

No. _____

In The
Supreme Court of the United States

JIYAO JIANG

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Richard Ware Levitt
LEVITT & KAIZER
40 Fulton Street, 23rd Floor
New York, NY 10038
(212) 480-4000
Counsel of Record
For Petitioner Jiyao Jiang

QUESTION PRESENTED

Whether, as a matter of law, multiple conspiracies exist when the person who formed the “hub” of an extortion conspiracy affirmatively abandons the two persons he initially enlisted to achieve the conspiratorial goal and, months later, independently enlists other persons to attempt to achieve the same goal?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Jiyao Jiang and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Jiyao Jiang respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, dated March 20, 2018.

OPINIONS BELOW

The judgment from which a Writ of Certiorari is sought is the decision of the United States Court of Appeals for the Second Circuit in *United States v. Jiang*, 715 Fed.Appx 91 (2d Cir. March 20, 2018) (Pet. Appx. “A. 1”).¹

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 20, 2018 (A. 1). This Petition is timely filed within the 90-day statutory time limitation. This Court has jurisdiction to review the judgment below on a writ of certiorari pursuant to Title 28 U.S.C. § 1254(1).

¹ Numbers in parentheses preceded by “A” refer to the appendix herein; numbers in parentheses preceded by “TR” refer to the minutes of the trial and numbers preceded by GX refer to government trial exhibits. Transcripts, minutes and the Second Circuit appendix are available to the Court should it wish to review them at this stage of the proceedings.

STATEMENT OF THE CASE

A. The Trial Evidence

1. Introduction

Tian Long Guo, aka Yi Long, allegedly owed money to others relating to his failure to repay loans. One of the creditors asked government witness Billy Chen to attempt to recoup the funds from Guo. Chen then recruited “Tai Bo” to help obtain repayment and Tai Bo recruited Petitioner Jiyao Jiang – a restaurant worker -- to whom Tai Bo was related by marriage, and who knew Guo from their village in China. After an initial effort to collect the money from Guo in Guo’s home town of New Rochelle, New York, failed, Chen lost confidence in Jiang’s willingness to use force against Guo and therefore had no further contact with either Jiang or Tai Bo. Thereafter, Petitioner Jiang – still working with Tai Bo but not with Chen -- had several phone conversations with Guo and Guo’s wife and Guo eventually agreed to deposit \$2,000 into a certain bank account controlled by Tai Bo.

Proceeding along an entirely separate track, Chen recruited a new crew consisting of the gangster “Cash” – a colleague of Chen’s from their alien smuggling days – and two of Cash’s associates. Together they travelled to New Rochelle, in December 2013, to confront Guo at his

residence. Upon seeing Chen and the others Guo became frightened and called 911. Police responded but no arrests were made.

The issue on appeal concerns whether the trial court should have excluded evidence of Chen's conspiratorial conduct with Cash and Cash's associates, which was entirely separate from Chen's alleged conspiratorial conduct with Jiang and Tai Bo and which Guo described as "very terrible" and "worse" than the events two months previous.

2. Billy Chen, Tai Bo and Jiang's initial effort to secure repayment of a loan allegedly owed by Guo.

Government cooperator Billy Chen testified that at some point in 2013 his older brother's ex-girlfriend, Xiu Ling Wang, informed him that Guo owed her between \$600,000 to \$700,000 and asked Chen if he was "able to get the gangsters from the Society to go to the restaurant to get the money back for her" (Tr. 205). She thereafter gave him Guo's phone number as well as a menu from Guo's restaurant in New Rochelle, the Queens City Super Buffet, that included the restaurant's address (Tr. 207-8). Chen drove to the restaurant to verify its location and followed a vehicle transporting the restaurant's employees to a location where they apparently were residing, believing that location was probably where Guo lived as well (Tr. 209-10). He then called his "very good friend" Lagor, aka Tian Si Lu (Tr. 213), with whom he had previously worked as an alien smuggler, and Lagor introduced

Chen to “Tai Bo,” who, according to Chen, was a member of the criminal “Dark Society” in Hong Kong (Tr. 214). The three met in Chinatown, where they discussed how to collect Guo’s debt (Tr. 219-20).

