No. 22-_____

In The
Supreme Court of the United States

JAMES D. PIERON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIK W. SCHARF*
ROBERT L. BRONSTON
SCHARF APPELLATE GROUP
1395 Brickell Avenue
Suite 800
Miami, FL 33131
(305) 665-0475
(786) 382-7611
erik@appealsgroup.com

Counsel for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

I. Whether the Sixth Circuit's ruling merits summary reversal where the court found constitutional error but deemed it harmless under the far less searching preponderance-of-the-evidence standard applied to non-constitutional errors.

II. When a district court erroneously refuses to instruct the jury about the effect of the statute of limitations in a criminal trial, is the proper remedy on direct review of a conviction:

> (1) to reverse for a new trial unless the error is deemed harmless in accordance with the "beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U.S. 18 (1967) (the rule suggested by this Court's precedent but not yet applied in any circuit court),
>
> (2) to presume prejudice, reverse the conviction, and conduct a new trial (the rule in the Fifth, Eleventh, and D.C. Circuits), or
>
> (3) to reverse for a new trial unless the error is deemed harmless in accordance with the preponderance-of-the-evidence standard governing non-constitutional errors (the rule in the Sixth Circuit)?

LIST OF PARTIES

James D. Pieron, Jr., Petitioner.

United States of America, Respondent.

RELATED PROCEEDINGS

1. *United States of America* v. *James D. Pieron, Jr.*, Case No. 18-20489 (E.D. Mich.) (Aug. 20, 2021)

2. *United States of America* v. *James D. Pieron, Jr.*, Case No. 21-2899 (6th Cir. Aug. 30, 2022)

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Petitioner James D. Pieron, Jr., respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 30, 2022.

OPINIONS BELOW

The opinion of the court of appeals, which is unreported in the Federal Reporter but can be found at 130 A.F.T.R.2d 2022-5813, 2022-2 USTC P 50,221, 2022 WL 3867562 (6th Cir. Aug. 30, 2022), is set out at pp. 1a-7a of the Appendix. The district court's opinion denying Pieron's post-trial motions can be found at 126 A.F.T.R.2d 2020-7182, 2020 WL 7353650 (E.D. Mich. Dec. 15, 2020), and is set out at pp. 9a-43a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on August 30, 2022. On November 16, 2022, Justice Kavanaugh extended the deadline for filing this petition until January 27, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 3 of the United States Constitution provides in pertinent part:

> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

STATEMENT OF THE CASE

I. Factual Background

James D. Pieron, Jr. ("Pieron") is a U.S. citizen and decorated U.S. Army veteran who served during the first Gulf War. ECF 194-7, PageID.4732 (Defendant's Sentencing Memorandum, Ex. 6). With an undergraduate degree in computer programming, he has designed currency trading programs and started multiple businesses. ECF 53, PageID.700-01; ECF 194-11, PageID.4749.

From 1998-2010 Pieron lived in Switzerland and paid Swiss taxes. App. 1a. Despite living abroad for 12 years, he learned he was required to file returns in the United States. Pieron sought the help of American Tax Solutions to prepare his U.S. tax returns for the years

2008 and 2009. App. 1a-2a. To ensure the returns' accuracy, he also sought a second opinion from CPA Kim Pavlik. App. 2a. In January 2011, Pieron submitted the returns prepared by American Tax Solutions, which stated that he owed the Government $267,829 and $125,490, respectively. App. 2a. Pieron did not include payment with the returns but later, in January 2012, filed amended returns, prepared by CPA Pavlik, that stated that the amount owed was even more, $365,082 for 2008 and $74,272 for 2009. App. 2a. Pieron also submitted a request for an installment agreement where he offered to pay $1,500 per month to settle his tax liabilities. App. 2a. Despite no response from the Internal Revenue Service ("IRS"), Pieron paid $1,500 per month for a total of six months. App. 2a. Pieron continued paying down his liabilities to the IRS by allowing excess regular withholdings to be sent to the agency. Between 2011 and 2016, Pieron had a total of over $72,000 credited against his 2008 and 2009 tax years. ECF 194-9, PageID.4744 (Defendant's Sentencing Memorandum, Ex. 8).

Given the complexities of the tax code and Pieron's unique situation, CPA Pavlik thoroughly examined Pieron's tax liability. By early 2013, Pavlik had concluded that there was a legitimate argument under the tax code that Pieron owed nothing for the years in question. Pavlik communicated this to Pieron and the IRS agent who interviewed Pavlik on May 15, 2013. ECF 146, PageID.3553-54 (Testimony of K. Pavlik).

In early 2014, based upon new advice from Pavlik, Pieron filed an amended 2011 return that resulted in

no current outstanding tax liability to include years 2008 and 2009. ECF 191-30, PageID.4573 (amended 2011 return); ECF 54, PageID.869-71 (Testimony of D. VanConnett). Additionally, CPA Pavlik, on behalf of Pieron, filed an "Offer to Compromise – Doubt as to Liability," offering the IRS $30,000 to resolve his tax liabilities for the years 2007, 2008, 2009, 2010, and 2011. App. 2a. The IRS did not respond to that proposal either. App. 2a.

