Under Article 4(1),(2) the 1975 US/UK tax treaty[10] in effect at the time, Little filed taxes as a citizen of the United Kingdom and was "treated as a resident" of the UK. He did not waive such status, and thus prior to returning to the US in 2005, he was not under 26 U.S.C. § 7701(b)(1)(a) "[a]n alien individual [who] shall be treated as a resident of the United States." Nor was he a U.S. "taxpayer" who fell under a purported obligation to affirmatively claim protection under the tax treaty under 26 U.S.C. § 6114. The court of appeals concluded under 26 U.S.C. § 7701(b)(6) petitioner, despite the above, remained a lawful permanent resident who had not revoked or abandoned his status. App.A. at 5. Even if the court of appeals is correct, petitioner was not shown to have acted willfully. This too should be a subject of this Court's review.

[10] The 1975 Treaty is available at https://www.irs.gov/pub/irs-trty/uk.pdf

III. The Court Should Also Review Conflict Whether a "Conscious Avoidance" Instruction Is Proper On the Sole Basis that Knowledge is Disputed.

Although reviewed as a matter of plain error, the court of appeals held that the three conscious avoidance instructions[11] in this case were proper because petitioner "defended himself by claiming ignorance of his obligations under the Tax Code," adding that "because of Little's legal education and the relative straightforwardness of his obligations, a reasonable juror could conclude that Little was aware of a high probability that his actions were unlawful." App.A. at 6. The court apparently adopted the government's suggestion that it is enough that the defendant disputes knowledge. *See* Gov't Brief on Appeal at 74 (*citing United*

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[11] The district court gave this charge:

"In determining whether the defendant acted knowingly,you may consider as well whether the defendant deliberately closed his eyes to what otherwise would have been obvious. A finding beyond a reasonable doubt of a onscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of that fact. You may consider whether or not the defendant displayed a deliberate indifference or refusal to be informed in this regard. If you find that the defendant was mistaken, foolish, or careless in not iscovering the truth, or if you find that the defendant actually believed his conduct was lawful, then the defendant did not act knowingly. It is entirely up to you whether you find any deliberate closing of the eyes, and it is up to you what inference may be drawn from any of the evidence."

This was given in reference to the willful failure to file counts on the issue of knowledge of an obligation to file a return (A132/Tr.2157), and referenced in the FBAR Count (A138/Tr.2163)as to knowledge of the obligation to report a foreign account. It was also referenced in the conspiracy charge with respect to whether the defendant had knowledge of the unlawful objectives of the conspiracy charged in Count Nine. (A157-58/Tr.2182-83).

States v. Scotti, 47 F.3d 1237, 1243 (2d Cir.1995) ("[W]here guilty knowledge is at issue, a conscious avoidance instruction is proper.").

But dispute over knowledge is *not* enough. This Court has held clearly that for a conscious avoidance instruction to be proper "(1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011). Here, neither the government nor the court below cited any evidence that petitioner took deliberate actions to avoid learning of the facts in question.

Multiple courts of appeal have signaled their understanding that affirmative evidence of avoidance of knowledge indeed must be shown. And they have done so in tax cases. As the Fourth Circuit put this instruction is permitted "in a criminal tax prosecution, when the evidence supports an inference that a defendant was subjectively aware of a high probability of the existence of a tax liability, *and purposefully avoided learning the facts pointing to such liability*…." *United States v. Poole*, 640 F.3d 114, 122 (4th Cir. 2011) (emphasis added).

Multiple other criminal tax decisions of circuit courts concerning conscious avoidance instructions have underscored the evidence that the defendants took affirmative steps to avoid knowledge of the law or facts underlying willfulness. *See United States v. Sorensen*, 801 F.3d 1217 (10th Cir. 2015)("government provided considerable evidence that Sorensen had at least attempted to remain deliberately ignorant of the pure trusts' illegality", detailing six separate ways in which

Sorensen deliberately sought to remain ignorant); *United States v. Vallone*, 698 F.3d 416, 466 (7th Cir. 2012)("the Aegis principals were deliberately avoiding any independent advice as to the legality of the Aegis trusts, realizing that the advice was likely to be that the trusts were an ineffective means of tax avoidance"); *United States v. Stadtmauer,* 620 F.3d 238, 256 (3d Cir.2010)(evidence that defendant deliberately avoided follow-up on information about operation of partnerships, expenditures); *United States v. Fingado*, 934 F.2d 1163, 1166-67 (10th Cir. 1991)(defendant attended seminars on tax avoidance among other affirmative steps); *United States v. Kelm*, 827 F.2d 1319, 1324 (9th Cir. 1987)("There must be evidence that the defendant purposely avoided learning all the facts in order to have a defense in the event of being arrested and charged."); *United States v. Callahan*, 588 F.2d 1078, 1082-83 (5th Cir. 1979)(upholding instruction in tax case but emphasizing conduct taken to avoid knowledge through dual books, false ledger entries, cash receipts taken home etc).[12]

Absent evidence of deliberate steps to avoid knowledge, there is no basis for a conscious avoidance instruction. The government can still argue knowledge as it did here, but the instruction should not afford the jury a second basis for decision that is unwarranted. This Court should review the dramatic departure in the Second Circuit from the longstanding rule in this area.

[12] Even the case cited by the court below identified evidence of conscious avoidance. *See United States v. Coplan*, 703 F.3d 46, 89-90(2d Cir. 2012)(summarizing defendant's review of documents on issue in question and concluding that if he lacked actual knowledge, he "*decided* not to learn that key fact")(citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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