A few days later Chen met in a Chinatown restaurant with Tai Bo, Ms. Wang’s younger sister Xiu Xin, Xiu Xin’s husband, and Petitioner Jiang, who was introduced to Chen by Tai Bo (Tr. 221-22). After the meeting, Chen, Tai Bo and Jiang drove to the Queens City Super Buffet in New Rochelle. During the car ride the three “discussed about talking to him [Guo] nicely when [they] get there.” (Tr. 227).

Guo’s sister-in-law, Mei Xiu Li testified she was working as a cashier at the Queens City Super Buffet in October 2013, when three or four Chinese individuals entered and ate a meal, and that one of them asked her if Guo was present. Li said he wasn’t, and the three left (Tr. 162; 165-67). Guo testified that Li called him and said three people had come to the restaurant asking for him. He proceeded to the restaurant and reviewed video footage (images of which were introduced as GX-3-A, 3-B), recognizing Jiang, who he said he had known from their village in China (Tr. 52-55). On cross-examination, he reluctantly acknowledged having seen Petitioner Jiang several times in the United States, including at his own son’s wedding, to which Guo had invited Jiang (Tr. 83-85).

Chen explained that after determining that Guo was not in the restaurant, the three drove to Guo's house. Not seeing him there, they drove back to Queens. During the ride, Jiang received a telephone call from Guo's wife, Min Hua Li, who had returned Jiang's earlier call (Tr. 238-39). Chen explained that he overheard Jiang's side of the call and was dissatisfied by its friendly tone (Tr. 238).

3. Chen loses confidence in Jiang's willingness to use violence against Guo to collect the debt and severs all contact with Jiang and Tai Bo.

The day following their trip to New Rochelle, Chen received a phone call from Tai Bo, who asked Chen to pay Jiang \$500 to compensate him for the work he had missed trying to obtain payment from Guo, but Chen demurred, saying he "would not be able to pay that \$500 since [Petitioner Jiang] ha[d] not resolved the matter for" him (Tr. 237) and was "being too nice to" Guo's wife (Tr. 368). Chen further acknowledged he had previously told the government – truthfully – that he "believed that 'Cousin' [*i.e.*, Petitioner Jiang] was simply using [him] to make quick money and had no intent or ability to collect" from Guo (Tr. 373-74).

After this conversation with Tai Bo, Chen stopped working with Petitioner Jiang:

Q Did there come a time when you stopped working with the defendant to collect this money from Tian Long Guo?

A It stopped.

Q Was that after he asked you for money even though he
Couldn't collect any?

A Correct.

(Tr. 238).

Chen elaborated:

Because when [Tai Bo] asked me for \$500, I thought that he didn't really want to help me out with this matter. Because when he spoke with his wife, he didn't – when he spoke with Guo Tian long, he didn't mention about the fact that they owe us money.

(Tr. 238).

Chen had no further contact with Petitioner Jiang and each went their separate ways. As discussed further below, Jiang thereafter had several phone calls with Guo and Guo's wife, and Guo eventually agreed to deposit \$2,000 into a certain bank account, which in fact was controlled by Tai Bo (Tr. 63). Chen – as further discussed below -- separately enlisted Chinatown gangsters to return to Guo's home in New Rochelle, in December 2013, in an aborted attempt to collect money from him (Tr. 239; 253-54).

4. Petitioner Jiang has several telephone conversations with Guo and Guo's wife, and Guo agrees to pay Jiang \$2,000.

According to Guo, he and Jiang spoke by phone approximately four to five times (Tr. 57). He explained that Jiang "didn't threaten me. On the surface, he called me 'Uncle'" (Tr. 159), but he also said that "his cousin from Hong Kong" who had come with him to the restaurant [an apparent

