No. _____

In the
Supreme Court of the United States

JAMES WARNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HAROLD GUREWITZ (P14468)
Counsel of Record
GUREWITZ & RABEN, PLC
333 W. FORT STREET
SUITE 1400
DETROIT, MI 48226
(313) 628-4733
hgurewitz@grplc.com

Attorney for Petitioner

QUESTION PRESENTED

In *Stirone v. United States,* 361 U.S. 212 (1960), this Court held that a jury instruction that broadens the charges of an indictment is fatal error. Since *Stirone*, however, courts have disagreed when reviewing claims of constructive amendment to which no objection was made at trial whether a jury instruction that broadens the charges of an indictment affects the defendant's substantial rights.

In this case, Mr. Warner's Indictment was constructively amended by a jury instruction that added a bribery offense different than as charged by the grand jury. Counts One, Five and Seven of his indictment charged Mr. Warner with conspiracy to solicit and receive bribes. The jury instruction erroneously stated, however, that the grand jury only charged conspiracies in which his co-conspirators would offer and pay bribes to Warner in violation of a different statute. The Court of Appeals affirmed Mr. Warner's convictions on those counts on plain error review concluding that the erroneous instruction "conflating [] payor and payee bribery would not have affected Warner's substantial rights with regard to his conspiracy convictions." (App. A, p. 12).

The Question Presented is :

> Whether the constructive amendment of an indictment by an erroneous jury instruction, stating that conspiracy counts alleged agreements to violate a different bribery statute from that alleged by the grand jury, is prejudicial *per se* on plain error review?

PARTIES TO THE PROCEEDINGS

The parties are only those named in the caption.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S.Court of Appeals for the Sixth Circuit and the U.S. District Court for the Eastern District of Michigan:

- *United States v. James Warner*, Case No. 20-1148 (6th Cir.)(opinion affirming conviction issued February 8, 2021; petition for panel rehearing and rehearing en banc denied March 29, 2021; mandate issued April 7, 2021)

- *United States v. James Warner* and *Douglas Earles*, Case No. 18-20255, (E.D. MI)(judgment entered February 5, 2020 as to James Warner; judgment entered September 26, 2019 as to Douglas Earles)

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of the Court's Rule 14. 1(b)(iii).

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JURISDICTION

The Sixth Circuit issued its opinion on February 8, 2021 and denied rehearing en banc on March 29, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

OPINIONS BELOW

The Opinion of the Sixth Circuit is unpublished but appears at 843 Fed Appx 740 (6th Cir. 2021) (App A, App. 1). The Order denying Petitioner's Petition for Rehearing En Banc was filed on March 29, 2021. (App C, App. 34).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Grand Jury Clause of the U.S. Constitution, Amendment V, clause 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; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Federal Program Theft and Bribery Statute, 18 U.S.C. §666, provides:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

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.

PETITION FOR WRIT OF CERTIORARI

Petitioner James Warner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

This case presents the pressing question dividing lower courts whether a constructive amendment of an indictment by a jury instruction, where a jury instruction literally adds an offense to the indictment not charged by the grand jury, affects the defendant's substantial rights and is plain error under Federal Rule of Criminal Procedure 52(b).

A. Factual and Procedural History

1. James Warner, was employed as a field construction inspector and Water Operator by the Wayne County Airport Authority (WCAA) from 1997 to August 15, 2014. Warner's work before his employment at the airport included operating heavy equipment ranging from dump trucks, to snow removal and grass cutting machinery for municipalities. He continued that kind of work on weekends and during his off hours after he was employed by the airport. Warner's airport work responsibilities included managing field infrastructure maintenance, airport parking structure maintenance, snow removal, and maintenance of field water supply systems. He left his airport job in August 2014. He was hired in a similar position by the West Bloomfield Township in suburban Detroit in January 2017 as a construction project manager in its Water and Sewer Department. (R197: TR 6/3/19, Happala, E., Pg ID 2926-28, 2937).

