No. _____

In The

Supreme Court of the United States

CHARLES ELOYS JOHNSON, a/k/a Adam White,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Charles Johnson was convicted of two counts of possessing a firearm during a crime of violence. 18 U.S.C. § 924(c). The district court instructed the jury that either of two underlying crimes could serve as a predicate crime of violence for the firearm convictions: (1) Hobbs Act robbery, and (2) conspiracy to commit Hobbs Act robbery. Based on that instruction, the jury returned a guilty verdict on a general verdict form that did not require it to choose between these two predicate offenses.

On appeal, the Fourth Circuit conceded that, because conspiracy to commit Hobbs Act robbery is not a crime of violence, it was plain error to instruct the jury otherwise. But it held that the error did not impact Mr. Johnson's substantial rights because Hobbs Act robbery ***is*** a crime of violence under the statute and the district court correctly instructed the jury on this alternative theory of liability.

The question presented is whether an acknowledged instructional error requires reversal where a reviewing court cannot determine if the jury based its verdict on the legally erroneous instruction or an alternative, valid theory of liability.

RELATED PROCEEDINGS

United States v. Johnson, 2:15-cr-00386-RMG-1 (D.S.C. Sept. 5, 2017).

United States v. Johnson, 17-4220 (4th Cir. Sept. 21, 2020)

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PETITION FOR A WRIT OF CERTIORARI

This Court has, with some regularity, granted certiorari and summarily reversed where a Circuit Court of Appeals defies this Court's precedents or fundamentally misapplies the rules those precedents articulate. *See, e.g., Davis v. United States*, 140 S. Ct. 1060 (2020) (summarily reversing the Fifth Circuit based on its failure to apply plain error review to factual errors); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (summarily reversing the Ninth Circuit's misapplication of qualified immunity principles). This is such a case.

In *Yates v. United States*, this Court held that, where a jury is presented with both a valid and invalid legal path to conviction, reversal is required unless the reviewing court can tell with certainty which path the jury chose. 354 U.S. 298, 312 (1957). And this Court has reaffirmed *Yates*'s holding ever since. *See Skilling v. United States*, 561 U.S. 358, 414 (2010) ("[C]onstitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory."); *Griffin v. United States*, 502 U.S. 46, 59 (1991) (explaining that a general jury verdict that may have rested on a factually insufficient ground may be sustained but one that may rest on an invalid legal theory must be vacated). Yet the Fourth Circuit either ignored or failed to apply that longstanding rule in this case.

Petitioner Charles Johnson therefore respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit and suggests that summary reversal is appropriate.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. Pet. App. A. The relevant order of the district court is also unpublished.

JURISDICTION

The Court of Appeals issued its order denying rehearing en banc on October 19, 2020. Pet. App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 924 of Title 18 of the United States Code is reproduced in the appendix to this brief at Pet. App. D.

STATEMENT OF THE CASE

A. Factual Background

At this stage, Mr. Johnson acknowledges that a jury validly convicted him of both Hobbs Act robbery and conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951. Viewing the trial evidence in the light most favorable to the verdict, Mr. Johnson and two accomplices arranged to rob two South Carolina jewelry stores.

But the government has never contended that Mr. Johnson set foot in the stores during the robberies. Rather, it was his accomplices who entered, one with a pistol and the other with a small sledgehammer. The man with the gun forced those in the store to the ground; the other smashed jewelry cases. Then they made a run for it with Rolex watches. No one was physically injured in the robberies.

Mr. Johnson was the "lookout" and getaway driver, using cars that were registered in his name. And he may have asked his girlfriend to help him case one of the two stores. Even so, the government presented no evidence that he ever touched a gun or knew that one would be used in the robbery.

Yet, besides the Hobbs Act charges, Mr. Johnson was also charged with and convicted of possessing, using, and carrying a firearm in connection with a crime of violence. According to the Government, he was responsible for the use of the firearms during the commission of the robberies because it was "foreseeable that a gun would be used." In other words, the government maintained that, as a co-conspirator, Mr. Johnson was liable for all the acts of his accomplices, including one accomplice's decision to use a gun.[1]

As this Court well knows, however, to find a defendant guilty under Section 924(c), a jury must find not just that the firearm was used, but also that it was used during a crime of violence. And that is where the problem lies in this case.