reference to Tai Bo] was a member of the Dark Society” and that this made him “scared” (Tr. 58; 60). The first time Guo spoke to Jiang on the phone “[h]e asked me, he said, you owe money to Xiao Xing. He said that I owe Xiao Xing and I have to pay back a certain amount to her.” (Tr. 57). Guo replied that he had already repaid the money, although he had no receipt. He explained that “Xiao Xing was a friend of [his] wife from work” (Tr. 58) and that he “had borrowed money from her, paid her back, but she did not give [him] back the receipt.” (Tr. 58). He added that his wife might have called and spoken to Jiang too, but he was not certain, although this claim of ignorance was almost certainly false.² After several phone calls Guo agreed to pay Petitioner Jiang \$2,000 to keep him away and because he was afraid that if he did not pay “the members of the Dark Society would have kidnapped [his] family members and [his] son in mainland China.” (Tr. 65).³ A few days later, on November 15, 2013, his wife deposited \$2,000 into a Chase bank account provided to Guo by Jiang, and which was controlled by Tai Bo (Tr. 65; 452-54).

² Referencing a phone record summary chart admitted into evidence as GX 25B, FBI Special Agent Terry Jeng testified that Jiang first called Guo or his wife, Min Hua Li, on October 30, 2013, and that the total number of phone calls between either Jiang and Guo or Jiang and Guo’s wife between October 30, 2013, and November 15, 2013, was 23.

³ At every opportunity, Guo told the jury that the “Dark Society” was like the “mafia.” *E.g.*, Tr. 59, 60, 61, 65, 97, 159.

5. Chen enlists “Cash” and two other “gangsters” to extract money from Guo.

Chen testified that after he severed contact with Petitioner Jiang he asked his former employer in the alien smuggling business, Lagor, to find him gangsters from Chinatown who could help him collect the money from Guo, and Lagor put Chen in touch with Qian Zheng, aka “Cash,” with whom Chen and Lagor had previously worked in the smuggling business (Tr. 239; 303).⁴ In their alien smuggling days Cash had been “responsible for collecting the money” from the aliens’ families in China (Tr. 306), which involved “using violence” (Tr. 306). Together with Cash and two of Cash’s gangster-thugs, Chen returned to the Queens City Super Buffet, in December of 2013, some two months after cutting off contact with Tai Bo and Petitioner Jiang (Tr. 253-54). Not finding Guo in the restaurant the group drove to his house. There, they saw Guo, who appeared to be “very nervous” (Tr. 259) and who “drove his vehicle to block [them] in the front trying to prevent [them] from leaving.” (Tr. 258). Guo then called the police and Chen left the vehicle and took a cab back to Queens (Tr. 259).

⁴ At this point in the proceedings defense counsel moved to exclude further testimony regarding Chen’s recruitment of Cash and their subsequent efforts to extort money from Guo, and to strike related previous testimony, because these efforts were unrelated to Chen’s conduct with Jiang. (Tr. 240 *et seq.*). These proceedings are addressed in detail in the argument portion of this petition.

Testifying regarding this encounter, Guo explained that on December 12, 2013, two months after he had viewed the videotape at his restaurant depicting Jiang and two others, his wife or sister-in-law telephoned him and said that people had come to the restaurant looking for him (Tr. 65-66). Asked how he felt when he got this phone call, he answered, “it was very terrible and it was worse than those two people from before.” (Tr. 67).

Shortly after Guo received the phone call, he looked out his window and saw a black Mercedes Benz. He spotted a bald man walking towards his house, saying, “Yes, this is the house. This is the house.” (Tr. 68). At first, he did not recognize the man, who was wearing a hat, but later recognized him as one of the three persons who had previously come to the restaurant with Jiang. Guo exited his home, intending to enter his Hummer, when he observed the Mercedes Benz return. Guo explained:

As soon as I got downstairs and before I even got to the vehicle, and then four people with the Benz, Mercedes Benz, came back in from there and they came in and directly approached me and I got scared and I left my Hummer car. And then when they saw my Hummer car, then they drove further in because – because they couldn’t go further. They had to drive further in order to turn around.

(Tr. 71).

