

IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE WU,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## **TABLE OF CONTENTS**

|                                                                                                                                                                                                   | <b>PAGE</b> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Table of Authorities.....                                                                                                                                                                         | ii          |
| Question Presented.....                                                                                                                                                                           | 1           |
| Opinions Below and Jurisdiction.....                                                                                                                                                              | 2           |
| Statement of the Case.....                                                                                                                                                                        | 2           |
| 1. The Alleged Bribery Offenses .....                                                                                                                                                             | 2           |
| 2. Erroneous Jury Instructions on Counts Three and Four .....                                                                                                                                     | 4           |
| 3. The Ninth Circuit Memorandum Opinion .....                                                                                                                                                     | 6           |
| ARGUMENT.....                                                                                                                                                                                     | 8           |
| THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT OF<br>WHETHER A CONSTRUCTIVE AMENDMENT OF THE<br>INDICTMENT SHOULD BE REVIEWED FOR PLAIN ERROR<br>OR AUTOMATICALLY REVERSED AS STRUCTURAL ERROR ..... | 8           |
| CONCLUSION.....                                                                                                                                                                                   | 11          |
| Appendix                                                                                                                                                                                          |             |

## TABLE OF AUTHORITIES

| FEDERAL CASES                                                                       | PAGE |
|-------------------------------------------------------------------------------------|------|
| <i>Johnson v. United States</i> ,<br>520 U.S. 461 (1997) .....                      | 7    |
| <i>United States v. Bear</i> ,<br>439 F.3d 565 (9 <sup>th</sup> Cir. 2006) .....    | 7    |
| <i>United States v. Brandao</i> ,<br>539 F.3d 44 (1 <sup>st</sup> Cir. 2008) .....  | 8,10 |
| <i>United States v. Daniels</i> ,<br>252 F.3d 411(5th Cir.2001) .....               | 9    |
| <i>United States v. Dipentino</i> ,<br>242 F.3d 1090 (9th Cir.2001) .....           | 9    |
| <i>United States v. Fletcher</i> , 1<br>21 F.3d 187 (5th Cir.1997) .....            | 9    |
| <i>United States v. Hugs</i> ,<br>384 F.3d 762 (9th Cir.2004) .....                 | 9    |
| <i>United States v. Lawton</i> ,<br>995 F.2d 290 (D.C.Cir.1993) .....               | 9    |
| <i>United States v. McKee</i> ,<br>506 F.3d 225 (3d Cir.2007) .....                 | 9    |
| <i>United States v. Morfin</i> ,<br>151 F.3d 1149 (9 <sup>th</sup> Cir. 1998) ..... | 7    |
| <i>United States v. Remsza</i> ,<br>77 F.3d 1039 (7th Cir.1996) .....               | 9    |
| <i>United States v. Stirone</i> , 361 U.S. 212 (1960) .....                         | 10   |

|                                                                                  |     |
|----------------------------------------------------------------------------------|-----|
| <i>United States v. Syme</i> ,<br>276 F.3d 131 (3 <sup>rd</sup> Cir. 2002) ..... | 8,9 |
|----------------------------------------------------------------------------------|-----|

|                                                                                   |     |
|-----------------------------------------------------------------------------------|-----|
| <i>United States v. Ward</i> ,<br>747 F.3d 1184 (9 <sup>th</sup> Cir. 2014) ..... | 6-7 |
|-----------------------------------------------------------------------------------|-----|

## **FEDERAL STATUTES**

|                        |        |
|------------------------|--------|
| 18 U.S.C. § 371 .....  | 2      |
| 18 U.S.C. § 201 .....  | 2, 5-6 |
| 28 U.S.C. § 1254 ..... | 2      |

**QUESTION PRESENTED FOR REVIEW**

Should this Court grant the petition for *writ of certiorari* to resolve the circuit split of whether an unnoticed erroneous jury instruction which constructively amends the indictment should be reviewed for plain error, or instead automatically reversed as structural error?

Petitioner George Wu respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on March 15, 2018.