2. Warner was charged in Count One of his indictment with conspiracy to commit Federal program theft, 18 U.S.C. §666(a)(1)(A) and to solicit Federal program bribes in violation 18 U.S.C. §666(a)(1)(B). Count One alleged his co-conspirator was William Pritula, the owner of Pritula and Sons Contracting, a contractor who did business with Warner's airport employer,

The conspiracy allegations of Count One provide that:

The Conspiracy

> 9. From in or about May of 2010, through in or about October of 2014, in the Eastern District of Michigan, Southern Division, and elsewhere, defendant **JAMES WARNER** did unlawfully, willfully, and knowingly combine, conspire, and confederate, and agree with William Pritula and others to commit:
>
> a. Theft from a federally funded program, in violation of Title 18, United States Code, Section 666 (a)(1)(A); and
>
> b. Federal program bribery, in violation of Title 18, United States Code Section 666(a)(1)(B).

(App E: Fifth Superseding Indictment, App. 40).

Pritula testified at Warner's trial that he met Warner in 2003 after his company, Pritula and Sons, contracted to repair airport field concrete and water hydrants. (R193: TR 5/23/19, Pritula, W., Pg ID 2332). Pritula's company performed lucrative repair contracts

at the airport until 2014. The airport paid Pritula a total of about $19,000,000 for his company's work. (R197: TR 6/3/19, Witkowski, B., Pg ID 2981).

After Pritula offered Warner a full-time position with his company, Warner began working for Pritula on Warner's off-hours operating equipment at Pritula's various commercial customers. The two agreed on a 10% commission as compensation for Warner. (R198: TR 6/4/19, Pritula, W., Pg ID 3076, 3135-36). Eventually, because of Warner's relevant contracting expertise, Pritula involved Warner in preparation of his company's contract bid packets, invoicing and even paying bills for Pritula's company. (R193: TR 5/23/19, Pritula, W., Pg ID 2323). The two would sit together to pay Pritula's bills.

Employees of Pritula and Sons knew that Warner was working for the company in his off hours from his airport job and that he and Pritula had a close working relationship. Pritula's daughter, Ashley, who worked in her father's office, thought Warner was her father's business partner. (R192: TR 5/22/19, Brown, A., Pg ID 2303). Pritula's employees called Warner "50/50" because they knew that he and Pritula split profits. (Id, Pg ID 2365). According to an FBI audit, the total amount Pritula paid Warner between 2010 and 2014 for all of Warner's work was about $5.5 million. (R197: TR 6/3/19: Witkowski, B., Pg ID 2981).

3. Warner was charged in Count Five of his indictment with co-defendant Douglas Earles, the owner of North Star Plumbing, another airport field contractor. Count Five charged that Warner conspired with Earles to commit Federal Program Theft in

violation of 18 U.S.C. §666(a)(1)(A) and to solicit and to receive bribes paid by Earles in violation of both Federal program bribery prohibitions, 18 U.S.C. §§666(a)(1)(B) and 666(a)(2).

The conspiracy charge in Count Five alleges that:

> **THE CONSPIRACY**
>
> 4. From in or about June of 2010, through in or about April of 2015, in the Eastern District of Michigan, Southern Division, and elsewhere, defendants **JAMES WARNER** and **DOUGLAS EARLES** did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree with each other to commit:
>
> a. Theft from a federally funded program, in violation of Title 18, United States Code, Section 666(a)(1)(A); and
>
> b. Federal program bribery, in violation of Title 18, United States Code, Sections 666(a)(1)(B) and (a)(2).

(App E: Fifth Superseding Indictment, App. 46).

The government did not call Earles as a witness at Warner's trial even though Earles pled guilty and agreed to cooperate with the government. According to business records for Earles' airport work, the airport paid Earles' company, North Star Plumbing, $408,717.54 between September 2010 and April 2015. Also according to those records, North Star Plumbing paid Warner $113,426.04 during the same time period. (R204-7: Ex DE-27, Pg ID 3406; R204-8: Ex DE-28, Pg

ID 3407; R197: TR 6/3/19, Witkowski, B., Pg ID 2977-78).

4. Warner was charged in Count Seven of his indictment along with Gary Tenaglia, the owner of Envision Engineering & Maintenance, LLC. The Count Seven conspiracy charged only a single object offense, that Warner conspired to solicit bribes in violation of 18 U.S.C. §666(a)(1)(B) from Tenaglia. The detail of Count Seven, however, alleged that Tenaglia conspired to corruptly offer and pay bribes to Warner as prohibited by 18 U.S.C. §666(a)(2):

THE CONSPIRACY

> 4. From in or about May of 2011, through in or about June of 2014, in the Eastern District of Michigan, Southern Division, and elsewhere, defendant **JAMES WARNER** did unlawfully, willfully, and knowingly combine, conspire, confederate, and agree with Gary Tenaglia and others to corruptly give, offer, and agree to give thousands of dollars in cash to **JAMES WARNER**, with the intent to influence and reward **JAMES WARNER** in connection with a business, transaction, or series of transactions of the WCAA invovlving $5,000 or more, in violation of Title 18, United States Code, Section 666(a)(1)(B).