Guo then entered his Hummer, parked it horizontally to block the Mercedes Benz and called 911 (Tr. 72). The 911 tape was played to the jury

during the testimony of FBI Special Agent Shi Yeng Jeng (GX-9; Tr. 439-40, 457, 466-68). By the time the police arrived the bald man had departed (Tr. 74). Guo had difficulty making himself understood to the police (Tr. 73). According to New Rochelle Police Officer Edward Martinez, who responded to Guo's 911 call, Guo appeared "very upset" and agitated and was "yelling at the driver" of the Mercedes Benz (Tr. 182; 184). The police eventually told everyone to depart and nothing further happened, although officer Martinez later responded to the Queens City Super Buffet where he saw Guo, who was now "calm" (Tr. 193). That evening, Guo called Jiang - who had not been one of the four persons in the Mercedes Benz (Tr. 142-43) - telling him about the incident and asking him why the people had come back. Jiang responded that he had nothing to do with those events (Tr. 73; 149-50).

After this incident, Chen stopped trying to collect money from Guo (Tr. 259).

6. Jiang is arrested in Ocala, Florida and voluntarily gives a full statement.

On December 15, 2015, FBI agents arrested Petitioner Jiang in Ocala, Florida, after following him back from the Japanese restaurant where he worked, to the apartment he shared with other restaurant employees. Jiang immediately agreed to speak with the agents and, with the assistance of an

interpreter, explained to FBI Agent Ray Yuen that “two years prior he received a phone call from a person [...] nicknamed Brother Chen” (the name Jiang used for Tai Bo; not witness Billy Chen) and that “Brother Chen called him and wanted Mr. Jiang to collect a debt ... from a person named Guo.” (Tr. 417). Jiang agreed to help Brother Chen collect the debt and went together with others to the restaurant that Guo supposedly owned. The group was not able to find Guo in the restaurant so “Brother Chen decided to go, because they also had the address of Guo’s home, they drove to his house nearby and they sat outside, waited for him a little bit. They didn’t see Guo, and they returned back to Flushing, New York.” (Tr. 422). Jiang explained that he received a phone call from Guo shortly after and “Guo told Mr. Jiang that he recognized him from the camera at the restaurant and told him not to get involved with this matter.” (Tr. 423). “Mr. Jiang told Guo that he’s got a debt he’s got to pay up, and he offer[ed] Guo an installment plan, to pay in installments.” (Tr. 423). Guo eventually deposited \$2,000 into a bank account and Jiang said he received a portion of the money (Tr. 423-24).

A. Rule 29 Motion

At the close of the government’s case and before he rested, Jiang, through counsel, moved under Fed.R.Crim.P. 29 to dismiss the indictment for insufficient evidence. The motions were denied (Tr. 478-80).

B. The Verdict and Sentence

On November 10, 2016, the jury returned a verdict of guilty (Tr. 623).

On March 21, 2017, the court sentenced Jiang to 28 months' imprisonment and two years' supervised release.

C. The Second Circuit's Affirmance

On March 30, 2018, the Second Circuit issued a summary order affirming Jiang's conviction and sentence. It stated the applicable rules as follows:

“Whether the government has proven the existence of the conspiracy charged in the indictment and each defendant's membership in it, or, instead, has proven several independent conspiracies is a question of fact for a properly instructed jury.” *United States v. Johansen*, 56 F.3d 347, 350 (2d Cir. 1995). Where a defendant contends that multiple conspiracies were proven at trial, rather than the single conspiracy charged in the indictment, the defendant bears the burden of showing that “no rational trier of fact could have concluded that a single conspiracy existed based on the evidence presented.” *United States v. Sureff*, 15 F.3d 225, 230 (2d Cir. 1994) (citations omitted).

A. 3. Noting “there is no requirement in conspiracy law that the same individuals be involved throughout the duration of the conspiracy, the court rejected Petitioner's argument that there were multiple conspiracies as a matter of law, finding:

The evidence presented at trial established the existence of a single conspiracy, of which Jiang was a part, to collect an alleged debt from Guo by the unlawful use of violence and/or

the threat of violence. At no point did that common purpose change, even if different actors were involved in accomplishing this goal at different times. Nonetheless, Jiang's principal argument on appeal is that he had no interaction with some of the other members of the single charged conspiracy. This argument is without merit.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Second Circuit's decision reflects a recurring error among the lower courts to disregard this multiple conspiracy law, particularly as it concerns "wheel" conspiracies.

