No. 22-710

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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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)?

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INTRODUCTION

In response to Pieron's motion to dismiss his indictment, the Government conceded that it bore the burden of proving Pieron committed acts of evasion within the limitations period. But at trial, the Government overwhelmingly (16 out of 19 incidents, or 84% of its case) relied on evidence ***before*** the limitations date. And, having successfully convinced the district court not to provide a limitations instruction, the Government proceeded to ask the jury to rely on evidence ***it knew could not legally be used to convict Pieron***. See Pet. App. 6a ("in closing arguments, the government * * * emphasized several incidents of evasive conduct before [the limitations date]"). Pieron's conviction was secured through constitutional error. The Sixth Circuit affirmed by applying the harmless error test applicable to minor, non-constitutional trial errors. Now the Government attempts to save its ill-gotten conviction by characterizing the violation of Pieron's rights as a statutory problem rather than a constitutional one. This Court's precedents say otherwise, and the Government's argument that they were all overruled *sub silentio* by this Court's *Smith* decision is manifestly wrong. Summary reversal is appropriate.

In addition, the courts of appeals are hopelessly confused when confronting a situation, like this one, where a court wrongly withholds a limitations instruction. The Government argues (Opp. 13) that the statute-of-limitations context is "unusual," but that is precisely the point. Statutes of limitations are nominally an affirmative defense, but this Court has made

clear that, once the defense is invoked, the Government must prove compliance with the statute of limitations beyond a reasonable doubt just as it would any other element of the crime. The defense is neither fish nor fowl, and the courts of appeals have fractured in their approach, with all of them seemingly deviating from this Court's guidance. This Court's further review is needed, either by summarily reversing with instructions or by providing an answer to the question presented following full briefing and argument.

ARGUMENT

I. THIS COURT SHOULD SUMMARILY REVERSE

1. The Government's first argument skirts bad faith. Apparently offered as a kind of alternate ground for affirmance to evade review, the Government asserts "the district court did not abuse its discretion by denying a statute-of-limitations instruction in the circumstances of this case," although, in its view, "the court of appeals did not elect to reach the issue." Opp. 6. The Government sought to convict Pieron on evidence overwhelmingly prior to the limitations date, and Pieron objected at every opportunity, including by pre-trial motion and by proffering the relevant instruction. The district court declined the instruction ***not*** on the supposed basis that Pieron had failed to press the issue, but rather because a small portion of the Government's

evidence was within the limitations period. See Pet. App. 47a.

According to the Government, that rationale "amounted to a finding that petitioner failed to press the statute of limitations defense at trial." Opp. 7. That is demonstrably false. The district court's rationale concerned ***only*** the sufficiency of the Government's post-limitations evidence, having ***no connection*** to what Pieron did or didn't do. Moreover, Judge Ludington, the district court below, has expressly held that a defendant sufficiently raises the defense for *Musacchio* purposes via motion to dismiss. *United States* v. *McQuarrie*, 2018 WL 2095735, at *2 (May 7, 2018) (Ludington, J.) ("A defendant may raise a statute of limitations defense in a pretrial motion."); see *id*. (citing *Musacchio* that the burden shifted to the Government to establish compliance with the statute of limitations). Beyond that, the Government has ***already conceded*** that Pieron adequately invoked the limitations defense. When opposing Pieron's motion to dismiss, the Government informed the court that "a jury will be able to find that Pieron committed affirmative acts of evasion within the six-year statute of limitations period." ECF 23, PageID.107.

Trying to renege, the Government tells this Court that, after the district court denied Pieron's motion, "petitioner did not thereafter raise any questions about the existence or effect of the tolling agreement at trial." Opp. 8. That, too, is demonstrably false. Pieron not only proposed the limitations instruction, he continued to press it at every opportunity. Indeed, the

Government, in its own Statement, admits that "[a]t the charge conference, petitioner objected to the omission of his proposed instruction." Opp. 4 (citing Pet. App. 46a). Finally, the Government complains that Pieron didn't "offer the jury any other reason to believe that the government's claims were untimely." Opp. 8. It's not clear exactly what additional steps the Government thinks Pieron should have taken; it certainly has suggested none. With the court refusing to instruct the jury on limitations, Pieron lost his ability to argue untimeliness ***to the jury***, and he raised it with the court at every opportunity. The Government is simply wrong to argue otherwise.

