Case No. _____

In The

Supreme Court of the United States

SHUNTARIO JOHNSON,

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 WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A federal grand jury returned an eleven count indictment in which Mr. Johnson was a named defendant. Mr. Johnson was a named defendant in ten of the eleven counts. In short, the indictment accused Mr. Johnson of the following:

- Three (3) counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (Counts 4, 7, and 10);
- Three (3) counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (Counts 3, 6, and 9);
- Two (2) conspiracies to commit Hobbs Act robberies by robbing narcotics traffickers in violation of 18 U.S.C. § 1951(a) (Counts 1 and 5);
- One (1) conspiracy to possess with the intent to distribute five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 846 (Count 8); and
- One count of carjacking in violation of 18 U.S.C. § 2119 (Count 2).

See Fifth Superseding Indictment (R. 225).

This matter proceeded to a six (6) day jury trial. The Jury found Mr. Johnson guilty of carjacking (Count 2), one count of using a firearm during and in relation to a crime of violence (Count 3), one count of being a felon in possession of a firearm (Count 4), and conspiring to possess with the intent to distribute five kilograms or more of cocaine (Count 8). The Jury found him not guilty of the two conspiracies to commit Hobbs Act robberies (Counts 1 and 5), the two remaining counts for using a firearm during and in relation to a crime of violence (Counts 6 and 9) and the two

remaining counts for being a felon in possession of a firearm (Counts 7 and 10). Mr. Johnson was sentenced to 371 months of imprisonment.

The questions presented are as follows:

1. **First Question**. Mr. Johnson was convicted of carjacking Mr. Ricky Stevenson. On the day of the carjacking, Mr. Stevenson was driving Mr. Johnson and Mr. Johnson's brother-in-law to purchase some marijuana and then to the store. The Memphis Police Department's Incident Report, which was prepared by the responding police officer (Trace Cisneros), indicates that Mr. Stevenson told the officer that when the carjacking occurred, Mr. Johnson was in the front passenger seat of Mr. Stevenson's vehicle, and the brother-in-law was seated in the back seat. At trial, however, Mr. Stevenson changed his story and testified that the brother-in-law was in the front passenger's seat and Mr. Johnson was seated in the backseat when the carjacking occurred. At trial, the district court sustained a hearsay objection and prohibited defense counsel from cross-examining the responding police officer about this discrepancy in Mr. Johnson's location at the time of the carjacking. The first question presented is:

- Whether the Sixth Circuit's decision to affirm the hearsay objection was contrary to *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) and its progeny in that it violated Mr. Johnson's due process rights, his right to present a defense, his right to present evidence on his own behalf, and his right to confront the witnesses against him.

Second Question. The Sixth Circuit pattern jury instruction for a a felon in possession of a firearm provides, in pertinent part, that the defendant "knowingly possessed ***a firearm*** *specified in the indictment*." The district court failed to follow this pattern jury instruction, however, and erroneously instructed the jury that Mr. Johnson was required to possess the firearm "***on the dates*** *specified in the indictment*" instead of instructing the jury that the *firearm* had to be specified in the indictment. That is, "the phrase 'specified in the indictment' modified 'the dates' instead of 'a firearm.'" The pertinent part of the district court's jury instruction reads as follows: "that the defendant, following his conviction, knowingly possessed a firearm *on the dates specified in the indictment*." A plain reading of the district court's instruction erroneously informs the jury that a defendant can be found guilty as long as he possessed ***any*** firearm on the *dates* specified in the indictment and does not indicate that the jury had to find that Mr. Johnson had to possess a firearm that had been specified in the indictment. The second question presented is:

- Whether the district court's failure to advise the jury that Mr. Johnson had to be in possession of ***a firearm*** *specified in the indictment* created such jury confusion on a critical issue, that reversal is mandated.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of the Petition is as follows:

Shuntario Johnson, Petitioner

United States of America, Respondent

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Shuntario Johnson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on December 9, 2020, a copy of which is attached at Appendix A to this Petition.

JURISDICTION

The opinion of the Court of Appeals was entered on December 9, 2020. This petition is filed within ninety (90) days after the entry of the Sixth Circuit decision affirming the trial court. *See* SUP. CT. R. 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTES AND GUIDELINES INVOLVED

Amendment V to the U.S. Constituion. The Due Process Clause of the United States Constitution

"[N]o person shall . . . be deprived of life, liberty, or property, without due process of law."