### **OPINIONS BELOW AND JURISDICTION**

On August 13, 2015, George Wu was convicted of one count of conspiracy to commit bribery and to defraud the United States in violation of 18 U.S.C. § 371 and five substantive counts of bribery of a public official in violation of 18 U.S.C. § 201(b)(1). The district court sentenced him to thirty-seven months custody on May 12, 2016. On March 15, 2018, a three-judge panel of the Ninth Circuit Court of Appeals affirmed his convictions in an unpublished memorandum decision. *See* Exhibit A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **STATEMENT OF THE CASE**

#### **1. The Alleged Bribery Offenses**

George Wu was a former immigration officer who became a consultant. He operated “Great Eastern Immigration Services,” a company which assisted immigrants who sought legal status, residency, asylum, or citizenship in this country.

John Lee was a lawyer whose immigration practice consisted of fraud – he would pay officials within the U.S. Citizenship and Immigration Services (“USCIS”) to approve his clients’ applications for permanent residency. On April

9, 2013, Lee was arrested and charged with bribery. He agreed to cooperate with government officials.

While Lee had sources who could issue permanent residency status, he lacked contacts who could approve applications for citizenship. Mr. Lee told the government that George Wu did have such contacts. He explained that the two helped each other – Mr. Wu served as Lee’s middleman for citizenship applications, while Lee served as Mr. Wu’s middleman for residency applications.

Lee agreed to wear a wire and record his conversations with Mr. Wu. During these conversations, recorded between June 2013 and March 2014, the two men consulted on various immigration cases. Lee had two clients seeking citizenship – one real and one pretend. Mr. Wu’s clients included three residency applications on behalf of wives of United States citizens whose cases were stalled due to suspicion that the marriages were not valid; one of these was N.H. Zhang. For each of these cases, the government alleged money changed hands or was discussed.

As it turned out, Mr. Wu did not himself have an inside source for citizenship applications; rather, the government claimed, he turned to Michael Bui, another immigration consultant who did have such a source –USCIS Officer Daniel Amos.

Fred Moldt was an Immigration Services Officer with USCIS who had worked with Mr. Wu as an immigration inspector at Los Angeles International

Airport in the late 1990s. A chance encounter in 2013 between the former co-workers led to a lunch meeting at Denny's where Mr. Wu's detailed questions about pending cases and the workings of the USCIS computer systems made Moldt uneasy. Moldt reported the incident to USCIS's Office of Internal Investigations, and was asked to help support the government's investigation of Mr. Wu. Working in an undercover capacity, Moldt pretended to have had a change of heart – needing money, he told Wu he would be interested in helping him. Between November 2013 and March 2014, Moldt recorded their conversations. In them, Mr. Wu sought assistance on behalf of several applicants, including Zhang. Mr. Wu gave Moldt \$3,000, and discussed additional payments.

The testimony and recordings made by John Lee and Fred Moldt constituted the bulk of the government's evidence at trial. In the defense case, Mr. Wu was the sole witness. He testified that his payments (or discussions of payment) to John Lee were for his legal services, while those to Moldt were motivated by friendship and Moldt's complaints about financial problems. At the defense's request and over the government's objection, the court gave the jury an entrapment instruction.

## **2. Erroneous Jury Instructions on Counts Three and Four**

Counts Three and Four of the Second Superseding Indictment charged substantive bribery connected to the residency application of Nian-Huan Zhang. The counts were silent as to the "public official" who was bribed because the

government's theory was that Mr. Wu dealt with cooperating witness and middleman, John Lee, who pretended to have an inside source at USCIS:

On or about August 7, 2013, in Los Angeles County, within the Central District of California, defendant GEORGE WU indirectly and corruptly offered and promised something of value, namely, money, to a public official, with intent to induct such public official to perform an official act with respect to N.H.Z.'s lawful permanent residence application.

*See* 1 ER 73 (Count Three)

On or about October 22, 2013, in Los Angeles County, within the Central District of California, defendant GEORGE WU indirectly and corruptly offered and promised something of value, namely, money, to a public official, with intent to induce such public official to perform an official act with respect to N.H.Z.'s lawful permanent residence application.

*See* 1 ER 74 (Count Four).

At trial, the government introduced evidence of payments made to John Lee on the Zhang case. The government also presented evidence of a promised payment to public official Fred Moldt on the Zhang case. At the close of the evidence, the district court incorrectly instructed the jury that to convict Mr. Wu on the bribery counts, it had to find that he had offered or promised something of value to Fred Moldt or Daniel Amos:

The defendant is charged in each of Counts 2 through Count 6 with bribery of a public official in violation of Section 201(B)(1) of Title 18 of the United States Code.

