No. 20-7820

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL LITTLE,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions and Rules

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ARGUMENT

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

Respondent's opposition ("Opposition") underscores why the Court should provide important guidance on the fundamentals of the constructive amendment doctrine and the continued vitality of *Stirone v. United States,* 361 U.S. 212 (1960). Respondent demonstrates – and defends – lower courts, including the Second Circuit that undermine *Stirone,* with rationales why specific, consequential charges in an indictment can be expanded at trial. Such cases stand in conflict with other

courts, the Tenth Circuit notably, which view *Stirone* as forbidding such expansion on specific charges in an indictment. Unlike the Second Circuit which regards specific allegations as subject to expansion according to various exceptions, as then Judge Gorsuch has implored on behalf of the Tenth Circuit, *Stirone* "remain[s] no less binding upon us today," and "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." *United States v. Farr*, 536 F.3d 1174 (10th Cir. 2008)(Gorsuch, J.),

A. Constructive Amendment Under *Stirone*

Respondent's curtailed description of *Stirone* mimics a growing practice in some lower courts that recharacterize this Court's seminal decision. Respondent effectively interposes within *Stirone* a construct that constructive amendment only takes place when the "theory" of the indictment is altered. *See* Opposition at 10. This closely resembles the rationale in the decision below that allegations in "to wit" clauses in indictments can be expanded upon, 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))

But the principles at stake here are about fair notice in an indictment, not whether those allegations can be said to change the "theory" of prosecution or otherwise modify "essential elements." Without such qualifications, *Stirone* holds more broadly 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. The indictment there specifically charged obstruction of interstate commerce by extortion of interstate shipments of sand, but at trial obstruction of steel shipments was added as a rationale to convict. This amended the specifics of the charges, not the "theory," but this Court found that it violated the Fifth and Sixth Amendment guarantees to grand jury indictment and to be informed of the charges:

> 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. Consistent with its reinterpretation of *Stirone,* respondent suggests that as to Count Eight the government was free to add Coutts Bank to the FBAR charge even though the indictment had specifically charged failure to disclose petitioner's interests in "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). Contrary to respondent's claim, petitioner clearly objected to this expansion of the indictment.[1] Regardless, respondent argues that the alteration does not amend the

[1] Petitioner strongly objected on the ground that this account was not referenced in Count 8. The district court overruled the objection agreeing with government counsel that the "to wit" language in the indictment was meant to convey an example or illustration only, and did not limit the accounts embraced by Count 8. Trial Transcript ("Tr.) at 1213-15. When initially delivering the charge, the court

indictment because it does not alter the "theory" in the indictment. Opposition at 10. But adding Coutts to Barclays was no different than adding steel to sand in *Stirone.* The court of appeals made a similar mistake, claiming that "to wit" clauses necessarily to not impact "essential elements of the offense." App.A. at 4. (True to these ever-shifting rationalizations, the district court had explained erroneously that "to wit" meant "for example" and the government was free to add other institutions. *See* Petition at)

Respondent also infers room for the Coutts charge elsewhere in the indictment in a reference to transfers to unidentified "accounts [petitioner] controlled in the United States and the United Kingdom" as if *this* is the charge. Opposition at 10-11 (citing Second Superseding Indictment at 10, ¶18). But this paragraph is in Count One, charging obstruction of the revenue laws, and not in Count Eight which charges the FBAR violation. The paragraph in question refers to transfers of undeclared income, and does not even address the issue of signatory authority over accounts, which is addressed in ¶19. And neither paragraph mentions Coutts. This truly speculative and baseless attempt to find an unmentioned reference to the Coutts account demonstrates what is wrong with the respondent's standardless reinterpretation of the constructive amendment doctrine. So too with the equally standardless notion that provision of discovery about Coutts

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described the count as only related to Barclays. Tr.2161. However, citing the prior discussion and overruling of petitioner's objection, the court revised the charge and allowed it to embrace any accounts, not simply the Barclay accounts. Tr.2172-75.

is license to constructively amend the indictment. Opposition at 11.