B. Proceedings Below

Based on the jewelry store robberies, Mr. Johnson was charged with (1) conspiracy to commit Hobbs Act robbery, (2) two counts of Hobbs Act robbery, and

[1] The Government also advanced an aiding and abetting theory for the first time on appeal. But it failed to do so at the trial level, choosing instead to rely exclusively on the conspiracy theory of liability to establish Mr. Johnson's guilt. Although evidence of reasonable foreseeability is enough to hold a defendant responsible for the acts of coconspirators (See Pinkerton v. United States, 328 U.S. 640 (1946)), the Government erroneously argued that foreseeability is a sufficient basis for finding liability under an aiding and abetting theory. That statement contradicts this Court's decision in United States v. Rosemond, 572 U.S. 65 (2014), which held that advance knowledge that a firearm would be used must be proven beyond a reasonable doubt.

(3) two counts of possessing, using, or carrying a firearm during a crime of violence. He pleaded not guilty on all counts and plead his case to a jury.

Before the jurors retired for their deliberations, the district court correctly instructed them that, to convict Mr. Johnson of the firearms charges, they needed find that his use, carrying, or possession of a weapon was connected to a predicate crime of violence. It further correctly told the jurors that Hobbs Act robbery was a crime of violence. But the district court also incorrectly instructed the jury that Hobbs Act conspiracy was a crime of violence.[2] Unfortunately, trial counsel for Mr. Johnson did not object to the error.

The jury convicted Mr. Johnson on all charges and the district court sentenced him to 384 months in prison; the vast majority of that period of incarceration depended on the two Section 924(c) convictions. Mr. Johnson appealed, arguing (among other things) that, under *Yates*, those firearms convictions were invalid because the jury was given both legally valid and legally invalid paths to conviction.

A panel of the Fourth Circuit rejected that argument. Applying a plain error standard, the panel held that the district court erred by instructing the jury that Hobbs Act conspiracy was a crime of violence. Pet App. 1a at 4. And it acknowledged that the

[2] While Mr. Johnson's appeal was pending, the Fourth Circuit held in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc), that — consistent with this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019) striking down the residual clause of Section 924(c) — Hobbs Act conspiracy was not a crime of violence. The panel below applied *Simms* to this case and Mr. Johnson does not seek certiorari on this question because it was decided in his favor.

error was plain. *Id.* But it nonetheless held that the error did not affect Mr. Johnson's substantial rights because "the jury ***could have*** based the firearms convictions not on" the erroneous conspiracy instruction, but on the district court's correct instruction that Hobbs Act robbery was a crime of violence. *Id.* (emphasis added).[3] In other words, though there was no way for the Fourth Circuit to know for sure, the jury could have taken the legally valid path and ignored the legally invalid one.

Mr. Johnson then sought rehearing en banc, protesting that the panel's decision ignored this Court's decision in *Yates* and its progeny. The Fourth Circuit denied his petition on October 19, 2020. Pet. App. 1c.

REASONS FOR GRANTING THE WRIT

Under the plain error standard, an error affects substantial rights where it is not harmless. *See* Fed. R. Crim. P. 52 (defining harmless error as one that does not affect substantial rights and allowing reversal of plain errors affecting substantial rights even if it was not objected to below); *United States v. Vonn*, 535 U.S. 55, 63 (2002) (referring to the phrase "does not affect substantial rights" as "the classic shorthand formulation of the harmless-error standard"). A defendant has established than an error is not harmless where he shows there is "a reasonable probability that the error affected the outcome of [his] trial." *United States v. Marcus*, 560 U.S. 258, 262 (2010).

[3] Because it concluded that the error did not affect Mr. Johnson's substantial rights, the Fourth Circuit did not consider whether the Section 924(c) convictions impacted the "fairness, integrity, and public reputation of judicial proceedings." That is an issue that can be addressed on remand; however, allowing a defendant to serve a 32-year sentence, the bulk of which rested on firearms convictions that likely rested on a legally invalid theory of liability, would meet that standard.

The Fourth Circuit's holding that the district court's instructional error in Mr. Johnson's case was harmless conflicts with this Court's past precedents, the Fourth Circuit's own past decisions, and the opinions of other Circuit Courts of Appeals. He therefore asks that this Court grant his petition for a writ of certiorari and summarily reverse.

A. The Fourth Circuit's Decision Ignores Nearly 90 Years of Decisions from this Court.

An unbroken line of this Court's decisions dating back nearly 90 years has held that, if a district court's instructions give a jury both legally valid and legally invalid paths to conviction and it is impossible to tell which the jurors chose, the instructional error is not harmless. The Fourth Circuit's contrary holding that the error in Mr. Johnson's case was harmless because the jury *could have* chosen the legally valid, robbery-based path to conviction defies that fundamental rule.