THE EVIDENCE, IF BELIEVED, ESTABLISHED TWO CONSPIRACIES AS A MATTER OF LAW, AND THE TRIAL COURT THEREFORE SHOULD HAVE EXCLUDED ALL EVIDENCE REGARDING THE DECEMBER 2013 CONDUCT

In *Berger v. United States*, 295 U.S. 78 (1935), Berger was charged with having conspired with seven other persons named in the indictment – including Rice, Jones and Katz -- to utter counterfeit notes purporting to be issued by designated federal reserve banks, with knowledge that they had been counterfeited. Katz cooperated with the government and testified at trial. The trial evidence, however, showed the existence of two conspiracies, "one between Rice and Katz and another between Berger, Jones and Katz. The only connecting link between the two was that Katz was in both conspiracies and the same counterfeit money had to do with both." *Id.* at 80. This Court, having found that one conspiracy was charged but two were

proved, then considered whether this “variance” affected Berger’s “substantial rights,” as required under 28 U.S.C. § 391, and found that it did not (although the conviction was reversed for prosecutorial misconduct).

A decade after *Berger*, the Court again addressed multiple conspiracies, in *Kotteakos v. United States*, 328 U.S. 750 (1946). There, petitioners Kotteakos, Lekacos and Regenbogen were convicted under 18 U.S.C. § 88 for conspiring to obtain loans under the National Housing Act by false and fraudulent statements. The evidence, however, showed there were multiple, separate illicit agreements to do so with only government cooperating witness Brown common to each. Brown, then, was the center, or “hub,” of a “wheel” with one “spoke” consisting of the petitioners and several other “spokes” consisting of groups of other co-defendants. All groups were dealing independently with Brown as their agent. The Court acknowledged the concept of the “wheel conspiracy” (*i.e.* multiple conspiracies of a similar nature linked by a common participant) as argued by the government but concluded that “the rim of the wheel to enclose the spokes” was missing. *Id.* at 755. The trial court therefore erred when it admitted evidence residing on the other “spokes” of the wheel, and the only question, therefore, was “whether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence

which the Government admits proved not one conspiracy, but some eight or more different ones of the same sort executed through a common key figure, Simon Brown.” *Id.* at 752. The Court answered this question in the affirmative, and therefore reversed defendants’ convictions.

Wheel-type conspiracies, such as those in *Kotteakos and Berger* are often susceptible to multiple conspiracy analysis as a matter of law, even though in many other instances the existence *vel non* of multiple conspiracies is appropriately left to the jury. This is so because the government’s evidence, even if accepted as true, may be insufficient to prove the existence of a “rim” to connect the “spokes” of the alleged conspiratorial wheel. *Kotteakos*, 328 U.S. 750 at 755 (“As the Government puts it, the pattern was ‘that of separate spokes meeting at a common center,’ though we may add without the rim of the wheel to enclose the spokes. The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment.”).

Multiple conspiracy analysis “as a matter of law” is not confined to wheel conspiracies, however. For example, in *United States v. Geibel*, 369 F.3d 682, 691 (2d Cir. 2004), the Second Court found multiple conspiracies as a matter of law in an insider trading case, where defendants, remote tippees, participated in a much narrower scheme to trade on inside

information that did not include the original tipper. There, the agreement between the tipper and the original tippee -- Cooper -- did not encompass disclosure of information to remote tippees, such as defendants. Nor was it reasonably foreseeable that inadvertent disclosure to remote tippees was a necessary or natural consequence of this trading scheme. Defendants' awareness of Freeman, the source of information, was found to not be sufficient evidence to link defendants in a conspiracy with Freeman because mere awareness does not satisfy the conspiracy requirement that two parties act in concert toward a common goal. Additionally, there was lack of mutual dependence. *See also United States v. Bertolotti*, 529 F.2d 149, 151 (2d Cir. 1975) ("Because of the Government's failure to heed our admonition in *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), that it cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected,[⁵] we are compelled to accede to appellants' request" to reverse their convictions).