Unbeknownst to Pieron, or to his accountants with power of attorney, the IRS had placed a "freeze code" on his account. Despite Pieron's efforts to reach a resolution through an installment agreement, compromise offer, and even an amended tax return that showed no liability, the IRS remained silent. Notwithstanding numerous attempts to contact the agency through logged telephone calls and certified letters, there was no response for a period of several years. ECF 54, PageID.878-81, 885-86 (Testimony of D. VanConett); ECF 146, PageID.3555 (testimony of K. Pavlik); ECF 191-7, 191-8, 191-23, 191-24, PageID.4211, 4213, 4418-19 (Exs. 1007, 1008, 1026, 1027).

II. Proceedings Below

1. As the district court observed, the pre-indictment history in this case is rather "unusual" in that "it remains completely unclear what steps, if any, the IRS took to resolve Defendant's tax liabilities before the criminal investigation." ECF 189, Page ID.4121 (Order Denying Motion to Dismiss). As a result, the IRS's first

substantive response to Pieron's many communications came in the form of an indictment.

The Government indicted Pieron for "willfully attempt[ing] to evade and defeat the payment of income taxes due and owing by him to the United States of America for calendar years 2008 and 2009, by committing affirmative acts of evasion." 26 U.S.C. § 7201; see also App. 2a-3a. Pieron then paid $870,117.14, the full amount (with penalties and interest) that the Government said he owed. App. 3a. Pieron sent a cover letter with the checks, saying they were "tendered as a cash bond to be applied to [his] outstanding federal tax liabilities, if any" for 2008 and 2009. App. 3a.

The statute of limitations for violating 26 U.S.C. § 7201 is six years. See 26 U.S.C. § 6531(2). Pieron and the Government entered into an Agreement to Toll the Statute of Limitations making the operative date for statute of limitations purposes January 9, 2012. App. 49a-51a.

The Government continued its prosecution. App. 3a. In August 2018, it filed a Bill of Particulars, which included 19 paragraphs of allegations regarding Pieron's evasion of his tax liabilities. App. 52a-58a. Of those 19 paragraphs, only the final three alleged actions committed after January 9, 2012: that Pieron provided false information with his request for an installment agreement, that he failed to provide full disclosure on FBAR forms, and that he provided false information concerning his assets on his offer to compromise. App. 56a-58a. Conversely, fully 16 of the

paragraphs concerned allegations of Pieron's actions or inactions ***before*** January 9, 2012, including claims that he had numerous transfers of large amounts of money between his personal and/or business accounts and had made personal purchases with funds that could have been used to pay taxes, as well as a claim that he falsely stated that he was not a U.S. citizen. App. 52a-56a.

Pieron raised his statute of limitations defense at his first opportunity, filing a pretrial Motion to Dismiss the Indictment on October 12, 2018. ECF 14, Page ID.44. Among other grounds, it sought dismissal because Pieron's returns were submitted, and any arguably evasive acts had occurred, outside the statute of limitations. *Id*. at PageID.51-52. The Government responded that "[b]ased on these events and other evidence that the government anticipates presenting at trial, a jury will be able to find that Pieron committed affirmative acts of evasion within the six-year statute of limitations period, as extended by the tolling agreement, in Pieron's case." ECF 23, PageID.107 (Response of the U.S. to Motion to Dismiss Indictment).

In addition, counsel for Pieron pressed the statute of limitations issue by drafting and submitting proposed jury instructions dealing with the issue. One week before trial, Defendant's Proposed Jury Instructions were submitted to the Court and the Government. The proposed jury instruction on the statute of limitations was Instruction No. 1. It provided that, to convict the defendant, the jury must find, beyond a reasonable doubt, that he committed an affirmative

act of tax evasion after January 9, 2012. ECF 68-2, PageID.1440-42.

The trial proceeded, and the Government introduced evidence showing, *inter alia*, transfers of funds between companies associated with Pieron and that Pieron enjoyed use of corporate assets at some of these companies, most notably a Mercedes Benz SUV. Most of the evidence, consistent with the Bill of Particulars, concerned events occurring ***outside*** the statute of limitations. At the charge conference, counsel for Pieron pressed his Instruction No. 1 on statute of limitations but was denied. The district court justified omitting the instruction on the basis that "I do not understand there to be disputes of fact concerning events as outlined in the bill of particulars that would have been within – actionable within the statute of limitations, and for that reason, I've elected not to furnish that instruction to the jury." App. 47a.