2. The Government passingly suggests (Opp. 5) the court of appeals never determined the district court erred in refusing the instruction. The court's analysis found "[m]ost of the actions alleged in the government's Bill of Particulars took place before [the limitations] date," (Pet. App. 6a), "Pieron's proposed instruction correctly stated [the law]," (*id.*), and "that instruction likely would have focused both the jury's attention and the parties' presentations at trial." *Id*. The court didn't dwell on the district court's abuse of discretion, but its analysis definitively confirms that refusing to provide the instruction ***was*** an abuse of discretion. And the court avoided reversal ***only*** by concluding that "any error as to the district court's failure to give the instruction was harmless." *Id*. Under these circumstances, the court's harmless error analysis was the determining factor; the Government doesn't dispute that.

3. The Government's primary argument resisting summary reversal is the assertion that – although it had the burden of proving compliance with the statute of limitations at Pieron's trial – its failure to do so was merely "statutory error, not constitutional error." Opp. 10. This is deeply flawed.

As Pieron demonstrated (Pet. 9-13), the error here is textbook *Yates* error. The Government claims Pieron's "attempt * * * to analogize this case to *Yates*" is "mistaken." Opp. 10. In the Government's view, *Yates* reversed a conviction resting on multiple theories of ***guilt*** when one is legally flawed, but violations of statutes of limitations don't go to the underlying guilt or innocence of the defendant. See *id*. at 10-11.[1] Of course, the Government overlooks that *Yates* itself was a statute of limitations case; the legally flawed "theory of guilt" in *Yates* was a time bar. See *Yates* v. *United States*, 354 U.S. 298, 312 (1957). The error below is classic *Yates* error, and this Court has ***always*** characterized *Yates* error as constitutional in nature. See, *e.g.*,

[1] The Government assumes that statute-of-limitations defenses don't address the underlying guilt of the defendant, but that is far from clear. To be sure, portions of *Smith* can be read to suggest that, but some of this Court's other cases appear to disagree. For example, in *Stogner* v. *California*, 539 U.S. 607, 615 (2003), the Court held that "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." Citing *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), the *Stogner* Court pointed out that statutes of limitations effectively create an irrebuttable presumption that renders proof unnecessary. *Stogner*, 539 U.S. at 615-16. In the criminal context, that is an irrebuttable presumption of innocence.

Hedgpeth v. *Pulido*, 555 U.S. 57, 60 (2008) ("Both *Stromberg* and *Yates* were decided before we concluded in *Chapman* v. *California*, 386 U.S. 18 (1967), that ***constitutional errors*** can be harmless.") (emphasis added); *Skilling* v. *United States*, 561 U.S. 358, 414 (2010) (describing holding in *Yates* as "***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") (emphasis added).

The Government's attempt to disregard this precedent relies on its misreading of *Smith* v. *United States*, 568 U.S. 106 (2013). *Smith* involved the intricacies "at the intersection of a withdrawal-[from-conspiracy] defense and a statute-of-limitations defense." *Id*. at 109. The Government's tactic is to use portions of *Smith* that pertain to the withdrawal-from-conspiracy defense and misleadingly suggest that they apply to the statute-of-limitations defense. The centerpiece of this sleight-of-hand is the assertion that it "'is not constitutionally required' to prove that the offense occurred within the limitations period." Opp. 10 (quoting *Smith*, 568 U.S. at 112). *Smith* distinguishes between things the Government ***is*** constitutionally required to prove beyond a reasonable doubt, and things the Government is ***not*** constitutionally required to prove, ***which may therefore be shifted to the defendant***. That discussion culminated:

> Thus, although ***union of withdrawal with a statute-of-limitations defense*** can free the defendant of criminal liability, it does not place upon the prosecution a constitutional

> responsibility ***to prove that he did not withdraw***. ***As with other affirmative defenses, the burden is on him.***

Smith, 568 U.S. at 112 (emphasis added). It was therefore the withdrawal-from-conspiracy aspect of the defense, for which the ***defendant*** bears the burden of proof, that was deemed non-constitutional in nature.