(Appendix E: 5th Superseding Indictment, App. 51).

Tenaglia testified at Warner's trial that he was told by Warner's supervisor, Ali Dib to work with Warner when Tenaglia's company won its first contract to do airport parking structure repair and maintenance in

about 2008. (R196: TR 5/30/19, Tenaglia, G., Pg ID 2753-56).

According to Tenaglia, he arranged to meet Warner in about 2008 at a restaurant for dinner where Warner proposed that Tenaglia pay him in return for Warner's assistance in processing Tenaglia's airport contract invoices. Tenaglia testified that Warner began their dinner by examining Tenaglia's clothing to see if he was wearing a "wire." During dinner, according to Tenaglia, Warner explained that airport contractors worked together as part of a "brotherhood," and suggested Tenaglia should pay him $5,000 by writing the amount on the corner of a paper napkin Warner showed him and then tore from the napkin and swallowed. (Id, Pg ID 2762-68). Warner testified the dinner took place without the dramatic details added by Tenaglia.

According to business records for Tenaglia's work at the airport, Tenaglia's company was paid about $15,000,000 for parking structure maintenance and snow removal between September 2010 and August 2014. Those records also showed that Tenaglia paid Warner about $100,000 during the same time period. (Id, Pg ID 2969, 2776-85).(R197: TR 6/3/19, Weiland, J., Pg ID 2999).

Tenaglia eventually became a government witness after he was caught in his own unaided scheme to inflate his invoices to the airport by more than $1 million for expensive snow deicing materials he used in parking structure maintenance. (Id, Pg ID 2827-28). Tenaglia agreed with the government in 2018 to plead guilty for his fraudulent billing with a loss amount in

excess of $1.5 million. He also agreed to continue his cooperation with the government's investigation of Mr. Warner. (Id, Pg ID 2835-43).

As part of his cooperation in 2017, Tenaglia recorded conversations at the direction of the FBI with Warner who was then a construction manager with West Bloomfield Township, a suburban Detroit community. In those recorded conversations, offered as evidence in support of Count Nine of Warner's indictment charging Warner with soliciting a bribe from Tenaglia in violation of 18 U.S.C. §666(a)(1)(B), Tenaglia explained to Warner that he was interested in obtaining construction work with Warner's employer and attempted to pass $1,000 in cash to Warner at the direction of FBI agents as a bribe, but Warner refused the money. Tenaglia's recorded conversations with Warner also include a discussion of a proposed arrangement with Warner for Tenaglia to perform work for the township that would be funded by start-up money loaned to Tenaglia by Warner and paid back to Warner by Tenaglia from his contract proceeds if he was awarded the work. (Id, Pg ID 2873-75, 2885-88). Tenaglia never obtained a contract with the Township.

5. The Indictment also charged in Counts Four, Six and Eight that Warner conspired with each of the contractors to launder the proceeds of the conspiracies charged in Counts One, Five and Seven. Additional counts charged that Warner stole and converted airport funds to his own use in violation of 18 U.S.C. §666(a)(1)(A) in Counts Two and Three, that he committed bribery in violation of 18 U.S.C. §666(a)(1)(B) with Gary Tenaglia on April 26, 2017

while he was employed as an agent of West Bloomfield Township as charged in Count Nine, and that he obstructed justice as alleged in Count 10 in violation of 18 U.S.C. §1519 on August 16, 2017 by providing a falsified report of outside employment to the FBI in order to impede their investigation in his case.

6. Although the grand jury charged Warner in Counts One, Five and Seven with conspiracies to solicit and receive bribes in violation of 18 U.S.C. §666(a)(1)(B), Jury Instruction 15 erroneously told the jury that each of those counts only charged a conspiracy by which a contractor offered and paid bribes to Warner in violation of a separate statute, 18 U.S.C. §666(a)(2). (App D: Jury Instruction 15, App. 36).