⁵ The court's fn 5, inserted at this point in the text, states:

In *Sperling*, Judge Timbers issued forth a clear warning to the United States Attorney's office:

In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this court, (citations omitted) we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. . . . (I)t has become all too common for

In the instant case the government's proof suggested a wheel conspiracy, consisting of a hub, *i.e.* Billy Chen, and two spokes, one consisting of Tai Bo and Jiang and the other consisting of Cash and Cash's associates. But no rim connected these spokes. This is apparent from the facts, as previously recited, reflecting that after the November 2013 trip to New Rochelle, Cash ceased all contact with Tai Bo and Jiang and, after a two-month hiatus, commenced with Cash a second, separate conspiracy:

Q Did you get in contact with Cash?

A Yes.

Q And that was after you refused to give Mr. Jiang the \$500; correct?

A I waited a long time afterward, about two to three months later, to contact Cash.

Q And then you and he planned to go up to New Rochelle again; correct?

A Correct.

(Tr. 375-76).

The "Tai Bo-Jiang" spoke of the wheel and the "Cash plus associates" spoke of the wheel shared Chen – the "hub" – and the goal of obtaining Guo's money. But this is not sufficient to establish a "rim." After all, Chen,

the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. 506 F.2d at 1340-41.

United States v. Bertolotti, 529 F.2d 149, 151 (2d Cir. 1975).

as hub, is not himself the “rim.” And the mere existence of a common goal is obviously insufficient as well, as is clear from *Kotteakos*, where the separate conspiracies shared the common goal of fraudulently obtaining loans.

During the argument upon defense counsel’s application to exclude the evidence regarding the Chen-Cash conspiracy the government argued that Petitioner Jiang was not absolved of responsibility for the events of December 2013 because conspiracies are presumed to continue and Jiang did not formally withdraw (Tr. 243), and the court echoed this sentiment (Tr. 242) (“I’m not sure [], Mr. Levitt, that you’ve shown a withdrawal from the conspiracy such that he’s no longer a member of the conspiracy...”). This argument, however, misses the point and misapprehends this Court’s teachings on multiple conspiracies. Although the alleged Chen-Tai Bo-Jiang conspiracy was presumed to continue until its termination, the Chen-Cash conspiracy was not a continuation of the Chen-Tai Bo-Jiang conspiracy, but rather was a separate conspiracy, which Jiang never joined.

The Second Circuit’s observation, in its decision affirming Petitioner Jiang’s conviction, that “There is no requirement in conspiracy law that the same individuals be involved throughout the duration of the conspiracy,” is beside the point; true, no such requirement exists, but this Court’s teachings do require that there be *something other than a common conspiratorial*

object to find a single conspiracy where diverse persons act entirely independently of one another, and during entirely different periods of time, with only a common leader or “hub.” The Second Circuit’s reasoning, applied to this Court’s decisions in *Berger* and *Kotteakos*, would upend the holdings of those cases; after all, there was a common object in *Berger* to utter counterfeit notes to obtain things of value, and a common object in *Kotteakos* to obtain fraudulent loans under a common government program. That there was but a single intended *victim* in the instant case is not a factor that distinguishes this Court’s multiple conspiracy law. If, instead of waiting *months* after parting ways with Jiang to recruit Cash and his crew, Billy Chen had waited *years*, surely the conclusion of multiple conspiracies would be apparent. Yet why, for purposes of conspiracy law, should it matter how much time transpired between the two events? What is significant is that Billy Chen recruited Cash *after entirely severing his relationship with Petitioner Jiang* and there was *nothing* that connected Jiang and Cash; “Nothing in the evidence connected petitioner[] with [Cash], except [Billy Chen], in the slightest way.” *Kotteakos*, 328 U.S. at 777.

CONCLUSION

For all the foregoing reasons this Court should grant Mr. Jiang's
Petition for a Writ of Certiorari.

Dated: New York, New York
June 13, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard Levitt", written in a cursive style.

RICHARD LEVITT
Attorney for Petitioner Jiayao Jiang
LEVITT & KAIZER
40 Fulton Street, 23rd Floor
New York, New York 10038
(212) 480-4000