Pieron also filed a Rule 29 Motion arguing that the elements of the offense had not been proven; it was denied. ECF 41, PageID.245 (Motion for Judgment of Acquittal); ECF 55, PageID.983. After the jury convicted him, Pieron renewed his motion for a judgment of acquittal and sought a new trial. He argued for each based, *inter alia*, on the failure of the Government to prove an affirmative act of evasion after January 9, 2012 (the effective statute of limitations cutoff date) and on the court's error in not submitting the statute of limitations issue to the jury. ECF 66, PageID.1262 (Motion for Judgment of Acquittal); ECF 68, PageID.1268 (Motion for New Trial). Each of

these motions was eventually denied. ECF 172, PageID.3935. Pieron was then sentenced to imprisonment for fifteen months, an assessment of $100, and two years of supervised release. App. 3a; ECF 195.

2. Pieron appealed to the Sixth Circuit, raising arguments about the sufficiency of the evidence at his trial, failure of the Government to abide by the Taxpayer's Bill of Rights, and the district court's failure to provide an instruction on the statute of limitations. The Sixth Circuit affirmed his conviction. App. 1a-7a.

On the statute of limitations argument, the court acknowledged that "[m]ost of the actions alleged in the government's Bill of Particulars took place before that [*i.e.*, the statute of limitations] date" (App. 6a) and that "Pieron's proposed instruction correctly stated" the law. *Id*. Nevertheless, the court concluded that the district court's error was harmless. App. 6a (citing *Skilling* v. *United States*, 561 U.S. 358, 414 (2010)). Notwithstanding the fact that the district court's error implicated Pieron's Fifth and Sixth Amendment rights, the court applied the harmless error test applicable to non-constitutional errors, finding that "[t]he government has shown by a preponderance of evidence that the district court's decision not to give Pieron's proposed instruction neither affected nor 'substantially swayed' the verdict." App. 6a-7a (quoting *United States* v. *Kettles*, 970 F.3d 637, 643 (6th Cir. 2020)). The court appeared convinced by the fact that the Government in its closing argument had relied upon certain evidence from 2012 and 2014. App. 6a. The court admitted that the Government in its closing argument had "also

emphasized several instances of evasive conduct before January 9, 2012." *Id*. Nevertheless, relying on the preponderance-of-the-evidence standard, the court affirmed the conviction. App. 6a-7a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW BECAUSE IT APPLIES THE WRONG HARMLESS ERROR STANDARD IN DISREGARD OF THIS COURT'S PRECEDENT

When a criminal defendant timely invokes a statute of limitations defense, the government becomes charged with the burden of proving beyond a reasonable doubt that the defendant committed his crime within the limitations period. At that point, the defendant has a Sixth Amendment right to have a jury decide that issue. If a district court refuses to instruct the jury on the statute of limitations in a case in which it is relevant, that is constitutional error, because it deprives the defendant to a right to jury trial on that issue. Under this Court's clear precedent, a defendant in those circumstances is entitled to a new trial unless the Government proves beyond a reasonable doubt to a reviewing court that the constitutional error did not contribute to the guilty verdict.

The Sixth Circuit radically departed from that precedent. Although the error in this case is indisputably of constitutional dimension, it employed the

harmless error test used for non-constitutional evidentiary errors, which relies on a preponderance-of-the-evidence standard. This Court should summarily reverse the judgment.

A. Constitutional Error Occurs When a Jury Has Not Been Instructed on the Statute of Limitations and its General Guilty Verdict May Have Been Based on Conduct Before the Limitations Period

This Court has determined that, because criminal statutes of limitations are an affirmative defense, no burden is imposed on the Government unless the defendant takes steps to raise the defense. See *Smith* v. *United States*, 568 U.S. 106, 112 (2013). Once the defendant invokes the statute of limitations, however, the situation changes. As this Court has explained:

> [A] statute of limitations defense becomes part of a case only if the defendant puts the defense in issue. When a defendant presses a limitations defense, the Government ***then*** bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the limitations period or by establishing an exception to the limitations period.

Musacchio v. *United States*, 577 U.S. 237, 248 (2016) (citing *United States* v. *Cook*, 17 Wall. 168, 179 (1872)) (emphasis in original). In other words, once properly invoked, compliance with the statute of limitations becomes an additional element of the crime that the

Government is required to prove beyond a reasonable doubt.[1]

Once the Government bears the burden of proving compliance with the statute of limitations as part of the underlying offense, the defendant has a Fifth and Sixth Amendment right to have the jury – rather than a judge – determine whether the crime has been committed within the limitations period:

> The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

---

[1] This Court did not specify the "beyond a reasonable doubt" standard in *Musacchio*, but the courts of appeals have uniformly held that is the appropriate burden. In this case, for example, Pieron's proposed jury instruction provided that "[i]f you do not find, beyond a reasonable doubt, that the defendant committed an affirmative act of tax evasion after January 9, 2012, you must find him not guilty." ECF 68-2, PageID.1440-42. The Government never disputed that was an accurate statement of the law, and the Sixth Circuit found that the law in the instruction was "correctly stated." App. 6a. The other courts of appeals agree. See, *e.g.*, *United States* v. *Piette*, 45 F.4th 1142, 1163 (10th Cir. 2022) ("It is therefore settled that if a defendant invokes the statute of limitations as a defense, the burden shifts to the government to establish the timing of the offense beyond a reasonable doubt."); *United States* v. *Pursley*, 22 F.4th 586, 591-92 (5th Cir. 2022) (finding that the instruction "[f]or you to find the defendant guilty, the government must prove beyond a reasonable doubt that the offense charged was committed within 6 years of the indictment" would be substantially correct once the instruction included a temporary suspension of the statute of limitations under the facts of that case).

> jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

United States v. *Gaudin*, 515 U.S. 506, 509-10 (1995) (citing *Sullivan* v. *Louisiana*, 508 U.S. 275, 277-78 (1993)); see also *id*. at 522-23 ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."); *In re Winship*, 397 U.S. 358, 364 (1970).

When a jury is not instructed about the statute of limitations and it returns a general guilty verdict based on evidence of potential incidents both before and after the statute of limitations date, there is no way of knowing whether the jury found that the crime occurred within the limitations period, which would render the verdict legally proper, or that it occurred outside the limitations period, which would render the verdict legally flawed. This Court has recognized for more than half a century that such a state of epistemic doubt represents constitutional error.

The leading case in this area is *Yates* v. *United States*, 354 U.S. 298 (1957). *Yates* involved 14 defendants – the leaders of the Communist Party in California – who were convicted of participating in a multi-object conspiracy, extending for more than a decade, in violation of the Smith Act. *Id*. at 300-02. The Court determined that one of the objects of the conspiracy – involving "organizing" the Communist Party – was

barred by the relevant statute of limitations. See *id*. at 312 ("[S]ince the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the 'organizing' charge, and required the withdrawal of that part of the indictment from the jury's consideration."). The jury had returned a general verdict, and the Court therefore was left in doubt as to whether the jury had convicted the defendants on the legally defensible "advocacy" object of the conspiracy or the time-barred "organizing" object. See *id*. at 311-12 ("we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy', rather than the 'organizing' objective of the alleged conspiracy."). The Court articulated the governing rule of law:

> In these circumstances, we think 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 (citing, *e.g.*, *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931)).

B. On Direct Review, Constitutional Errors Require Reversal Unless They Are Deemed Non-Structural and Found to Be Harmless Beyond a Reasonable Doubt

This Court resolved the question whether constitutional error could ever be harmless in *Chapman* v. *California*, 386 U.S. 18 (1967). Having determined "that there may be some constitutional errors which, in the setting of a particular case, are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction" (*id*. at 22), the Court set about fashioning a test for when constitutional errors could be deemed harmless. Looking back to the prior case of *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), for guidance, the Court believed it was necessary to "requir[e] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. The Court therefore announced its holding: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id*.

Since *Chapman*, this Court has systematically divided constitutional errors into two categories: "structural" errors, which are not subject to harmless error review, and non-structural errors, which are reviewed for harmless error under the *Chapman* standard. Examples of structural errors include a complete denial

of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927), racial discrimination in the selection of a grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), denial of self-representation at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984), denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984), and a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Most errors fall into the category of non-structural errors subject to review under the *Chapman* standard. Errors of this type include erroneous jury instructions, see *Rose* v. *Clark*, 478 U.S. 570 (1986), the admission at trial of coerced confessions, see *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), and the omission of an element of a crime from the jury instructions, see *Neder* v. *United States*, 527 U.S. 1 (1999).

Under these precedents, the direct review of constitutional errors can lead to one of only two outcomes: automatic reversal as structural error, or harmless error review under the *Chapman* standard. The limitation to cases on direct review is intentional; this Court has held that constitutional errors raised on collateral review are not subject to *Chapman* review, but rather to review under the less rigorous standards announced in *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). See *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993) ("The *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes

the considerations underlying our habeas jurisprudence."). On direct review, however, the least favorable outcome for a defendant victimized by constitutional error is harmless error review under the *Chapman* standard.

C. This Court's Precedents Provide that *Yates* Errors Must be Reviewed Under the *Chapman* Standard

For many years after *Chapman* was decided, *Yates* errors were assumed to be structural. In *Griffin* v. *United States*, 502 U.S. 46, 59 (1991), this Court reviewed a general verdict in a multiple-object conspiracy where there was insufficient evidence to sustain a conviction as to one of the objects. The petitioner argued that the situation was automatically reversible as *Yates* error, but this Court pointed to its prior precedent of *Turner* v. *United States*, 396 U.S. 398, 420 (1970), in which it had held that a conviction on a general verdict of violating a statute listing several alternate ways of completing the crime listed in the conjunctive (*i.e.*, "knowingly purchasing, possessing, dispensing, and distributing heroin") would be sustained if the evidence was sufficient under any ***one*** of the ways listed in the statute. The Court decided the case by distinguishing between ***factual inadequacy***, which does ***not*** require reversal, and ***legal inadequacy*** – expressly including when a conviction is time-barred – which ***does*** require reversal:

> That surely establishes a clear line that will separate *Turner* from *Yates*, and it happens to

> be a line that makes good sense. Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law-whether, for example, the action in question is protected by the Constitution, ***is time barred***, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence, see *Duncan* v. *Louisiana*, 391 U.S. 145, 157 (1968).