18 U.S.C. §666(a)(1)(B) and 18 U.S.C. §666(a)(2) prohibit separate offenses. 18 U.S.C. §666(a)(1)(B) prohibits solicitation and receipt of a Federal program bribe by whoever,

> corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more.

18 U.S.C. §666(a)(2) prohibits the offer and payment of a Federal program bribe by whoever:

> corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence

> or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

Jury Instruction 15 (App. 36), however, instructed that the only Federal program bribery object alleged in Counts One, Five and Seven was bribery by contractors who offered and paid bribes to Warner as prohibited by 18 U.S.C. §666(a)(2):

> to corruptly give, offer and agree to give thousands of dollars to James Warner with the intent to influence or reward James Warner in connection with a business transaction or series of transactions of the Wayne County Airport Authority involving $5,000 or more.

Instruction 15 repeated that instruction for each count as a description of its bribery allegations.

Although the jury also was provided Warner's indictment during its deliberations, Counts One and Five of Warner's indictment include no allegations of bribery except by citations to the statutes. Count Seven cites to the payee bribery statute, 18 U.S.C. §666(a)(1)(B), but sets forth allegations of bribery in narrative language of the payor bribery statute,18 U.S.C. §666(a)(2). The jury was given no instruction explaining the language of either bribery statute; and, there was no objection by either party to the absence of any instruction providing the content of the two statutes to the jury.

7. The jury returned verdicts of guilty on all counts.

8. The trial court denied Mr. Warner's post-trial motion for new trial. Warner asked for a new trial because the Court had denied Warner's pre-trial motion to adjourn which he made because of his lawyer's increasing pain and loss of mobility caused by a failed spinal surgery months before the trial. (R153: Order Denying Motion For New Trial; R169: Order Denying Reconsideration).

B. The Decision Below

The Court of Appeals affirmed Mr. Warner's conviction on February 8, 2021. (App A: Opinion and Order, App. 1). It reviewed Mr. Warner's claim of constructive amendment for plain error because no objection had been made at trial. Warner asked the court to reverse because Instruction 15 constructively amended his indictment by adding or amending allegations of bribery not made by the grand jury for each of the three counts charging conspiracy to commit Federal Program Theft and Federal Program bribery. The court applied the common *Olano* formulation of the plain error test: "Plain error means that '(1) there was an error (2) that was plain, (3) that affected a substantial right, and (4) seriously affected the fairness, integrity, or public reputation of the judicial proceedings.'" (App A: Opinion, App. 10). Although Warner asked the court to reverse because his indictment was constructively amended by an erroneous jury instruction adding offenses not charged in violation of the Fifth Amendment grand jury clause, the court reviewed the record to determine whether there was a variance from Warner's indictment by "a

combination of evidence *and* instructions". (App A: Opinion, App. 11).

The court's Opinion explained that a constructive amendment can only be found if shown when "a combination of evidence *and* jury instructions [] effectively alters the terms of the indictment and modifies the essential elements of the charged offense to the extent that the defendant may well have been convicted of a crime other than the one set forth in the indictment." *Id.* In this formulation, the Court concluded that the error at Warner's trial did not affect Warner's substantial rights because it was only "mildly confusing," (App A: Opinion, App. 12), and because there was not a sufficient risk that Warner was "convicted of a crime other than the one set forth in the indictment." (App A: Opinion, App. 11).

The Court also rejected Warner's related argument that his convictions for money laundering conspiracies in Counts Two, Four and Eight of his indictment, based on alleged laundering of proceeds from the bribery and theft conspiracies charged in Counts One, Five and Seven should be reversed, and that the trial court's denials of Warner's motions to adjourn and for new trial made because of trial counsel's physical disabilities caused by failed spinal surgeries were abuses of discretion and reversible error. (App A: Opinion, App. 6).

The Court denied Mr. Warner's Motion for Rehearing and Rehearing En Banc on March 29, 2021. (App C: Order Denying Rehearing, App. 34).

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION DIVIDING LOWER COURTS ON PLAIN ERROR REVIEW OF CONSTRUCTIVE AMENDMENTS OF INDICTMENTS BY ERRONEOUS JURY INSTRUCTIONS, WHETHER THOSE ERRORS AFFECT SUBSTANTIAL RIGHTS .