Federal Rule of Evidence 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

INTRODUCTION

By sustaining the government's hearsay objection and limiting cross-examination, the district court excluded evidence which would have furthered the theory of the defense. This limitation denied Mr. Johnson of his constitutional guarantee of a meaningful opportunity to present a complete defense. In affirming the hearsay objection on the grounds that Mr. Johnson had not laid proper foundation, the Sixth Circuit violated Mr. Johnson's right to due process, his right to present a defense, his right to present evidence on his own behalf, and his right to confront the witnesses against him.

STATEMENT OF THE CASE

During December of 2017, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") was investigating Mr. Johnson's codefendants - Marcus Danner, John Lott, and Quintez Agnew for being robbers of narcotics traffickers. *See* Trial Transcript, R. 305, Page ID# 2282. As part of the investigation, the ATF set up a "stash house sting," in which the ATF used informants to provide information about someone that the informant would know on the street to have a history or reputation of being a robber. *Id.* at 2283. The ATF has the informant "pitch a scenario" to the targets, then introduces an undercover agent. *Id*. at Page ID # 2284. The undercover ATF agent pretends to be a disgruntled drug courier and

provides the targets with details about a house with a certain amount of cocaine contained therein; in the present case, ATF claimed that there were over five kilograms. *Id.* The ATF agent will describe individuals inside of the house, and tell the target that one of the individuals in the house is always armed, because the ATF wants to "escalate the level of violence" to where the targets know that the house is controlled by a cartel. *Id.* at Page ID # 2284-85. The ATF determines the amount of cocaine to be part of the sting in order to target individuals presumed to have a network to sell the cocaine. *Id.* at Page ID# 2285. Co-defedant Marcus Danner ("Danner") was identified as a person that would be willing to participate in the robbery of a drug house, and the informant then introduced the undercover ATF agent to Danner. *Id.* at Page ID # 2287-88.

The ATF set up telephone calls with Danner, and eventually arranged a meeting between the informant, the undercover agent, and Danner, which was recorded via audio and video. *Id.* at Page ID # 2289-90. The government introduced numerous calls and videos of various meetings between the undercover ATF Agent, the informant, Danner and one other co-defendant. *Id.* at Page ID # 2290-91.

One of the videos depicts the ATF agent, the informant, and Danner meeting in a vehicle on December 13, 2017. *Id.* at Page ID # 2298-2300. Danner referred to more than one person during the conversation, which caused the ATF to believe that there was a group or crew involved. *Id.* at Page ID # 2305-06. At subsequent

meetings with the undercover agent, Danner brought co-defendant Quintez Agnew with him to the meetings. *Id.* at Page ID # 2307-08. Therefter, co-defendant Quintez Agnew and co-defendant John Lott also met with the ATF agent and the informant. *Id.* at Page ID # 2315-16.

The fourth and final meeting occurred in a Popeye's Chicken parking lot just prior to the "takedown", which occurred a few minutes later. During the takedown, ATF agents arrested all three co-defendants inside of the perimeter fencing of a storage unit. As part of the sting, the undercover agent and the co-defendants used the storage unit as a staging location where all of the individuals were meeting before they would go rob the stash house. *Id.* at Page ID # 2317-20. During the final takedown, only Danner and Angew were arrested inside of the Storage Unit, however. *Id.* at Page ID # 2340. Mr. Johnson was arrested in a field across the street from the storage unit. A Ruger, 9mm, semiautomatic handgun was found in the field close to Mr. Johnson.

Mr. Johnson was not seen on any of the videos that were recorded by the ATF during the stash house sting or the meetings leading up to the sting. *Id.* at Page ID # 2339. The undercover agent testified that Mr. Johnson was inside the vehicle with Danner during the final meeting in the Popeye's parking lot, but his image is not seen on the video. *Id.* at Page ID # 2339-40.

Based on proffer sessions with Danner and Agnew that occurred after their arrests, the ATF investigated other incidents that were not staged by the ATF. *Id.* at Page ID # 2329-30. The first of those investigations related to an attempted robbery of a Bobby Buffer ("Buffer") during which Viola Richardson ("Richardson") was shot that occurred at 4156 Fizer Avenue in Memphis, Tennessee on January 22, 2018. *Id.* at Page ID # 2329-30. Memphis police officers recovered a projectile from the scene of this shooting. *Id.* at Page ID # 2331-32

The second incident was a January 9, 2019 carjacking. *Id.* at Page ID # 2331. The MPD recovered two shell casings from the scene of the carjacking. An ATF firearms testified that the shell casings recovered from the scene of the carjacking and the shell casing recovered from the Fizer Avenue shooting had been fired by the Ruger, 9mm, semiautomatic handgun that had been recovered in the field close to Mr. Johnson.