Yates. In *Yates*, the petitioners were convicted of violating the Smith Act by conspiring (1) to advocate or (2) organize a society of persons to advocate the violent overthrow of the U.S. government. 354 U.S. at 300. This Court held that the district court had improperly instructed the jury on what it meant to "organize" a society of persons. *Id.* at 303–12.

The government countered that, even if that were true, the error was harmless. After all, the jury was also instructed that the petitioners could be convicted if they had merely "advocated" violent overthrow without organizing to do so. *Id.* at 311. The Court should assume, the government posited, that the jury followed a valid legal path to conviction, not an invalid one. *Id.*

But this Court rejected that argument. It held that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312.[4]

And that decision did not come out of the blue. The *Yates* majority cited three earlier cases reaching the same basic conclusion. *See Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945) ("The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient."); *Williams v. North Carolina*, 317 U.S. 287, 292 (1942) ("[I]f one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained."); *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("[T]he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.").

Griffin. Nor has this Court departed from that rule in the more than 60 years since *Yates* was decided. In *Griffin*, the petitioner had been convicted of conspiring to defraud the government by either (1) impairing the efforts of the IRS to assess

[4] This is not to say that a *Yates* error is structural, circumventing harmless error review altogether. This Court rejected that argument in *Hedgpeth v. Pulido*, 555 U.S. 57 (2008). But the error is not harmless if there is no basis to believe that the conviction rested only on the valid theory. *See Skilling*, 561 U.S. at 414. After all, if the defendant can establish that there is a 50/50 chance that his conviction rested on an illegal basis, there is a reasonable probability that a correctly instructed jury would have reached a different result.

income taxes or (2) impairing the DEA's efforts to establish forfeitable assets. 502 U.S. at 47. But the evidence at trial connected her only to the attempt to defraud the IRS. *Id.* at 48. Because the jury returned a general verdict, so that it was impossible to tell which factual basis the jurors used to convict her, the petitioner argued that her conviction should be reversed under *Yates*. *Id.*

This Court distinguished *Yates* and upheld her conviction. But in doing so it reaffirmed the principle at issue. When one of the *legal* theories of conviction is unconstitutional (as it was in *Stromberg*) or otherwise contrary to law (as in *Yates*), reversal is required unless the government can prove the conviction rested on the valid theory. *Id.* at 55–56. On the other hand, where one of several possible *factual* theories is unproven, the Court assumes the jury relied on the theory the evidence supported. *Id.*

This case is about an invalid legal theory, not an unproven factual one. As the Fourth Circuit acknowledged below, it was not only error but plain error to instruct the jury that conspiracy to commit Hobbs Act robbery was a crime of violence for Section 924(c) purposes. The jury's general verdict makes it impossible to tell whether the jurors here rejected or accepted that invalid legal theory. Thus, under *Yates*, even as clarified by *Griffin*, reversal was required.

Skilling. More recently, this Court again held fast to the *Yates* rule. In *Skilling*, this Court held that a former Enron executive did not commit honest-services fraud. *Skilling*, 561 U.S. at 413. Because the petitioner's conspiracy conviction could have rested on any of three legal theories — honest-services wire

fraud, securities fraud, or money-or-property wire fraud — the conviction was "flawed" because the jury was "instructed on alternative theories of guilt and return[ed] a general verdict that may [have rested] on a legally invalid theory." *Id.* at 414. The Court remanded the case so the Court of Appeals could consider whether there was proof that the jury's verdict rested on a legally valid theory. *Id.*

Here there is no such proof — thus the Fourth Circuit concluded that the jury merely "could have" relied on the valid theory, not that it did. Indeed, there is every reason to believe that the jury relied on the invalid conspiracy theory in this case.

During closing arguments, the government beseeched the jury to convict under Section 924(c) based on the conspiracy charges. "If he was the driver, [and] it was foreseeable that a gun would be brandished," the prosecutor argued, "then the driver's just as responsible under the law as the person that brandished the gun." And the Court told the jurors that a conspiracy was enough; it could serve as a predicate for the Section 924(c) convictions. Relying on the conspiracy conviction was thus the path of least resistance for the jurors, and it was the path marked out for them by both the prosecution and the district court.

Of course, we do not know that the jurors did not beat their own path. They could have ignored the Court's instructions and the government's invitations and relied only on the Hobbs Act robbery convictions as predicates. But why would they? And more to the point, there is no way to know for sure. There is thus no support for a conclusion that the district court's *Yates* error was harmless here.