The question at the center of this case is the recurring one dividing lower courts, whether the amendment of an indictment by a jury instruction broadening charges made by the grand jury violates the Fifth Amendment grand jury clause and should be recognized on plain error review as a serious error in violation of the defendant's substantial rights. This question arises in this case from a jury instruction adding allegations of conspiracy to offer and pay bribes in violation of 18 U.S.C. §666(a)(2) in place of charges made by the grand jury of conspiracy to solicit and receive bribes in violation of 18 U.S.C. §666(a)(1)(B).

A. An Erroneous Jury Instruction That Broadens Charges Made By The Grand Jury Is Prejudicial Per Se.

This Court recognized in *Stirone v. United States*, 361 U.S. 212 (1960), where objection to an erroneous jury instruction broadening the essential elements of the offense charged in an indictment was preserved, that the error violates the Fifth Amendment grand jury clause because no "court can know that the grand jury would have been willing to charge" the conduct as an offense. *Id*. at 217. "Deprivation of such a right is far

too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id*.

In *Stirone*, the defendant was charged with extortion in violation of the Hobbs Act, 18 U.S.C. §1951. An element of the Hobbs Act offense requires proof of an affect on interstate commerce. *Id.* at 213. The indictment alleged that interstate commerce affected by the defendant's extortion was movement of supplies into Pennsylvania for the construction of a steel-processing plant. At Stirone's trial, however, the court allowed the prosecution to offer evidence over the defendant's objection of an affect on commerce by the shipment of steel products produced by the constructed plant to other states. The court also instructed the jury over the defendant's objection that guilt could rest on either ground. *Id.* at 213.

This Court has explained that the purpose of the rule in *Stirone* requiring that the defendant is tried on the charge as made by the by grand jury, "is to limit his jeopardy to offenses charged by a group of citizens acting independently of either prosecuting attorney or judge." *Russell v. United States,* 369 U.S. 749, 772 (1982). The purpose served by grand jury indictment begins with the Fifth Amendment guaranty of felony charge only by a grand jury and the Sixth Amendment guaranty of the defendant's right "to be informed of the nature and cause of the accusation." *Id*. at 761.

Lower courts have agreed with the rule in *Stirone* where objection is preserved, that the error is *per se*. The reason is straightforward. "Plainly and simply, 'a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.'"

United States v. Floresca, 38 F.3d 706, 711, n. 12 (4th Cir. 1994) (collecting cases in agreement from all circuits); *United States v. Zingaro*, 858 F.2d 94, 97 (2nd Cir. 1988); *United States v. Hathaway*, 798 F.2d 902, 910-912 (6th Cir. 1986); *United States v. Leichtnam*, 948 F.2d 370, 379-81 (7th Cir. 1991). The basis for presuming prejudice, whether objection is made or not, is similarly grounded in the Fifth Amendment: that a constructive amendment results in a broadening of the basis for conviction without being passed on by the grand jury. ("We stress that it is the broadening itself that is important – nothing more. It matters not, if a constructive amendment has occurred, whether the fact-finder could have concluded (as it surely could have based on reasonable inferences arising from Lopez's testimony) that Floresca intended to influence both the investigation and his trial.")."*United States v. Floresca*, 38 F.3d at 711; *United States v. Syme*, 276 F3d 131 (3rd Cir. 2002) (applying a rebuttable presumption that constructive amendments are prejudicial because "it is very difficult for a defendant to prove prejudice resulting from most constructive amendments to an indictment.) *Id.* at 154. (emphasis in original); *United States v. Lawton*, 995 F.2d 290, 294 (D.C. Cir. 1993) ("The trial court's instructions thus violated the Grand Jury Clause just as surely as if the court had written additional charges onto the grand jury's 'true bill.'").

However, lower courts remain in substantial disagreement whether presumptive prejudice must apply when an erroneous jury instruction that similarly broadens an indictment, as did Warner's, is reviewed on appeal for plain error pursuant to Federal

Rule of Criminal Procedure 52(b) where no objection is made at trial. The outcome to this question now depends on the circuit where the issue is raised.

B. Since *Stirone,* Lower Courts Are In Open Disagreement Whether An Erroneous Jury Instruction Broadening An Indictment, Where Objection Is Not Preserved, Affects The Defendant's Substantial Rights And Is Plain Error.