Mr. Johnson was never mentioned or seen in any of the audio recordings, video recordings, or telephone conversations between either the undercover agent or the confidential informant and the other co-defendants. *Id.* at Page ID # 2343. According to the government, Mr. Johnson never entered the storage unit facility, but rather chose to stay outside of a locked gate instead of entering the premises. *Id.* During the takedown, the ATF photographed all of the individuals on the scene that they stopped that night, including Danner and Agnew. *Id.* at Page ID # 2345. There

were no photographs of Mr. Johnson taken at the scene of the take down that night. *Id.* at Page ID # 2349. One of the individuals that the ATF stopped and photographed that night, who they initially believed was a co-conspirator, turned out to be an innocent gentleman who had just been working at a nearby Burger King and was walking home after finishing his shift. *Id.* at Page ID # 2346-48.

At trial, the victim of the carjacking, Rickey Stevenson ("Stevenson") testified that he knew Mr. Johnson, who he referred to as "P", from work. *Id.* at Page ID # 2386-88. Stevenson is a convicted felon and has a history of domestic violence. *Id.* at Page ID # 2396-97.

Stevenson testified that Mr. Johnson called him and asked for a ride. Stevenson then picked "P" and his brother-in-law up and then drove to purchase some marijuana. *Id.* at Page ID # 2389-90. "P" was in the front passenger seat of the car and the brother-in-law in the back. *Id.* After purchasing the marijuana, the passengers swapped seats. *Id.* at Page ID # 2390. He testified that when he came to a stop, they "just made real fast moves, just draw down on me." *Id.* The brother-in-law was trembling with his gun, so Stevenson got out of the car "before his scary self shoot me." *Id.* at Page ID # 2391. Stevenson claimed that P climbed over the back seat, at which time Stevenson saw the gun with a silver top on it. *Id.* at Page ID # 2391. "P" looked at Stevenson, got out of the car, and began to shoot at him. *Id.* P and the brother-in-law then drove off in the car. *Id.* at Page ID# 2393.

On cross examination, Stevenson testified that he did not remember the exact words that were exchanged during the encounter. *Id.* at Page ID # 2395-96. He admitted that he was going to purchase marijuana on that day, and he does use marijuana. *Id.* at Page ID # 2396. Stevenson testified that he had not used any marijuana or alcohol on the date of the encounter. *Id.* Stevenson testified that he had not spent time with "P" outside of work until that date and that "P" initiated the phone call and marijuana purchase plan. *Id.* at Page ID # 2397.

Officer Cisneros responded to Mr. Stevenson's call. While at the scene of the carjacking, Officer Cisneros located two 9-millimeter shell casings, which were entered into evidence trial. *Id.* at Page ID # 2484-86. On cross-examination, Cisneros indicated that he prepared a report of this incident, pursuant to his training as an officer. *Id.* at Page ID # 2490. Officer Cisneros testified that he had been trained to include all relevant and important information in his incident reports. *Id.*

Government counsel objected to defense counsel questioning Officer Cisneros about his perception and understanding of the relative locations of the two individuals involved in the carjacking on the grounds of hearsay. *Id.* at Page ID # 2491. The objection was sustained, and defense counsel was not permitted to question Cisneros about Cisneros' understanding of the location of the individuals involved in the carjacking that Mr. Stevenson had provided to him. The district court, in not permitting this question, cited concern for confusing the jury and lack

of foundation stating that defense counsel had not laid the foundation when questioning Mr. Stevenson. *Id*. at 2493.

At the conclusion of a six (6) day jury trial, Mr. Johnson was found guilty of (1) one count of carjacking, (2) one count of using a firearm during and in relation to a crime of violence, (3) one count of being a felon in possession of a firearm, and (4) conspiring to possess with the intent to distribute five kilograms or more of cocaine. The Jury found him not guilty, however, of two conspiracies to commit Hobbs Act robberies, two counts for using a firearm during and in relation to a crime of violence, and two counts for being a felon in possession of a firearm. Mr. Johnson was sentenced to 371 months of imprisonment.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant the Petition because the Sixth Circuit's Decision Failed to Apply Settled Law from this Court's Decisions Regarding the Exclusion of Hearsay.

