No. _____

In The

Supreme Court of the United States

IKEVIAUN QUAMONN JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

Paul K. Sun, Jr.
Counsel of Record
Kelly Margolis Dagger
ELLIS & WINTERS LLP
Post Office Box 33550
Raleigh, North Carolina 27636
(919) 865-7000

Counsel for Petitioner
Ikeviaun Quamonn Johnson

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 ♦ Richmond, VA 23218
804-249-7770 ♦ www.gibsonmoore.net

QUESTION PRESENTED

Was Mr. Johnson entitled to vacatur of his conviction for assaulting federal officers where the essential element of the charge that Mr. Johnson acted "forcibly" was not alleged in the indictment, but instead the indictment alleged that he acted "feloniously," and he was not advised of the elements of the charge at his arraignment?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Ikeviaun Quamonn Johnson. Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case in a published opinion issued on 27 January 2025. The opinion is included in Appendix A.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming petitioner's conviction and sentence following his conviction of assaulting an FBI Agent and FBI Task Force Officer while they were engaged in the performance of their official duties, using a deadly weapon in the commission of the offense, and aiding and abetting, in violation of 18 U.S.C. §§ 2 and 111(a)(1), (b); and carrying a firearm during and in relation to a crime of violence, possessing a firearm in furtherance of a crime of violence, and discharging said firearm, and aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A)(iii). The petition is being filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's order pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 111 of Title 18 provides:

> (a) In general.—Whoever—
>
> > (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in [18 U.S.C. § 1114] while engaged in or on account of the performance of official duties . . . .
> >
> > shall . . . where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced Penalty.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

Mr. Johnson's arrest

On 16 October 2020, FBI Special Agent Pete Mines and Task Force Officer Matthew McKnight were conducting surveillance in Greenville, North Carolina as part of an investigation of gang activity and drug and firearm offenses. JA45-47. Agent Mines and Task Force Officer McKnight drove away from a potential surveillance location when they thought their undercover status may have been compromised. JA50. A Ford Explorer started following the vehicle with the agents. JA50, JA52. After several turns, the agents thought they heard shots being fired from the Explorer. JA52-54.

The agents contacted other law enforcement personnel, and police stopped the Explorer. JA59. Mr. Johnson was a passenger in the back seat of the Explorer. JA168. Mr. Johnson and the others in the Explorer were arrested. JA170.

Indictment and plea

Mr. Johnson and Willard Lee Acklin, Jr., who was the driver of the Explorer, JA92-93, were charged in an indictment, JA4, and then a superseding indictment, JA10, JA21-25. Mr. Johnson and Mr. Acklin were charged in Count 1 with

conspiracy to attempt to kill Agent Mines and Task Force Officer McKnight[1] while the federal officers were engaged in the performance of their official duties, in violation of 18 U.S.C. §§ 1113 and 1114. JA21-22. Mr. Johnson and Mr. Acklin were charged in Count 2 with attempting to kill Agent Mines and Task Force Officer McKnight while the federal officers were engaged in the performance of their official duties, in violation of 18 U.S.C. §§ 2, 1113, and 1114. JA23. Mr. Johnson and Mr. Acklin were charged in Count 3 with carrying a firearm during and in relation to a crime of violence, possessing a firearm in furtherance of a crime of violence, and discharging said firearm, and aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A)(iii). JA23. The grand jury charged in Count Four:

> On or about October 16, 2020, in the Eastern District of North Carolina, the defendants, IKEVIAUN QUAMONN JOHNSON and WILLARD LEE ACKLIN, JR., aiding and abetting each other, did knowingly and feloniously assault, resist, oppose, impede, intimidate and interfere with Special Agent P.G.M., of the Federal Bureau of Investigation, and Task Force Officer M.T.M., of the Federal Bureau of Investigation, while Special Agent P.G.M. and Task Force Officer M.T.M. were engaged in the performance of their official duties, and used a deadly and dangerous weapon in the commission of said offense, in violation of Title 18, United States Code, Sections 111(a)(l) and 111(b), and 2.

JA23.

Mr. Johnson was arraigned and he pleaded not guilty to all charges. JA15, JA26-29.