Lower courts have reached significantly disparate results applying plain error review to claims of constructive amendments by jury instructions where an objection has not been preserved. The Second and Fourth Circuits, *Floresca, supra*, *United States v. Thomas,* 274 F.3d 655 (2nd Cir. 2001), have found *per se* error. The Third Circuit applies a rebuttable presumption of prejudice. *United States v. Syme*, 276 F.3d 131, 155 (3rd Cir. 2002). The Eleventh Circuit agrees that a jury instruction broadening the allegations of the indictment is a constructive amendment and plain error. *United States v. Madden*, 733 F.3d 1314 (11th Cir. 2013) ("[W]e find it self-evident in this case that the error seriously affects the fairness, integrity, and public reputation of judicial proceedings.") *Id.* at 1323. A fundamental principle stemming from the Fifth Amendment grand jury clause "is that a defendant can only be convicted for a crime charged in the indictment." *United States v. Keller*, 916 F.2d 628, 633 (11th Cir. 1990).

Other circuits, however, including the First, Fifth, Sixth and Seventh Circuits, "adhere to the usual plain error formulation when considering constructive

amendments, requiring the defendant to bear the burden of showing specific prejudice." *United States v. Brandao*, 539 F.3d 44, 58 (1st Cir. 2008)(collecting cases).

The source of this marked disparity in outcomes among the circuits lies in their approaches to the "affects substantial rights" factor of the plain error formulation as applied to constructive amendments. Under the plain-error test of Federal Rule of Criminal Procedure 52(b), an appellate court only "can correct an error not raised before the trial court, if there is "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 466-467 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 467 (internal quotation marks omitted)(quoting *Olano*, *supra*); *United States v. Cotton,* 535 U.S. 625, 632 (2002).

Courts concluding that jury instruction error constructively amends an indictment when it broadens the charges made by the grand jury and is plain error agree that the error is a serious violation of the Fifth Amendment grand jury clause. These courts answer the question left open in *Olano*, whether there are some forfeited errors that must be corrected "regardless of their effect on the outcome," 507 U.S. at 735, by extending the holding in *Stirone* to constructive amendments by jury instruction where no objection

was made at trial. ("Because the *Stirone* Court held that the error occasioned by constructive amendments can *never* be harmless, [ ]it follows that such errors *must* affect substantial rights.") *Floresca*, *Id.* at 713**.** These courts ground their analyses in the same purposes to protect the defendant's Fifth Amendment right to grand jury indictment and Sixth Amendment right to notice articulated by this Court in *Russell* and *Stirone*.

The Fourth Circuit sitting en banc in *Floresca, supra,* held that an erroneous jury instruction defining elements of a witness tampering offense different than the one charged by the grand jury was error per se and satisfied all *Olano* factors because it violated the Fifth Amendment grand jury clause. "[I]t is 'utterly meaningless' to posit that any rational grand jury *could* or *would* have indicted Floresca under Paragraph 3, because it is plain that this grand jury *did not*, and absent waiver, a constitutional verdict cannot be had on an unindicted offense." *Id.* at 712. (emphasis in the original). According to the Court in *Floresca*, a conviction on a charge not returned by a grand jury is most serious and must be corrected on appellate review even when no objection has been made at trial because it affects the integrity and public reputation of a federal conviction. "We do not hesitate to say that convicting a defendant of an unindicted crime affects the fairness, integrity and public reputation of a federal judicial proceeding in a manner most serious." *Id.* at 714. Because, according to the court in *Floresca*, "it is the broadening itself that is important," *Id.* at 711, it matters not whether the fact-finder could have found

the defendant's guilt if a constructive amendment has occurred. *Id*.

Similarly, the Second Circuit sitting en banc in *Thomas*, *supra,* where the defendant received an enhanced sentence for a drug offense without an indictment allegation of drug quantity required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), concluded that the resulting constructive amendment of the indictment by the defendant's conviction and sentence for an offense not charged in his indictment was *per se* prejudicial, *Id.* at 671, because "it would be inappropriate for a court to speculate as to whether a grand jury *might* have returned an indictment in conformity with the available evidence . . ." *Id.* at 670.