Griffin, 502 U.S. at 59 (emphasis added).

The first indication that *Yates* errors might ***not*** be structural came in *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008) (*per curiam*). The Court didn't actually decide the issue based on an adversarial presentation; in *Hedgpeth* the respondent decided strategically not to argue that the error was structural because he believed he could have his relief affirmed based on a harmless error analysis. See *id*. at 58 ("The parties now agree that the Court of Appeals was wrong to categorize this type of error as 'structural.'"); *id*. at 61-62 ("Pulido now agrees with the State that the Court of Appeals erred by treating the instructional error in this case as structural, and that the required prejudice analysis should be governed by *Brecht*'s 'substantial

and injurious effect' standard."). The case had arisen on collateral review, however, so the Court did not apply the *Chapman* standard. It remanded for application of harmless error analysis under the *Brecht*/*Kotteakos* standard.

Because *Hedgpeth* was a *per curiam* opinion arising on collateral review in which the issue was assumed rather than litigated, it remained unclear whether *Yates* errors arising on direct review were subject to harmless error analysis under the *Chapman* standard. The Court answered that question in *Skilling* v. *United States*, 561 U.S. 358 (2010). In that case, the Fifth Circuit had assumed that the *Yates* error was structural, reading *Hedgpeth* as being confined to the collateral review arena. In a footnote towards the end of a lengthy majority opinion, this Court rejected that interpretation:

> That reasoning relied on the mistaken premise that *Hedgpeth* v. *Pulido*, 555 U. S. ___ (2008) (*per curiam*), governs only cases on collateral review. See 554 F.3d, at 543, n.10. Harmless-error analysis, we clarify, applies equally to cases on direct appeal.

Skilling, 561 U.S. at 414 n.46. After *Skilling*, then, this Court's precedents indicate that *Yates* error encountered on direct review should be evaluated for harmlessness under the *Chapman* standard.

D. The Sixth Circuit's Decision Disregards This Court's Precedent, and it Should Be Summarily Reversed

1. It is against this background of precedent that the Sixth Circuit evaluated Pieron's claim of error. There is no question of preservation in this case. Pieron raised the statute of limitations at every opportunity, he proffered a jury instruction on the issue, and the Sixth Circuit acknowledged that Pieron's instruction "correctly stated" the law. App. 6a. Nor is there any question that the instruction should have been given under the facts of this case. The court below correctly understood that "[m]ost of the actions alleged in the government's Bill of Particulars took place before that [*i.e.*, the statute of limitations] date" (*id.*) and that "in closing arguments, the government also emphasized several instances of evasive conduct before January 9, 2012." *Id*. The jury here was confronted with a morass of undifferentiated evidence that overwhelmingly occurred prior to January 9, 2012. The jury was never informed about the legal significance of the statute of limitations. The Government actively encouraged the jury to rely upon stale evidence by emphasizing it in closing arguments. And the jury returned a general guilty verdict. This is classic *Yates* error.

Nor can there be any doubt that the error in this case was of constitutional dimension. The failure to have a jury make a necessary finding on which the Government bore the burden of proof beyond a reasonable doubt violated Pieron's Fifth and Sixth Amendment rights. The Sixth Circuit had to have understood

that; the court recognized that it was dealing with *Yates* error, as it cited *Skilling* in its relatively brief analysis of harmless error. See App. 6a. *Skilling* itself characterized the holding in *Yates* as being that "***constitutional 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." *Skilling*, 561 U.S. at 414 (emphasis added).

Confronted with constitutional error, under this Court's precedents the Sixth Circuit was obligated to reverse the conviction and order a new trial unless it could find the error harmless beyond a reasonable doubt under the *Chapman* standard. That's not what the court did. Rather, it applied the far less searching test applicable to non-constitutional error. See App. 6a-7a (citing *United States* v. *Kettles*, 970 F.3d 637, 643 (6th Cir. 2020)). *Kettles*, relied on by the Sixth Circuit as the standard for the harmless error test it applied, involved routine evidentiary error. See *Kettles*, 970 F.3d at 643. The *Kettles* court was quite clear that it was articulating the test applicable to the "harmlessness for ***nonconstitutional*** evidentiary errors in a criminal case." *Id*. (emphasis added). The *Kettles* court took its cue from this Court's *Kotteakos* test. See *id*. ("The Supreme Court, meanwhile, has instructed that we may not grant a new trial on the basis of non-constitutional trial error where we have a 'fair assurance' that the verdict was ***not*** 'substantially swayed' by the error.") (quoting *Kotteakos*, 328 U.S. at 765) (emphasis in original). By applying the far less rigorous harmless error test intended for non-constitutional errors to the

clear constitutional error in this case, the Sixth Circuit radically departed from the requirements imposed by this Court's settled precedent.