In order for the defendant to be found guilty of the charge, the government must prove each of the following elements beyond a reasonable doubt and I will now read three elements. First, the

defendant gave, offered or promised something of value, namely, money either directly or indirectly to Fred Moldt or Daniel Amos as specified in the indictment.

Second, Fred Moldt or Daniel Amos as specified in the particular counts was a public official and third, the defendant acted corruptly, that is with the intent to influence an official act by Fred Moldt and Daniel Amos as specified in the indictment, influence a public official to commit or allow a fraud on the United States or induce the public official to do an act in violation of his lawful duty.

1 ER 22. This instruction was appropriate for three of the five substantive counts – Count Two, alleging a bribe to Daniel Amos on the Rui Han case and Counts Five and Six, alleging bribes to Fred Moldt on the L. Li case. Counts Three and Four, however, did not concern Moldt or Amos.

Each juror was provided with a copy of the jury instructions, as well as a copy of the Second Superseding Indictment. During deliberations, the jury sent a note to the court asking for guidance on the substantive counts. They requested “the list of each bribery case #2-6,” explaining “we don’t know which count is for which bribery action.” The court, with the agreement of the parties, replied by providing another copy of the indictment with this note: “Here is the indictment. If you need further assistance, please let me know.” The jury returned guilty verdicts approximately an hour later.

### **3. The Ninth Circuit Memorandum Opinion**

The Ninth Circuit panel reviewed Mr. Wu’s constructive amendment claim for plain error, in accordance with Ninth Circuit precedent. *See United States v.*

*Ward*, 747 F.3d 1184, 1188 (9<sup>th</sup> Cir. 2014). To reverse under this standard, “there must be (1) error, (2) that is plain, and (3) that affects substantial rights.” *See United States v. Bear*, 439 F.3d 565, 568 (9<sup>th</sup> Cir. 2006), citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (internal citations and quotations omitted). If all three conditions are met, this Court may exercise its discretion to reverse if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* (citations omitted).

The panel found that the first two prongs of the plain error standard were met:

The substantive-bribery instruction was misleading as to counts three and four, and the error was clear. Counts three and four charged Wu with having bribed John Lee’s unnamed contacts within the U.S. Customs and Immigration Service (“USCIS”), but the instruction directed the jury to assess whether Wu bribed Fred Moldt or Daniel Amos, two unknown USCIS officers with no connection to Lee. The instruction was thus “unquestionably erroneous on its face.” *United States v. Morfin*, 151 F.3d 1149, 1151 (9<sup>th</sup> Cir. 1998) (per curiam).

Despite the clear error, which meant there was no way the jury convicted Mr. Wu based on what he was charged with in the indictment, the appellate court found that it did not affect Mr. Wu’s substantive rights. The court decided that the jury would have convicted Mr. Wu anyway because the evidence against him was overwhelming:

Wu did not dispute that he gave thousands of dollars in cash to Lee on August 7 and October 22, 2013; the jury received hours of taped conversations between Wu and Lee in which, among other things, Wu

explicitly agreed to pay so that Lee's USCIS insiders could secure legal residency for one of Wu's clients; and Wu admitted to having never introduced Lee to the clients on whose behalf Wu was supposedly paying attorney fees. Moreover, in response to its request for a "list of each bribery case" for which it was to assess guilt, the jury was provided with a copy of the indictment, which clarified the specific conduct for which the jury was to convict or acquit. Given this record, we are satisfied "that the error did not affect the jury's verdict, and thus did not affect the defendant's substantial rights." *Morfin*, 151 F.3d at 1151.

See Memorandum Decision at page 2.

### **ARGUMENT**

#### **THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT OF WHETHER A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT SHOULD BE REVIEWED FOR PLAIN ERROR OR AUTOMATICALLY REVERSED AS STRUCTURAL ERROR.**

Following Ninth Circuit precedent, the panel reviewed Mr. Wu's constructive amendment claim for plain error. It found that the jury instruction as to counts three and four was dead wrong – no jury could have found him guilty based on this instruction. Nonetheless, the panel substituted itself for the jury, affirming Mr. Wu's convictions on these counts on the grounds that the evidence on these counts was overwhelming. This was the incorrect approach, as other circuits have recognized. See *United States v. Syme*, 276 F.3d 131 (3<sup>rd</sup> Cir. 2002) (presuming prejudice in plain error review of constructive amendment); cf. *United States v. Brandao*, 539 F.3d 44, 56-59 (1<sup>st</sup> Cir. 2008) (collecting cases, but ultimately finding that the standard prejudice evaluation should be applied to constructive

amendment claims on plain error without an presumption of prejudice).