The same reluctance to speculate about what the grand jury might have done with an alternative theory of fraud not alleged in the indictment led the Third Circuit in *Syme, supra*, to hold that a jury instruction adding a theory of fraud – not an allegation of violating a statute different than alleged in the indictment as in *Warner* – was sufficiently serious to require a presumption of prejudice under plain error review and to require the government to bear the burden to establish the constructive amendment was not prejudicial. *Id*. at 155. *See also*, *United States v. McKee*, 506 F.3d 225-233 (3rd Cir. 2007), holding that a jury instruction adding examples of employment tax fraud not alleged in the indictment was presumed prejudicial because "it is nearly impossible for a defendant to demonstrate that his/her conviction was based on particular evidence or a particular theory." *Id*. at 232.

The Eleventh Circuit, in *United States v Madden*, 733 F.3d 1314, 1323 (11th Cir. 2013), while reversing after concluding that a jury instruction for possession of a firearm "during and in relation to " a drug crime was not charged in the defendant's indictment and was a constructive amendment, explained that it did so because it could not say "with certainty that the defendant was convicted "solely on the charge made in the indictment." *Id*. at 1323. Other courts, however, have refused to adopt the view of the Second, Third, and Fourth Circuits, that jury instructions adding offenses not charged by the grand jury are serious constitutional defects.

The First Circuit, as a matter of first impression, has explained that a defendant who attempts to establish a constructive amendment bears the additional burden of "demonstrating a reasonable probability that, but for the error, the result of the proceedings would have been different." *United States v. Brandao*, 539 F.3d 44, 58 (1st Cir. 2008). In *Brandao*, the Court accepted the parties agreement that a jury instruction that described a RICO racketeering act as a substantive crime of murder was a constructive amendment and plain error, but was reluctant to abandon the usual plain error rule and place the burden on the defendant to show prejudice. It did so for several policy reasons including this Court's lack of resolution of the issue. *Id.* at 61. In the end, however, the court was satisfied that Brandao was denied neither Fifth nor Sixth Amendment protections because the questioned murder allegation was included in another part of his indictment. *Id.* at 62.

The Sixth Circuit, in Warner's case, has required the defendant whose indictment has been amended by an erroneous instruction to bear some measure of burden to establish that the resulting error is serious and affects the fairness and integrity of the proceedings within the language of *Olano*. (App. A: App. 11). To reach this result, the Sixth Circuit places constructive amendment in the category of factual variances, as "a more subtle modification to the indictment." *United States v. Combs*, 369 F.3d 925, 935 (6th Cir. 2004). On this basis, it placed the burden on Warner to prove Instruction 15 prejudiced his defense. (App. A: App. 11). *Combs* at 936 ("Constructive amendments are variances occurring when an indictment's terms are effectively altered by the presentation of evidence and jury instructions that 'so modify essential elements of the offense charged that there is a substantial likelihood the defendant [was] convicted of an offense other than that charged in the indictment.'"). *Id*.

Similarly, the Fifth Circuit, in *United States v. Reyes*,102 F.3d 1361 (5th Cir. 1996) refused to find plain error where the trial court instructed the jury that to convict the defendant of a firearm possession in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c), it must find conspiracy to possess drugs instead of possession of drugs as alleged in the indictment. The court concluded the instruction constructively amended the indictment, but exercised its discretion to decide the defendant was not prejudiced by lack of notice. *Id.* at 1365. It also refused to reverse based on the cynical view that a contrary decision would encourage defense attorneys to "sandbag," to leave correction of erroneous jury

instructions to appeal instead of objecting at trial. *Id.* at 1366. In the Seventh Circuit, the Court has required the defendant to show "the 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).

Petitioner's case presents an excellent vehicle on which to resolve this significant disparity and to clarify application of the rule in *Stirone,* where objection has not been made at trial to an erroneous instruction that adds offenses to an indictment not passed on by the grand jury.

II. THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE ERRONEOUS JURY INSTRUCTION BROADENING CHARGES IN THREE COUNTS OF WARNER'S INDICTMENT WAS NOT PLAIN ERROR.

The Sixth Circuit also erred in its analysis of Warner's constructive amendment claim by failing to meaningfully distinguish between constructive amendment broadening allegations of criminal conduct, *Stirone*, 361 U.S. at 216, and a variance or a divergence of alleged facts. Courts are divided in analysis of these distinctions.