2. Summary reversal is appropriate "to correct" a lower court's "clear misapprehension" of governing law. *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (*per curiam*). Summary reversal allows this Court to correct a "plain departure from prior Supreme Court precedent" without "having to go through full briefing and oral argument only to reaffirm a legal rule already announced." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12 (c), 5-46 (11th ed. 2019). As Justice Gorsuch observed in dissent, "[s]ummary reversal is usually reserved for cases where 'the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" *Pavan* v. *Smith*, ___ U.S. ___, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (quoting *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)).

This case meets all the requirements for summary reversal. This Court has announced a clear rule of law – failure to charge on the statute of limitations under circumstances like these (*i.e.*, facts present the issue, issue is preserved, direct review) requires reversal unless the error is found to be harmless beyond a reasonable doubt under the *Chapman* standard. The facts here are not materially in dispute – the Sixth Circuit opinion acknowledged that Pieron's instruction correctly stated the law, that the majority of the Government's evidence concerned the time period before the limitations date of January 9, 2012, and that the

Government in its closing argument expressly asked the jury to rely on the stale evidence by repeatedly emphasizing it. See App. 6a-7a. And the decision below is clearly wrong – the court expressly applied the harmlessness standard for non-constitutional error to the error here, which is indisputably of constitutional dimension.

It is not necessary for the Court to issue a GVR order to allow the Sixth Circuit to apply the *Chapman* standard in the first instance. The court's own analysis demonstrates that the error here could not survive *Chapman* review. That would require the Government "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. When sixteen of the nineteen incidents listed in the Government's Bill of Particulars occurred before January 9, 2012, and the Government ***emphasized*** those stale incidents in its closing, ***inviting the jury to convict on that basis***, there is no way that any rational reviewing court could conclude ***beyond a reasonable doubt*** that the error did not contribute to Pieron's guilty verdict. Summary reversal is appropriate.

II. NOTWITHSTANDING THIS COURT'S PRECEDENT, THERE IS A CIRCUIT CONFLICT REGARDING HOW TO DETERMINE HARMLESS ERROR ON DIRECT REVIEW WHEN A DISTRICT COURT ERRONEOUSLY REFUSES TO PROVIDE A STATUTE OF LIMITATIONS INSTRUCTION

Although this Court has articulated a clear rule for evaluating *Yates* errors, the lack of adversarial presentation in *Hedgpeth* and the extension of that holding in a footnote in *Skilling* appear to have left the lower courts in confusion. Just last year, two cases were decided by the courts of appeals with nearly identical facts, but the courts applied very different analysis and reached very different conclusions. The Fifth Circuit assumed that the error was prejudicial and reversed and remanded for a new trial without conducting any type of harmless error analysis. See *United States* v. *Pursley*, 22 F.4th 586 (5th Cir. 2022). The Sixth Circuit reviewed for harmlessness under a clearly inappropriate standard. See App. 1a-7a. Neither court implemented the rules imposed by this Court's precedent. Because of the confusion of the courts of appeals on this issue, this Court needs to clarify the governing rule. If it does not wish to state those rules in a *per curiam* opinion summarily reversing the decision below, this case presents an ideal vehicle for resolving the rules governing failure to instruct on statutes of limitation, a form of *Yates* error in which conducting a principled harmless error review is particularly difficult.

A. This Court Deems Failure to Instruct on Statute of Limitations to Be a Non-Structural Error That Must Be Reviewed for Harmlessness Under the *Chapman* Standard

As set forth above, this Court's precedents establish the proper mode of analysis for analyzing error of the type involved in this case. When there is no way of knowing whether the jury convicted on the basis that a crime took place prior to the limitations date, that is *Yates* error. Under *Skilling*, that constitutional error is deemed non-structural and may be reviewed for harmlessness. Under *Chapman*, that harmless error review must be conducted beyond a reasonable doubt.

But although this Court has articulated a clear rule of law to govern this type of error, the courts of appeals do not appear to have implemented it. Rather, as discussed below, they have either presumed prejudice (effectively treating the error as structural) or applied a lower standard for harmless error review. For that reason, this Court's review is necessary to provide clarity and uniformity on this issue.

B. The Fifth, Eleventh, and D.C. Circuits Infer Prejudice, Effectively Treating Failure to Instruct on Statute of Limitations as Structural Error

Although this Court has held that at least some constitutional errors can be harmless since 1967, the Sixth Circuit's decision in this case appears to be the

first one in which statute of limitations error was reviewed for harmlessness. Instead, courts confronting this issue have assumed prejudice from the error, effectively treating it as structural.

For example, in *United States* v. *Pursley*, 22 F.4th 586 (5th Cir. 2022), the defendant was convicted of participating "in a significant tax fraud scheme." *Id*. at 587. He requested that the jury be instructed on the effect of the statute of limitations, but the district court denied the request. *Id*. at 589. The jury convicted *Pursley* on all counts. *Id*.