2. Given its reinterpretation of *Stirone,* it is small wonder respondent sees no "conflict" between lower courts but offers instead explanations that "not every circuit articulates the constructive-amendment standard in precisely the same way" or that the cases are "fact bound" or that conflicting cases would not have decided this case differently. Opposition at 14-15. At most, this explanation derives from the reality that the lower courts, like respondent, are all over the place on constructive amendment, and badly need guidance from this Court.

What unites the cases cited in the Petition is a commitment that when an indictment makes a consequential and specific charge, expansion on that charge is not permitted. The conflict between the Second Circuit, and the Tenth Circuit is particularly striking. In *United States v. Farr*, 536 F.3d 1174 (10th Cir. 2008)(Gorsuch, J.), then-Judge Gorsuch implored that the admonitions of *Stirone*, "remain no less binding upon us today," *Id.* at 1180. As Judge Gorsuch wrote, "[i]t is settled law in this 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 1181 (internal quotations omitted).

The Tenth Circuit takes this obligation seriously. As reiterated in *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." There the indictment referenced a false statement about a state professional license but the theory at trial was expanded to also include a different falsehood about a federal registration. In *United States v. Bishop*, 469 F.3d 896, 901–03 (10th Cir. 2006), *overruled in part on other grounds Gall v. United States*, 552 U.S. 38 (2007), the court rejected expansion of the indictment's charge of unlawful possession of a specific weapon to another. The court followed the similar decision by the Seventh Circuit in *United States v. Leichtnam*, 948 F.2d 370, 374 (7th Cir. 1991) where the indictment specifying a particular weapon ("*to wit,* a Mossberg rifle"; emphasis added), was constructively amended to allow conviction as to three other weapons. *See also United States v. Weissman*, 899 F.2d 1111, 1112 (11th Cir. 1990)(RICO specification "to wit" of specific crime family as enterprise did not allow conviction as to alternate enterprise).

These and the other cases cited in the Petition (Petition at 14-15) do not abide the expansion of specific, consequential charges in an indictment. And, nothing in the reasoning in those cases indicates a willingness to excuse the modification of the charges because the "theory" remains the same, or "essential elements" are unaltered or one can piece together references to the additional charges in discovery or unstated implications in other parts of an indictment.

To the extent respondent relies upon cases taking its more expansive point of view, then the conflict with the cases cited by petitioner is all the more pronounced.

Tellingly, respondent cites *United States v. Broadnax*, 601 F.3d 336, 341 (5th Cir.2010) for the proposition that a "to wit" reference to a specific gun could be viewed as a generic reference to "firearm." Opposition at 11. That clearly places *Broadnax* in conflict with the decisions of the Tenth Circuit in *Bishop* and the Seventh in *Leichtnam* as discussed above . That is the conflict here, and it is time this Court established standards rather than allow such cases to be decided almost randomly.

C. Count Nine Also Reflects the Need for Review.

Count Nine warrants review over the standard of review and whether a showing of prejudice is mandated on constructive amendment claims reviewed as plain error.

1. Respondent ignores the conflict between a standard that requires a likelihood that the jury convicted on a theory not charged in the indictment and a standard that asks whether the instructions and proof simply allowed such a conviction. *Stirone* suggests the latter by holding 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. It underscores a more lenient standard by holding that prejudice need not be shown. In contrast, a standard requiring a likelihood of wrongful conviction is one that requires prejudice. The petition cites conflicting caselaw on this point, but respondent does not respond. *See* Petition at 15-17.

On the decision of the court of appeals, respondent insists that the district court "merely instructed the jury to 'apply the instructions for Counts Ten through

Nineteen' when considering the conspiracy charge." Opposition at 12. But that is not "merely" what happened. As set forth in greater detail in the petition, 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. Petition at 18-19 n.9 (quoting jury charge; emphasis added). That language refers, not to the legal elements, but, rather, incorporates the *crime* charged on Counts Ten through Nineteen as the third object of the conspiracy. This message was underscored in the charge on the second object of the conspiracy, which explicitly referenced the factual dispute in those counts -- whether petitioner "falsely claim[ed] transfers of funds were gifts when in fact they were not." Petition at 19 (citing A155/Tr.2180).