Thus, when the Government argues that it "has no constitutional duty to overcome the defense beyond a reasonable doubt" (Opp. 10), it is quoting a portion of *Smith* that in turn is quoting *Dixon* v. *United States*, 548 U.S. 1, 6 (2006). *Dixon* involved this Court's determination that there was "no constitutional basis for placing upon the Government the burden of disproving petitioner's duress defense beyond a reasonable doubt." *Id*. The Government's argument denying that the error here is of constitutional dimension rests completely upon cases in which the ***defendant bears the burden of proof on a defense***, and the Government has no constitutional duty to do ***anything*** to secure a conviction.

That is not this case. Three years after *Smith*, this Court confirmed in *Musacchio* that, once invoked, the ***Government*** bears the burden of proving compliance with the statute of limitations beyond a reasonable doubt. *Musacchio* v. *United States*, 577 U.S. 237, 248 (2016).[2] Under *Smith*'s analysis, then, the Government

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[2] As explained in the Petition (at 11 n.1), this Court didn't specify the beyond-a-reasonable-doubt standard in *Musacchio*. But every court to have addressed the issue has used that

did have a constitutional obligation to prove compliance with the statute of limitations in precisely the same way it had the constitutional obligation to prove the elements of the crime. The Government provides no explanation why Pieron's Sixth Amendment right to have the jury decide the statute-of-limitations issue would not be implicated by the erroneous decision to remove that aspect of the Government's burden from the jury's purview.

In sum, the Government's misreading of *Smith* would interpret that case as implicitly overruling *Yates* (making clear that a verdict potentially resting on time-barred activity is constitutional error), *Hedgpeth* (recognizing *Yates* error as constitutional), *Skilling* (same), and *Griffin* v. *United States*, 502 U.S. 46, 59 (1991) (same, expressly referencing time bar) (see Opp. 11-12 n.2, suggesting *Griffin* is no longer good law). Surely the *Smith* Court would have said so plainly if that were its intention, and the Court's decision ***three years later*** in *Musacchio* to require the Government, once the issue has been raised, to prove compliance with the statute of limitations precisely as it must prove all other elements of the crime, negates the Government's argument. Pieron had a constitutional right to have his jury decide compliance with the statute of limitations, and it was constitutional error to deny him that right.

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standard, and the Sixth Circuit and the Government acknowledged in this case that it is the correct standard. *Id*.

4. The Government's final argument against summary reversal – that "the court of appeals would have found any error here harmless even under petitioner's proposed standard" (Opp. 14) – also enters bad faith territory. The Government's approach is to conduct a sufficiency analysis, cherry picking its favorite evidence and speculating that a properly instructed jury might have found it compelling. *Id*. But, as Pieron pointed out (Pet. 22), that is not a *Chapman* inquiry. That analysis requires proof "beyond a reasonable doubt that the error complained of did not contribute to the verdict." *Chapman*, 386 U.S. at 24. The error here, in addition to failure to instruct the jury properly, is that the Government overwhelmingly presented stale evidence and then ***actively misled the jury by asking them to rely on it*** in its closing. Pet. App. 6a. The Government cannot even bring itself to argue with a straight face it can show ***beyond a reasonable doubt*** that its overt attempts to hoodwink the jury were ineffective. Instead, it conceals the relevant factors from this Court in its analysis and asserts by *ipse dixit* that the (unnamed) error was harmless. Such tactics should not succeed.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT CONFLICT REGARDING THE RESULT ON DIRECT REVIEW WHEN A DISTRICT COURT ERRONEOUSLY REFUSES A STATUTE OF LIMITATIONS INSTRUCTION

1. The Government claims Pieron "fails to demonstrate any conflict between the court of appeals' harmlessness determination and the decision of any other court of appeals." Opp. 12. The Government's argument, however, is merely intended to distract from the fact that the Sixth Circuit's decision cannot be reconciled with those of the D.C., Eleventh, and Fifth Circuits, and all four Circuits' decisions cannot be reconciled with this Court's approach.