On appeal, Pursley pressed his claim that the court's failure to instruct the jury on the statute of limitations was reversable error. The Fifth Circuit agreed that the district court had erred in refusing to give the instruction, that Pursley's proposed instruction was a substantially correct statement of the law (see *id*. at 591-92), and that the instruction was necessary because the facts of the case required it. See *id*. at 592 ("Moreover, even if the jury instruction had incorporated the Government's preferred length of tolling, there were acts incorporated as to each count outside of this period."). With respect to the remedy to which Pursley was entitled because of the court's error, the Fifth Circuit explained as follows:

> Once a statute of limitations defense was raised, the Government was required to prove that at least one overt act or affirmative act took place within the limitations period as to each count. The jury never made any such finding in this case, on the jury form or

> elsewhere, as it was never instructed that it was required to do so. * * * Pursley is entitled to a new trial, in which a jury must find that an overt or affirmative act was committed in the proper limitations period as to each count.

Id. at 593 (citations omitted). The court did not conduct any form of harmless error analysis.

Although decided before this Court's opinion in *Skilling*, several other circuits have adopted an approach identical to the Fifth Circuit. The Eleventh Circuit, for example, in *United States* v. *Edwards*, 968 F.2d 1148 (11th Cir. 1992), confronted a multi-defendant conspiracy to import illegal drugs. *Id*. at 1149-50. One of the defendants, Roker, raised a statute of limitations defense at trial and requested that the jury be instructed as to the statute of limitations, but the district court declined to do so. *Id*. at 1150-51. Finding that Roker had adequately preserved the argument (see *id*. at 1152-53), the court proceeded to evaluate whether the district court had erred in refusing to give the instruction. Observing that "the witnesses at trial presented conflicting accounts of when the offenses charged in Counts II and III occurred" (*id*. at 1153), and that even one indictment supported the argument that the offenses were time-barred, the court found error. *Id*.

The court turned to the proper remedy:

> As set out by our predecessor court in *United States* v. *Lewis*, 592 F.2d 1282, 1285 (5th Cir. 1979), "It has long been established in this

> Circuit that it is reversible error to refuse to charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent." Had the jury been properly instructed, it could have found that the 1983 offenses occurred outside of the limitations period. Such a finding would have mandated Roker's acquittal on the charges set forth in Counts II and III. We, therefore, conclude that the district court committed reversible error by failing to instruct the jury on the asserted defense.

Id. at 1153. The court reversed and remanded for a new trial; no harmless error analysis was conducted. *Id*.

United States v. *Wilson*, 26 F.3d 142 (D.C. Cir. 1994), involved an Independent Counsel's investigation of alleged misconduct at the U.S. Department of Housing and Urban Development. There was a dispute in the case whether the defendant had waived his statute of limitations defense. See *id*. at 154-57. The district court concluded that Wilson had waived the defense. *Id*. at 155. As a result of that finding, Wilson did not seek an instruction on the application of the statute of limitations. But the D.C. Circuit found that the vehemence with which the district court had made the waiver ruling effectively excused Wilson's failure to seek an instruction, so it treated the issue as being preserved on appeal. See *id*. at 159 ("Nonetheless, we believe in the instant situation that the unconditional and final nature of the district court's pretrial ruling relieved Wilson of any obligation to reiterate his

limitations concerns at the time when the jury was instructed."). Considering the issue on the merits, the court concluded that there was no way of determining whether the jury had convicted Wilson on time-barred evidence. See *id*. at 160-61. The court's discussion of remedy comprised a single sentence: "Because, then, the jury may have convicted Wilson on an impermissible ground, the conviction cannot stand." *Id*. at 161. No harmless error analysis was conducted.

In each of these circumstances, the courts reversed without considering harmless error. They did not expressly state that the error was "structural," and it is possible that the courts' willingness to infer prejudice resulted from the uniquely harmful effect of depriving the jury of guidance on the statute of limitations. See *infra*, at 31-33. It is clear, however, that the mode of analysis differs from this Court's instruction to conduct a harmless error analysis under the *Chapman* standard.

C. The Sixth Circuit Applied the Harmless Error Test for Non-Constitutional Errors to the Constitutional Error Here

As discussed above, the Sixth Circuit in this case employed a very different approach. The court understood that the error was subject to harmless error review. App. 6a. Without any explanation, however, the court applied its test for the harmlessness of ***non-constitutional*** errors, asking only whether "[t]he government has shown by a preponderance of evidence

that the district court's decision not to give Pieron's proposed instruction neither affected nor 'substantially swayed' the verdict." App. 6a-7a (quoting *Kettles*, 970 F.3d at 643). The court conducted that analysis, not by asking what effect the constitutional error had on the jury's verdict, but expressly by putting itself in the role of the jury and speculating as to what the jury might have found convincing based on things the Government said, as well as the court's own reaction to the evidence:

> In closing arguments, the government emphasized the 433-F forms that Pieron filed in 2012 and 2014. Those forms, as discussed above, were patently misleading; and Pieron made little effort to persuade the jury otherwise during trial and particularly during his closing argument. * * * [W]e see no reason to think that the jury might have overlooked his 2012 and 2014 433-F forms or otherwise found them non-evasive. Moreover, in the context of the trial record as a whole, the jury had every reason to think that Pieron's August 2012 Foreign Bank Account Report (in which he claimed a $250,000 maximum balance for a Swiss account that held $750,000 during the relevant year) was evasive as well.