In applying the Rules of Evidence and affirming the exclusion of the testimony, the Sixth Circuit failed to properly consider the trustworthiness of the excluded statements and failed to consider that application of the hearsay rule would deprive Mr. Johnson of his right to due process, his right to present a defense, his right to cross-examine witnesses, and his right to a fair trial. This analytical failure cannot be squared with *Chambers v. Mississippi*, 410 U.S. 284 (1973) and its progeny.

Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284 302 (1973). In the exercise of this right, both the accused and the prosecution must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. *Id.* Notwithstanding the applicability of the rule of evidence excluding hearsay, exceptions have developed that allow the introduction of evidence which is likely to be trustworthy. *Id.* The testimony that the district court excluded was critical to Mr. Johnson's defense and bore persuasive assurances of its trustworthiness. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

This Court and other courts have followed that analysis in numerous other cases. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) ("[T]he Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote . . . ."); *Kubsch v. Neal*, 838 F.3d 845, 862 (7th Cir. 2016) ("*[D]ue process demands that evidence rules must be overridden in a narrow set of circumstances.*" (emphasis added)); *United States v. Hurn*, 368 F.3d 1359, 1363 n.2 (11th Cir. 2004) ("[T]he fact that a particular rule of evidence requires

the exclusion of certain evidence is not dispositive, as particular applications of a generally valid rule may unconstitutionally deny a defendant his rights under the Compulsory Process or Due Process Clauses."); *Lunbery v. Hornbeak*, 605 F.3d 754, 761 (9th Cir. 2010) (finding a *Chambers* violation where "[t]he state court[s] excluded as hearsay Rory Keim's testimony that Henry Garza, dead at the time of Kristi's trial, had admitted that his partners had murdered Charlie Bateson in error."); *Harris v. Thompson*, 698 F.3d 609, 635 (7th Cir. 2012) ("*Chambers* shows that 'if the defendant tenders vital evidence the judge cannot refuse to admit it without giving a better reason [than] that it is hearsay.'" (quoting *Rivera v. Director, Dep't of Corrections*, 915 F.2d 280, 281–82 (7th Cir. 1990)); *Taylor v. Curry*, 708 F.2d 886, 891 (2d Cir. 1983) (citing *Chambers* and explaining that "[i]t necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."); *United States v. Veltmann*, 6 F.3d 1483, 1493 (11th Cir. 1993) (despite the fact that the evidence was perhaps inadmissible as cumulative, "its import was such that exclusion violated defendants' right to put on a defense.").

In the case at bar, however, the Sixth Circuit violated the rule from *Chambers* by mechanistically applying the hearsay rule to limit defense counsel's cross-examinaton of Officer Cisneros finding that defense counsel had not laid a foundation for this line of questioning. Mr. Johnson hoped to elicit testimony from

officer Cisneros that would reveal a discrepancy between the way Mr. Stevenson had described the location of the car's occupants during the carjacking and how he had described the same scene at trial. Mr. Johnson intended to use that inconsistency to cast doubt on Mr. Stevenson's credibility as a witness. The Sixth Circuit found, however, that Mr. Johnson has failed to question Mr. Stevenson about his prior inconsistent statements and affirmed the trial court's limitation of the scope of cross-examination on the grounds that "[e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it." *See* Sixth Circuit decision at 12 (quoting Fed. R. Evid. 613(b)). The Sixth Circuit quoted *Chambers* in support of the exclusion stating "the accused must comply with established rules of procedure and evidence." *Id.* (quoting *Chambers*, 410 U.S. at 302). The Sixth Circuit failed to recognize the true holding in *Chambers* that provides that where constitutional rights directly affecting the ascertainment of guilt are implicated, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

The Sixth Circuit further defied the rule from *Chambers* when it reviewed for plain error whether the anticipated testimony could be admitted under the residual exception to hearsay, Fed. R. Evid. 807, as a present sense impressions, Fed. R. Evid. 803(1), or as an excited utterance, Fed. R. Evid. 803(2) on the grounds that "Johnson

did not press these arguments at trial." Sixth Circuit Decision at 12. By limiting the consideration of these hearsay objections to plain error review, the Sixth Circuit once again ignored the *Chambers* rule that the hearsay rule may not be applied mechanistically to defeat the ends of justice. *Id.* at 302.

The Sixth Circuit avoided the constitutional issue entirely by affirming the straightforward application of the Rules of Evidence. The decisions cited above make clear, however, that when hearsay evidence is at issue in a criminal case, the analysis cannot begin and end merely with the Rules of Evidence. Since that is exactly what the Sixth Circuit did in this case, the grant of this Petition is necessary to resolve the conflict.