2. Moreover, Count Nine[2] 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). Respondent does not dispute that there is a conflict on this question, but dismisses the issue as "academic." Opposition at 19. Were plain error review merely "academic," this Court would not continually revisit it. *See, e.g., Greer v. United States,* 141 S.Ct. 2090 (2021); *Davis v. United States,* 140 S.Ct. 1060 (2020); *Rosales-Mireles v.*

[2] As noted above, and contrary to the claim of respondent, Opposition at 10, petitioner preserved his constructive amendment objection as to Count Eight.

United States, 138 S.Ct. 1897 (2018); *Molina-Martinez v. United States,* 136 S.Ct. 1338 (2016). Nor was it "academic" that the Court noted this very issue in *Cotton.* And, more broadly, as respondent's positions on this case demonstrate, the government would claim the broadest of authority to allow indictment modifications to specific allegations. To the extent that this permissive standard continues to gain ground in the lower courts, the question of prejudice is bound to recur repeatedly and consequentially.

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 reasoning below as to FBAR disclosures and willful failure to file challenge the legacy of this Court's seminal decision in *Cheek v. United States.*, 498 U.S. 192, 201 (1991) holding 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." Expansively construing the applicable statutes and regulations, the court of appeals deemed all willfulness challenges to the many counts subject to rejection because petitioner was a "sophisticated professional" and would blindly apply U.S. tax law to overseas green card holders.

A. FBAR

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. For the tax years in question, respondent suggests that FBAR's

applied to any "person subject to the jurisdiction of the United States" under 31 C.F.R. 103.24 and that under the instructions in effect that applied to "a resident of the United States." Opposition at 21. Although respondent appears to argue that whether petitioner was "a resident of the United States," was a matter of evidence to be weighed, *see* Opposition at 21, the district court charged the jury that throughout the period in question, it was enough that petitioner held a green card. *See* Tr. at 2162 (A137) ("Resident in this regard includes those who are lawfully entitled to reside in the United States, known as green card holders or lawful permanent residents.")

Respondent claims it was "commonsense" to view FBAR as applying to green card holders such as Little. *Id.* Opposition at 21. On its face, this invocation of an objective "rule of reason" is at odds with the subjective willfulness requirement of *Cheek*.

With respect to tax years 2007-2009, contrary to respondent's erroneous claim, Opposition at 23-24, petitioner *does* dispute that the term "resident of the United States" would necessarily apply to any green card holder as the court charged the jury, especially one residing overseas. Because petitioner strongly disputes this construction of the term "resident of the United States," the rule of lenity and presumption against territoriality, as all interpretive doctrines, are properly invoked. *See* Petition at 21-22. This language is not at all clear, particularly given that this interpretation had to be clarified for the 2010 filings when, as respondent notes, the regulations were amended to apply to "resident

alien[s]." Opposition at 21 (citing 31 C.F.R. 110.350(b)).[3]

Respondent does not dispute, moreover, that this regulation actually making clear that green card holders had to file FBAR's came into being just six days before the 2010 return was due, when petitioner was back in the United Kingdom having not the slightest incentive to be monitoring obscure regulatory developments across the pond. *See* Petition at 22-23. That the amendment was necessary at all undermines any pretense that the prior language was applicable to overseas green card holders as a matter of common sense. And, the notion that any such green card holder would be expected to know of the amendment with all of six days notice before the return was due is absurd. This is U.S. tax arrogance writ large.