App. 6a.

That is a far cry from *Chapman* analysis. The Sixth Circuit's approach differs markedly from this Court's precedent and the approach taken by every other circuit to confront the issue.

D. This Court Should Grant Certiorari to Clarify the Effect of *Hedgpeth* and *Skilling*, Particularly on Statute of Limitations Errors, Which Present Unique Challenges to Harmless Error Analysis

This Court has, of course, determined in *Hedgpeth* that *Yates* errors are non-structural in nature. But the issue was never actually litigated in that case; it was conceded by the respondent. And statute of limitations errors represent a unique variant of *Yates* error that were not under consideration in *Hedgpeth* or *Skilling*. Most *Yates* errors can sensibly be reviewed under a harmless error analysis. For example, in *United States* v. *Reed*, 48 F.4th 1082 (9th Cir. 2022), the Ninth Circuit considered a case in which the defendant had been convicted of participating in two conspiracies – to commit Hobbs Act robbery and to obtain and distribute cocaine. *Id*. at 1084. The defendant was also convicted of using a firearm in relation to a crime of violence or a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A), but because the verdict was a general one, it was not clear whether the Section 924(c) conviction related to the robbery conspiracy or the drug conspiracy. *Id*. After this Court determined in *United States* v. *Davis*, ___ U.S. ___, 139 S. Ct. 2319 (2019), that conspiracy to commit a Hobbs Act robbery could not serve as a valid predicate for a Section 924(c) conviction, the *Reed* court was confronted with classic *Yates* error – the Section 924(c) conviction was legally erroneous if it was predicated on the robbery conspiracy but unproblematic if predicated on the drug conspiracy, and the jury's

general guilty verdict failed to specify upon which predicate it had relied. *Reed*, 48 F.4th at 1084.

Nevertheless, the *Reed* court was able to affirm the Section 924(c) conviction on a harmless error review.[2] Under the facts of that case, Reed had conspired to rob cocaine from a stash house, and the Ninth Circuit was able to determine that the error was harmless "because the conspiracies were inextricably intertwined such that the jury's verdict on the § 924(c) charge necessarily rested on ***both*** the Hobbs Act robbery ***and*** the drug trafficking conspiracies." *Reed*, 48 F.4th at 1090 (emphasis in original). In other words, the court was able to take an actual, unproblematic finding of the jury (*i.e.*, conviction on the drug trafficking conspiracy) and find that it necessarily supported the Section 924(c) conviction, rendering any error harmless.

The situation is very different in cases involving statute-of-limitations *Yates* errors. There are no jury findings that can act as guideposts to aid a court engaging in harmless error review. Such a review necessarily involves speculation in which the reviewing court tries to imagine what a property instructed jury ***would have done*** – effectively substituting the judgment of the reviewing court for the jury's and directing a verdict when the error is found to be "harmless." As

---

[2] The harmless error review in that case was conducted under the *Brecht/Kotteakos* standard because the case involved a collateral review of the conviction. *Reed*, 48 F.4th at 1084, 1090. For purposes of the present discussion the question isn't the depth of the harmless error review, but whether that review can be meaningfully conducted at all.

Justice Scalia pointed out for a unanimous Court in *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993) (emphases in original):

> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the ***same*** verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no ***object***, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury ***would surely have found*** petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt ***would surely not have been different*** absent the constitutional error. That is not enough. See *Yates*, *supra*, at 413-414 (SCALIA, J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946).

Sullivan involved a faulty reasonable doubt instruction, but the same analysis can be applied to the specific variant of statute-of-limitations *Yates* error. There is no way of knowing from the jury's general verdict which events the jury relied on and thus whether those incidents fell outside of the limitations period. There is no "object" upon which a principled harmless error analysis can be based; the only alternative is the substitution of the reviewing court's view of the evidence for the jury's, as the Sixth Circuit did here.

Because of the procedural peculiarities of *Hedgpeth*, this Court has never had adversarial briefing and argument on the applicability of harmless error review to ***any*** type of *Yates* error, and the argument against harmless error review (or, alternatively, for a mandatory assumption of prejudice) is particularly strong in the context of statute-of-limitations error. The courts of appeals are clearly confused on this point. If the Court does not wish to summarily reverse the decision below, it should grant certiorari and consider the question of the proper remedy in cases like this one, where it is impossible to discern whether the jury's general verdict of guilty was based on conduct within the limitations period.

CONCLUSION

For the above reasons, a writ of certiorari should issue to summarily reverse or, in the alternative, to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ERIK W. SCHARF*
ROBERT L. BRONSTON
SCHARF APPELLATE GROUP
1395 Brickell Avenue
Suite 800
Miami, FL 33131
(305) 665-0475
(786) 382-7611
erik@appealsgroup.com

Counsel for Petitioner

**Counsel of Record*