B. The Fourth Circuit's Decision Strays from its Own Earlier Rulings.

The Fourth Circuit panel's defiance of *Yates* is puzzling because it has, in the past, followed the rule. *United States v. Moye*, 454 F.3d 390, 400 n.10 (4th Cir. 2006) (en banc) ("Under *Yates*, reversal is required when a case is submitted to a jury on two or more alternate theories, one of which is legally (as opposed to factually) inadequate, the jury returns a general verdict, and it is impossible to discern the basis on which the jury actually rested its verdict."); *United States v. Cone*, 714 F.3d 197 , 211 (4th Cir. 2013) (same).

Then again, this is not the first time the Fourth Circuit has strayed in this area. In *United States v. Hastings*, 134 F.3d 235, 242–44 (4th Cir. 1998), it held that — under plain error review — it was the defendant's burden to prove that the jury relied on the invalid theory to reach conviction. The Fourth Circuit has strained to rationalize *Hastings*'s holding in the past. *See United States v. Robinson*, 627 F.3d 941, 954 (4th Cir. 2010) (explaining that *Hastings* was about an improper instruction about one prong of one offense, while other cases were about erroneously instructed offenses); *Cone*, 714 F.3d at 215 (relegating *Hastings* to a "but see" cite as a case contrary to this Court's holding in *Yates*). But the tension between *Hastings* and this Court's precedents (as well as the decisions in the Fourth Circuit correctly applying the rule) is irreconcilable.

The Fourth Circuit did not take the opportunity here to consider the issue en banc and overrule *Hastings*, even though the panel opinion followed *Hastings* to the

letter (without citing it).[5] It thus falls to this Court to correct the Fourth Circuit's repeated, though not dogmatic, failures to abide by the *Yates* rule and reverse where it is impossible to tell whether the jury convicted on a valid or invalid legal theory. More than that, the Fourth Circuit's failure to consistently apply the same remedy in cases involving similar *Yates* errors diverges from the accepted and usual course of judicial proceedings and warrants the exercise of this Court's supervisory powers. *See Pepper v. United States*, 562 U.S. 476, 510 (2011) (Breyer, J., concurring) ("A just legal system seeks not only to treat different cases differently but also to treat like cases alike.").

C. Almost Every Other Circuit Correctly Follows the *Yates* Rule, Making the Fourth Circuit an (Inconsistent) Outlier.

The Fourth Circuit's lukewarm embrace of *Yates* makes it an outlier among its sister Circuits. The other circuits consistently hold that, where it is impossible to tell whether the jury took a valid legal path to conviction, reversal is required.

For example, in *United States v. Howard*, 517 F.3d 731 (5th Cir. 2008), the Fifth Circuit affirmed the district court's decision vacating a conviction for falsifying books and records. As in this case (though, admittedly, for more complicated reasons), the jury should not have been allowed to use the conspiracy count in Howard's indictment as the basis for his conviction for falsifying records. *Id.* at 735. But the district court had instructed them otherwise.

[5] *Moye* and *Cone* did not present the opportunity to overrule *Hastings* because they were not plain error cases. *See Moye*, 454 F.3d at 398–401; *Cone* 714 F.3d at 214–15.

Because it was "unclear whether the convictions rested on legally valid or invalid bases," the district court vacated the conviction. *Id.*at 737. The Fifth Circuit, in affirming that decision, rejected the government's argument that the error was harmless because it could not show that the jury inevitably took a valid path to conviction. *Id.*

This is true even when a defendant has failed to object and the Court of Appeals must apply the plain error standard, which flips the burden of proving prejudice to the defendant. For example, in *United States v. Latorre-Cacho*, 874 F.3d 299, 310–11 (1st Cir. 2017), the First Circuit held that the defendant had shown a plain *Yates* error was not harmless even though he did not prove that the jury relied on the erroneous legal theory. Rather, it found it sufficient that the evidence at trial on the valid theory was not overwhelming enough to render the erroneous instruction "immaterial to the outcome at trial." *Id.* And it pointed out that the government had rested much of its closing argument on the invalid theory. *Id.* In other words, it could not say for sure that the jury did not rely on the invalid theory — and by establishing that uncertainty, the defense had shown prejudice. *See also United States v. Samora*, 954 F.3d 1286, 1295 (10th Cir. 2020) (defendant established reasonable probability of different result where evidence on the valid theory was relatively weak); *United States v. Garrido*, 713 F.3d 985, 994–98 (9th Cir. 2013) (defendant showed substantial probability of prejudice where government emphasized the invalid theory of liability in closing arguments); *United States v. Joseph*, 542 F.3d 13, 17–19 & n.15 (2d Cir. 2008) (reversal was required when the defendant created enough doubt that the

Court could not be sure whether the jury relied on a valid or invalid theory of liability);[6] *United States v. Fuchs*, 218 F.3d 957, 961–63 (9th Cir. 2000) (defendant showed prejudice where the facts underlying the invalid theory were more compelling than those underlying the valid theory).