Finally, respondent denies relying on petitioner's status as a surrogate for actual proof of willfulness, Opposition at 23-24, yet recites those components of his status that support the claim. Opposition at 22. There isn't a shred of evidence that petitioner knew of FBAR at all – his testimony on that point was unrefuted

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[3] Respondent appears to further suggest, contrary to the green card theory instructed and argued to the jury at trial, that it also should have been "commonsense" because during 2007 and parts of 2008, petitioner "lived in New York full-time and worked in New York as an attorney for two different New York law firms." Opposition at 21. This mischaracterizes the record. Petitioner had of necessity come to New York to oversee litigation on behalf of a British firm with which he was affiliated and worked on that and some other matters *with* two firms. He was not employed by and did not work *for* those firms. *See* Opening Brief on Appeal at 9, 21-22. (Hypothetically, had a U.S. attorney temporarily relocated to London, even for many months, to oversee litigation, would it be casually assumed that the lawyer had to comply with unfamiliar U.K. disclosure laws?). Respondent also suggests that petitioner should have remembered a reference to FBAR disclosure in the *1985* 1040 instructions (Opposition at 22), but this return was filed by petitioner's accountant Robert Gordon, *see* District Docket#275-3 and the 1040 form itself contained no such advice.

(Tr.1905) -- let alone an obscure amendment churned out by the tax bureaucracy days before the return was due.[4]

B. Willful Failure to File

Respondent (Opposition at 24-25) misconstrues the argument that again raises serious concerns about international overreaching by U.S. tax authorities. Despite retaining his green card, petitioner 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 *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 was not required to make an election to be treated as a resident of the United Kingdom under the *1975* Treaty.

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

As to plain error on the conscious avoidance instruction, respondent points to no discussion in the decision below of how petitioner, in addition to believing in a high probability of tax obligations, "t[ook] deliberate actions to avoid learning of that fact" as required by this Court's holding in *Global-Tech Appliances, Inc. v. SEB*

[4] Respondent contends that petitioner undertook "extensive efforts to help the Seggerman family establish – and hide from the IRS -- Swiss bank accounts, which allowed them to evade income tax and other reporting obligations." Opposition at 23. This overstates the government's case which, as to petitioner, was focused on repatriation of funds. As Seggerman family members admitted, petitioner did not establish any such accounts nor take any responsibility for their tax reporting. *E.g.,* Tr. 864 (Suzanne Seggerman admits petitioner had "no part" in establishing and utilizing accounts); Tr.304 (Yvonne Seggerman admits not petitioner's responsibility to oversee filing of father's estate tax returns).

S.A., 563 U.S. 754, 769 (2011). Although respondent claims that "each predicate" was satisfied, Opposition at 27 (quoting decision below), no deliberate avoidance is even noted in the decision. In other words, contrary to *Global-Tech,* the court of appeals conflated the issues and deemed both satisfied by petitioner's supposed awareness of "high probability that his actions were unlawful" and dispensed with proof of avoidance.[5]

Reminiscent of its argument as to *Stirone,* respondent contends that the cases are "fact bound" and petitioner quibbles over words. Opposition at 27-28. But petitioner assumes this Court would have its precedent followed in the lower courts, including all parts of legal tests proscribed. *Global-Tech* unequivocally requires that to justify a conscious avoidance instruction it is not enough for there simply to be a dispute over knowledge, but that the defendant must have been shown to take "deliberate actions to avoid learning that fact." 563 U.S. at 769.

Respondent also argues that the decisions cited by petitioner are consistent with the decision below. Opposition at 28. But the decisions relied upon in the petition are where courts of appeal indeed do recite the actual evidence of the "deliberate actions" in question and required by *Global-Tech*. *See* Petition at 25-26. These are not "slightly different formulations" as respondent terms it, but demonstrable conflicts in whether prong two of *Global-Tech* must be supported by

[5]Respondent, citing the government's brief below, claims that the record supported the contention that "deliberate actions" to avoid knowledge were taken, but examination of that passage reveals evidence suggesting an issue as to knowledge, not evidence of deliberate actions to avoid knowledge. Opposition at 27 n.4 (citing Government Brief on Appeal at 74).

evidence that can actually be mustered, or as respondent would seem to have it, simply presumed from the proof of a high probability of knowledge. The cases cited in the petition actually follow the process that this Court required in *Global-Tech.* This case provides an opportunity for the Court to underscore that requirement or to declare that it may be presumed as took place below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 1, 2021

Respectfully submitted,

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