A jury instruction *"broadening* the bases for conviction from that which appeared in the indictment" is a constructive amendment. *United States v. Miller*, 471 U.S. 130, 138 (1985) (emphasis in original). However, facts proved at trial that deviate from those alleged in the indictment but where the offenses remain the same are a variance. *Miller*, 471 U.S. at

145. ("The variance complained of added nothing new to the grand jury's indictment and constituted no broadening.")

According to the Sixth Circuit, a variance occurs "when charging terms are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment," *United States v. Combs*, 369 F.3d 925, 935-936 (6th Cir. 2004); and, a constructive amendment is a form of variance requiring the defendant to show prejudice. According to the Sixth Circuit, a "[c]onstructive amendment occurs when an indictment's terms are effectively altered by the presentation of evidence and jury instructions that 'so modify essential elements of the offense charged that there is a substantial likelihood the defendant [was] convicted of an offense other than that charged in the indictment." *Combs*, 369 F.3d at 936. The Court applied that definition of constructive amendment in *Warner*, requiring the defendant to show prejudice, to reject his claim of constructive amendment by Instruction 15 that advised the jury Warner was charged differently than as alleged in the indictment. According to the Opinion in Warner, Instruction 15 only "framed" allegations of bribery, although as violations of a statute different than as alleged by the grand jury. (App A: App. 11).

Courts are divided in applying the constructive amendment/variance test used by the Sixth Circuit. The Fifth Circuit, *United States v. Salinas*, 654 F.2d 319, 324 (5th Cir. 1981), and the District of Columbia Circuit Court, *Gaither v. United States*, 413 F.2d 1061,

1071 (D.C. Cir. 1969), agree with *Combs* and apply the same test.

Other courts, however, have rejected the Sixth Circuit test because it fails to meaningfully distinguish between a factual variance within the scope of the indictment allegations and an alteration of an indictment that "broaden[s] the possible bases for conviction beyond what is contained in the indictment". *United States v. Keller*, 916 F.2d 628, 634 (11th Cir. 1990); *United States v. Zingaro*, 858 F.2d 94, 103 (2nd Cir. 1988) (evidence that impermissibly broadened the charges against Zingaro resulted in a constructive amendment requiring reversal. In *Keller*, the Court held that substitution of the word "anyone" in a jury instruction, to define those with whom Keller was charged in his indictment with conspiring to violate laws of the United States, for the specific identification of Millard Lee Smith in his indictment as his sole co-conspirator, was an impermissible amendment because it allowed "the jury to convict him if he conspired with anyone, when the indictment alleged he conspired solely with Smith." *Id*. at 636.

At least three Circuit Courts support the rule defined in *Keller,* that impermissible amendments occur when instructions broaden the grand jury's charges, and are serious constitutional violations, not factual variances. *United States v. Floresca*, 38 F.3d 706, 711 (4th Cir. 1994) ("We stress that it is the broadening itself that is important – nothing more."); *United States v. Syme*, 276 F.3d 131, 151 (3rd Cir. 2002)("Cases from the Supreme Court and this court hold that it violates the Grand Jury Clause of the Fifth

Amendment when a court instructs a jury on a ground of conviction that is not fully contained in the indictment."); *United States v. McKee*, 506 F.3d 225, 231 (3rd Cir. 2007)("Nevertheless, the Defendants can not be convicted on the basis of an affirmative act that is not included in jury instructions, but not charged in the indictment."); *United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001)("It is evident that the district court constructively amended the indictment because the jury instruction permitted the jury to convict the defendants of violating a work practice standard they were not charged in the indictment with violating, namely that 'all asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at a waste disposal site that meets appropriate federal requirements."); and, *United States v. Madden*, 733 F.3d 1314, n.3 (11th Cir. 2013) ("Regardless of how one looks at it, the court's instruction still provided a basis for conviction that was not included in the indictment–carrying a firearm during and in relation to a drug trafficking offense.").

This Court should grant certiorari to clarify the application of this important rule critical to distinguishing between constructive amendment and variance.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

GUREWITZ & RABEN, PLC

By: /s/Harold Gurewitz
HAROLD GUREWITZ (P14468)
Counsel of Record
GUREWITZ & RABEN, PLC
333 W. FORT STREET
SUITE 1400
DETROIT, MI 48226
(313) 628-4733
hgurewitz@grplc.com

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