The Government begins by implying without proving that the D.C., Eleventh, and Fifth Circuits didn't ***actually*** treat failure to charge juries with adjudicating statute-of-limitations defenses as structural error. The word "structural" may not appear in the *Pursley*, *Edwards*, and *Wilson* decisions, but it is incontrovertibly true that is what those courts ***did***. See Pet. 24-29; *United States* v. *Pursley*, 22 F.4th 586, 593 (5th Cir. 2022) ("[t]he jury never made any such finding in this case * * * 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."); *United States* v. *Edwards*, 968 F.2d 1148, 1153 (11th Cir. 1992) ("reversible error to refuse to charge on a defense theory for which there is an evidentiary

foundation * * * [s]uch a finding would have mandated Roker's acquittal"); *United States* v. *Wilson*, 26 F.3d 142, 161 (D.C. Cir. 1994) ("[b]ecause, then, the jury may have convicted Wilson on an impermissible ground, the conviction cannot stand.").

Undeterred, the Government argues that "even [Petitioner] does not view such an approach [*i.e.*, structural error] as correct." Opp. 12. For purposes of conflict analysis, however, what matters is not whether these three Circuits are "correct," or even whether Pieron ***thinks*** they are "correct." Rather, what matters is that the approach taken by these courts is irreconcilable with both the approach of the Sixth Circuit and this Court, thereby warranting the writ.

The Government ends its "rebuttal" of the conflict by misleadingly suggesting those decisions rested on something ***other*** than reversal for failure to instruct on limitations. Thus, the Government myopically focuses (Opp. 12) on the Fifth Circuit's remand instructions for the district court, while completely ignoring the central holding, which is that "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." *Pursley*, 22 F.4th at 593 (emphasis added). The Government's description (Opp. 12-13) of *Edwards* is accurate, but irrelevant – the Eleventh Circuit did observe a factual basis for the limitations defense and ***then went on to hold that it was reversible error not to instruct the jury to assess it***. Similarly, the Government correctly observes (Opp. 13) that it admitted the potential time bar in

Wilson while again ignoring its central holding that "[b]ecause, then, the jury may have convicted Wilson on an impermissible ground, the conviction cannot stand." *Wilson*, 26 F.3d at 161.

This Court is charged with ensuring consistent application of U.S. law, and that law is in chaos when defendants are denied statute-of-limitations instructions. The Sixth Circuit thinks it's acceptable to deny the instruction if it subjectively views the timely evidence as sufficient by a preponderance of the evidence. Three other circuits – based on longstanding notions that jurors (not judges) determine facts establishing guilt beyond a reasonable doubt – automatically reverse. This Court's precedents take a third approach, evaluating harmlessness under the *Chapman* standard. The Petition showed this in exacting detail. The Government attempts to sow more confusion but has no real answer to the fact that the courts are in disarray on this question.

2. The Government further resists review by arguing that "this case would be an especially poor vehicle * * * both because it involves an affirmative defense and because petitioner failed to press his current argument." Opp. 6.

First, the Government doesn't appear to have read the Question Presented. The Government's argument presupposes that Pieron seeks review as to the ***general*** harmless-error standard for instructions and this case is a poor vehicle because it involves an affirmative

defense. But the Question Presented on which Pieron seeks review ***is expressly limited*** to the statute-of-limitations context. See Pet. i. Not only is statute of limitations an affirmative defense, it's an atypical affirmative defense because the Government retains the burden of proof beyond a reasonable doubt. That is why the courts of appeals are hopelessly confused, and why this case is an ideal vehicle – it ***is*** a statute-of-limitations case in which the Government ***overwhelmingly*** relied on state evidence and ***expressly*** invited the jury to convict on an illegal ground, thereby assuring an unconstitutional conviction.

Second, Pieron argued below in favor of the approach taken by the Fifth, Eleventh, and D.C. Circuits – one of the prongs he identified in the split. If there is a reason why that poses any impediment to further review, the Government has failed to identify it.

CONCLUSION

A writ of certiorari should issue to summarily reverse or, in the alternative, to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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