The Sixth Circuit erroneously concluded that the district court did not abuse its discretion by sustaining a hearsay objection and limiting Mr. Johnson's cross-examination of responding officer Cisneros. In reaching this conclusion, the Sixth Circuit focused entirely on the mechanical application of the hearsay rule by finding that the exclusion of this testimony was not an abuse of discretion since Mr. Johnson had failed to lay the proper foundation when cross-examining Mr. Stevenson. The Sixth Circuit failed to follow the rule from *Chambers* and failed to consider properly how the application of this exclusionary rule defeated the ends of justice and deprived Mr. Johnson of his right to due process, his right to present a defense, his

right to present evidence on his own behalf, and his right to confront the witnesses against him thereby rendering this trial fundamentally unfair.

This Court has explained how essential the right of cross-examination is in a criminal trial setting as follows:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970); *Bruton* v. *United States*, 391 U.S. 123, 135-137 (1968). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E. g., Mancusi* v. *Stubbs*, 408 U.S. 204 (1972). But its denial or significant diminution calls into question the ultimate "'integrity of the fact-finding process'" and requires that the competing interest be closely examined. *Berger* v. *California*, 393 U.S. 314, 315 (1969).

Chambers, 410 U.S. at 295. Since the Sixth Circuit completely ignored the *Chambers* and its progeny, the grant of this Petition isnecessary to resolve the conflict.

II. This Court Should Grant the Petition Because the District Court's Instructions were Confusing and Misleading.

When confronted with the possibility that jurors misunderstood instructions on a critical issue, this Court has found that those instructions violate the Constitution. *See Shafer v. South Carolina*, 532 U.S. 36, 53 (2001) (reversing where trial court's instructions "did nothing to ensure that the jury was not misled"); *Mills*

v. Maryland, 486 U.S. 367, 381 (1988) (reversing where there was "at least a substantial risk that the jury was misinformed"); *Sandstrom v Montana*, 442 U.S. 510, 519 (1979) (reversing while acknowledging that "[w]e do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive").

Here, the district court failed to advise the jury that in order to be found guilty the evidence had to show that Mr. Johnson was in possession of a firearm ***specified in the indictment***. The jury submitted both an oral and a written question to the court during its deliberations regarding its confusion over the firearm instruction. The jury wanted to know whether it had to find that Mr. Johnson possessed the Ruger that had been presented in evidence or could it convict if it found that Mr. Johnson had merely possessed any firearm. Nevertheless, the district court failed to clarify the jury's confusion and failed to inform the jury that it had to be the firearm specified in the indictment.

It is well established law that in order to be found guilty of being a felon in possession of a firearm, "the evidence must prove that the defendant possessed the same handgun 'identified in the indictment.'" *United States v. Grubbs*, 506 F.3d 434, 439 (6th Cir 2007) (quoting *United States v. Arnold*, 486 F.3d 177, 183 (6th Cir. 2007)); *see also United States v. Schreane,* 331 F.3d 548, 560 (6th Cir. 2003) (defendant must knowingly possess the firearm "specified in the indictment").

Indeed, the Sixth Circuit's own pattern jury instruction provides, in pertinent part, as follows:

> (B) Second: That the defendant, following his conviction, knowingly possessed a firearm [the ammunition] *specified in the indictment*.

Sixth Circuit Pattern Jury Instruction 12.01.

In the case at bar, at the conclusion of the proof, the district court inquired of the parties if there were any jury instructions that the parties wanted to submit to the court for consideration. *See* Trial Transcript, R. 307, page ID # 2933. In response to this inquiry, defense counsel explained that earlier that day he had emailed proposed jury instructions to the court's chambers email address and had basically requested that the court use the model jury instructions when instructing the jury. *Id.* The district court advised that it would review all of Defendant's requested instructions. *Id.* at Page ID # 2934, lines 12 – 13. Defendant's requested jury instruction was based on the Sixth Circuit's Pattern Jury Instruction 12.01 Firearms – Possession of Firearm by Convicted Felon (18 U.S.C. 922(g)(1)).

With respect to Count IV, Mr. Johnson requested that the firearm that was specified in the indictment be named in the instruction namely a Ruger, 9mm, semiautomatic handgun. The district court decided not to use Mr. Johnson's requested jury instruction, but instead, chose to use its own.