As the First Circuit noted, the circuits “have reached disparate conclusions” when it comes to the standard of review on constructive amendments:

The Fifth, Seventh, Ninth, and District of Columbia 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. Hugs*, 384 F.3d 762, 768 (9th Cir.2004) (finding that a constructive amendment error did not violate defendant's substantial rights under prong three without discussion of per se prejudice or structural error); *United States v. Fletcher*, 121 F.3d 187, 192-93 (5th Cir.1997), *abrogated on other grounds as recognized by United States v. Robinson*, 367 F.3d 278, 286 n. 11 (5th Cir.2004); *United States v. Remsza*, 77 F.3d 1039, 1044 (7th Cir.1996); *United States v. Lawton*, 995 F.2d 290, 294 (D.C.Cir.1993) (finding that a constructive amendment error was prejudicial under prong three without discussion of per se prejudice or structural error). Both the Fifth and the Ninth Circuits have recognized that their pre-*Olano* jurisprudence required automatic reversal for constructive amendments even on plain error review, but that more recent Supreme Court case law had raised serious doubts that such a per se approach was still appropriate. *United States v. Dipentino*, 242 F.3d 1090, 1095 (9th Cir.2001); *Fletcher*, 121 F.3d at 192-93; *see also United States v. Daniels*, 252 F.3d 411, 414 n. 8 (5th Cir.2001) (describing *Fletcher* as replacing automatic reversal rule in constructive amendment cases with standard plain error review in order to align with *Olano* ). Finally, the Third Circuit alone has departed from the usual plain error protocol and fashioned a rebuttable presumption of prejudice for unpreserved claims of constructive amendment on plain error review. *United States v. Syme*, 276 F.3d 131, 154 (3d Cir.2002) (en banc); *see also United States v. McKee*, 506 F.3d 225, 229 (3d Cir.2007). On the assumption that it will normally be difficult for a defendant to prove a constructive amendment resulted in prejudice, that circuit presumes a defendant has met the prejudice requirement of the third prong unless the government meets its burden of rebuttal. *Syme*, 276 F.3d at 154.

*United States v. Brandao*, 539 F.3d 44, 58–59 (1st Cir. 2008) (footnotes omitted).

The Ninth Circuit’s approach violates a basic right of criminal defendants – the grand jury and due process guarantees of the Fifth Amendment, as well as the Sixth Amendment right to jury trial. *See, e.g. United States v. Stirone*, 361 U.S. 212, 215-16 (1960). Mr. Wu’s case demonstrates the problematic nature of allowing appellate courts to substitute their own judgment for that of the jury. In his case, there was evidence of the uncharged conduct which the jury was erroneously instructed to consider, and there was no way to determine if the jury convicted him based on the conduct alleged in the indictment (requiring them to ignore the jury instructions) or based on uncharged conduct. By taking the fact-finding out of the jury’s hands, the Ninth Circuit violated Mr. Wu’s constitutional rights. This Court should grant certiorari to resolve the circuit split.

## **CONCLUSION**

On the basis of the foregoing, the Court should grant the petition for writ of certiorari.

Respectfully Submitted,

/s/ Katherine Kimball Windsor

Date: May 29, 2018

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**PROOF OF SERVICE**

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I, THE UNDERSIGNED, SAY:

1. That I am over eighteen years of age, a resident of the County of Los Angeles, State of California, and that my business address is 65 N. Raymond Avenue, Suite 320, Pasadena, CA 91103; and
2. That I served the original and ten copies of George Wu's petition for writ of certiorari to the Clerk of the Supreme Court of the United States by electronic filing and by mailing to 1 First Street, N.W., Washington, D.C. 20543; and
3. That I served the petition for writ of certiorari to the Solicitor General by mailing a copy to Department of Justice, Rm 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001;
4. That I mailed a copy to Petitioner George Wu who is in custody at the Satellite Camp at USP Tucson;

I certify that the foregoing is true and correct. Executed on May 29, 2018, at Pasadena, California.

*/s/ Katherine Kimball Windsor*

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KATHERINE KIMBALL WINDSOR