Indeed, the other Circuits have generally refused to reverse convictions based on *Yates* errors only where: (1) the evidence on the valid theory was overwhelming; [7] or (2) the omitted or inaccurate instruction related to an uncontested issue. *See United States v. Cardena*, 842 F.3d 959, 997–99 (7th Cir. 2016) (overwhelming evidence); *United States v. Sorensen*, 801 F.3d 1217, 1237–39 (10th Cir. 2015) (same); *United States v. Moore*, 651 F.3d 30, 93 n.22 (D.C. Cir. 2011) (same); *United States v. Griggs*, 569 F.3d 341, 344–45 (7th Cir. 2009) (uncontested); *United States v. Wiedner*, 437 F.3d 1023, 1043–44 (10th Cir. 2006) (government presented no evidence on invalid theory).

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[6] The Second Circuit later suggested in dicta that *Hedgpeth* abrogated *Joseph*, because it said harmless error review was required in *Yates* error cases. *United States v. Ferguson*, 676 F.3d 260, 276 n.14 (2d Cir. 2011). But that overstates *Hedgpeth*'s holding. The issue there was whether *Yates* errors were structural, so that merely instructing the jury on an invalid theory was enough for reversal if the jury returned a general verdict. *Hedgpeth* did not address what could demonstrate prejudice under a plain error review. Under *Marcus*, showing a reasonable possibility the jury relied on the invalid theory is enough.

[7] A subset of this variety of cases are those explaining that, if a jury necessarily found (when convicting on other counts) the elements required by the valid theory of liability, the instructional error was harmless. *United States v. Toms*, 136 F.3d 176, 181–82 (D.C. Cir. 1998); *United States v. Washington*, 106 F.3d 983, 1013 (D.C. Cir. 1997); *United States v. Hudgins*, 120 F.3d 483, 487–88 (4th Cir. 1997). The Fourth Circuit here made no such finding, explaining only that the jury *could* have relied on the robbery charges to convict Mr. Johnson.

As discussed above, here there is no reason to believe that the jury necessarily followed the legally permissible path. And given the government's reliance on the conspiracy theory of liability, there is every reason to think the jury strayed from it.

The only Circuit that has supported the Fourth Circuit's wayward *Hastings* view of harmless error is the Third. In *United States v. Turcks*, 41 F.3d 893, 897–99 (3d Cir. 1994), it held that a defendant must show that the jury relied on a legally invalid theory of liability to establish prejudice on plain error review. But that case, like *Hastings* itself, was decided before this Court clarified in *Marcus* that a defendant need only show a substantial probability that the result of the trial would be different to establish prejudice for plain error purposes. Requiring actual proof that an error affected the trial's outcome, as *Hastings* and *Turcks* do, goes against that approach. It is also generally impossible.

This Court should grant certiorari and summarily reverse to bring the Fourth Circuit in line with its sisters.

D. Summary Reversal is Appropriate.

The Fourth Circuit's decision below is so obviously erroneous that summary reversal is appropriate. *See Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (agreeing with the Solicitor General's position that summary reversal is appropriate where a Ninth Circuit decision contradicted an earlier decision); *see also Davis v. United States*, 140 S. Ct. at 1062 (summarily reversing the Fifth Circuit because there was "no legal basis" for its decision). Because it contradicts unbroken line of cases from

this Court, the opinions of most other Circuit Courts of Appeal, and the Fourth Circuit's own earlier rulings, there is no need for full briefing or argument on this question. It would only prolong the inevitable.

CONCLUSION

The district court's instructions gave the jury two paths to convicting Mr. Johnson under Section 924(c) — one valid, the other plainly erroneous as a matter of law. This Court should grant certiorari and summarily reverse to reaffirm that, when it is impossible to tell which path the jury chose, a reviewing court cannot say that the instructional error was harmless.

Respectfully submitted,

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