Unfortunately, the district court's instruction failed to instruct the jury that in order to be guilty Mr. Johnson had to have possessed a firearm that had been specified in the indictment. *See* Closing Instructions, R. 283, Page ID # 1737 – 38. Rather, the district court's instruction erroneously instructs the jury that the defendant was required to possess the firearm "*on the dates* specified in the indictment." *Id.* (emphasis added). That is, "the phrase 'specified in the indictment' modified 'the dates' instead of 'a firearm.'" *See* Sixth Circuit decision at 9. The pertinent part of the district court's jury instruction reads as follows:

> (2) that the defendant, following his conviction, knowingly possessed a firearm *on the dates specified in the indictment*;

Id. at Page ID # 1737 (emphasis added).

A plain reading of the district court's instruction erroneously informs the jury that a defendant can be found guilty as long as he possessed ***any*** firearm on the *dates* specified in the indictment. Thus, the district court's original jury instruction fails to make it clear to the jury that Mr. Johnson could only be convicted if he knowingly possessed a firearm specified in the indictment. *See* Closing Instructions, R. 283, Page ID # 1737 – 38.

The court's instruction clearly confused the jury because during deliberations the jury asked two questions about the firearm. The first question was asked orally while the jury was in the box for the court to answer an unrelated written question

that the jury had submitted previously to the court. The oral jury question was as follows:

> **JUROR:** It does. I didn't get to write another question that we just had as we were waiting, and I think it's more to understanding the law and the charges, but it's related to just firearms, just the possession of a firearm and being a felon in those particular charges. Are you saying any gun in his possession or a gun as it says, or are we actually talking about the Ruger that he has to have because in the charges it says the Ruger and describes it, but in the verdict note it just says, is he guilty of a gun, for instance, and some instances where he may have had a gun, but we do not know if it was the Ruger.

See Trial Transcript, R. 308, Page ID # 2950-51.

The district court chose not to answer the oral question, however, but instructed the jury to submit its question in writing. Thereafter, the jury submitted the following written question to the Court:

> "In the indictment, related to the firearm, are we to be specific about the Ruger or possession of a or any firearm? Example, Counts 9 and 10."

See Trial Transcript, R. 308, Page ID # 2953.

In response to this question, defense counsel specifically requested that the court say, "it has to be the firearm specified in the indictment." *Id.* at Page ID # 2954. Instead of using that language however, the court vaguely replies to the jury

> And to answer that question I am going to

5 refer you to the language of the indictment. The
6 indictment sets out what the exact charge is against the
7 defendant. So look to the charges in the indictment, the
8 firearm charges or whatever to know about the firearm.
9 Do you understand what I am saying?

Id. at page ID # 2958.

The problem with this response, however, is that with respect to Count IV of the Fifth Superseding Indictment the defendant is charged with possessing "***a*** Ruger, 9mm, semiautomatic handgun." *See* Fifth Superseding Indictment, R. 225, Page ID # 883 (emphasis added). Thus, the court's vague instruction that the jury should just "look to the charges in the indictment . . . to know about the firearm" does not advise the jury that it must be the firearm specified in the indictment, but rather, allows the jury to infer that it could be ***any*** Ruger, 9mm, semiautomatic handgun because the indictment only says "*a* Ruger, 9mm, semiautomatic handgun." Thus, not only was there evidence that the jury was confused over a critical issue, but the district court's supplemental instruction led to further jury confusion instead of clarifying the legal issue.

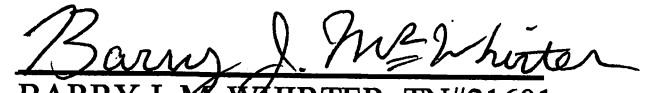
In finding there was no error, the Sixth Circuit found that the district court's response of "I'm going to refer you to the language of the indictment . . . .So each of the firearms charges, just refer to the language in the indictment" is "nearly the same as the Pattern Jury Instruction on this point: 'That the defendant . . . knowingly possessed a firearm specified in the indictment.'" *See* Sixth Circuti Decision at 9.

This consluion simply igores the reality that an indictment that merely states "*a* Ruger, 9mm, semiautomatic handgun" can be interpreted to mean *any* Ruger, 9mm, semiautomatic handgun and not necessarily the Ruger, 9mm, semiautomatic hangun specified in the indictment. The Sixth Circuit failed to recognize that the district court's instruction did nothing to ensure that the jury was not mislead, and it also failed to recognize that there was a substantial risk that the jury was misinformed. *Shafer*, 532 U.S. at 53 (reversing where trial court's instructions "did nothing to ensure that the jury was not misled"); *Mills*, 486 U.S. at 381 (reversing where there was "at least a substantial risk that the jury was misinformed").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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