As relevant to this petition, with respect to Count 4, the court advised Mr. Johnson, "In Count 4 you're charged with assaulting, resisting, opposing,

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[1] The law enforcement officers' initials rather than their full names were pleaded in the superseding indictment. JA21-23.

impeding, intimidating, or interfering with an officer or employee of the United States and aiding and abetting in that." JA28. The court then asked Mr. Johnson how he pleaded to that offense, and Mr. Johnson pleaded not guilty. JA28-29.

Trial testimony

At the beginning of the trial, before the jury was sworn, the Government moved to dismiss Counts 1 and 2 of the superseding indictment, and the court granted the motion. JA16, JA33.

Mr. Johnson and Mr. Acklin were at the home of Theodore Dunn along with Ja'quella Carr, Briona Little, and Qua'Sean Little on 16 October 2020. JA89-91, JA114, JA137-138. The group had been smoking marijuana when Mr. Acklin asked the group to go for a ride because he liked to feel the wind in his face when he was high. JA90-91, JA104-105, JA114, JA116, JA138. They got into Mr. Acklin's Ford Explorer with Mr. Acklin driving, Mr. Little in the front passenger seat, Mr. Johnson in the back seat behind the driver, Ms. Little next to him, then Ms. Carr, and Mr. Dunn. JA92-93, JA118, JA144.

FBI Agent Pete Mines was driving with FBI Task Force Officer Matthew McKnight in an unmarked Hyundai sedan conducting surveillance at 1680 Sandstone Court in Greenville, North Carolina on 16 October 2020. JA45-47, JA49. The agents thought they might have been recognized as law enforcement, so they drove away from the Sandstone Court location and onto Old River Road. JA50-51. The agents turned around and were driving on Old River Road when they noticed a black Explorer approaching quickly from behind. JA52, JA56.

Mr. Little thought the agents' vehicle was being driven by someone named Jo Jo, and someone told Mr. Acklin to follow the car. JA90-91, JA93, JA117, JA142-143. Jo Jo resided in an area of Greenville known as C-Block, and there was a simmering dispute between C-Block residents and residents from the Old River Road or Moyewood area, where those in the Explorer lived. JA97, JA141-143, JA161-162, JA175-176.

Agent Mines turned right onto Airport Road, and the Explorer followed. JA52, JA56. Agent Mines turned left onto Perkins Road, but the Explorer kept going. JA53, JA56. Agent Mines turned around and after turning left onto Airport Road, he noticed the Explorer was behind their car stopped near the intersection with Perkins Road, with the driver's side facing the back of the car with the agents. JA53-53, JA67. Agent Mines heard eight "popping noises" that he thought were gunshots from a semi-automatic weapon. JA54, JA57-58. Agent Mines heard the noise but did not see any gunfire or anyone who was shooting. JA54, JA58, JA62. The police recovered eight shell casings on the ground near the intersection of Perkins Road and Airport Road. JA72.

Agent Mines turned around to pursue the Explorer, but was unable to keep up with that vehicle. JA55, JA59. Other law enforcement officers stopped the Explorer. JA59, JA79. Mr. Acklin, sitting in the driver's seat, was the first removed from the Explorer. JA122, JA147, JA167. Mr. Johnson, sitting behind the driver's seat, was the second removed from the Explorer. JA147, JA168.

Inside the Explorer, the police found a Glock handgun on the backseat floorboard behind the center console. JA80-81. The police also recovered three cell phones. JA84, JA86. Mr. Johnson's cell phone had pictures of the Glock handgun that was recovered in the Explorer. JA178-180.

All those in the Explorer were transported to the police station for questioning. JA170. Mr. Johnson told the police that Mr. Acklin was the shooter. JA183. Mr. Acklin said he did not know who did the shooting. JA124. Ms. Little likewise said she did not know who did the shooting. JA155. Ms. Carr refused to talk to law enforcement. JA101. In subsequent interviews with the police, Mr. Acklin, Ms. Little, and Ms. Carr all said that Mr. Johnson was the shooter. JA101, JA148-149, JA155, JA296.

Mr. Acklin testified that Mr. Johnson had fired the gun. JA117-118, JA125-126. Both Ms. Carr and Ms. Little testified that Mr. Johnson had the Glock with him on the day of the shooting, and that he fired the shots from the Explorer. JA94-96, JA104, JA142, JA144. Mr. Johnson told Mr. Acklin to drive off after the shooting. JA120. At some point, Mr. Johnson passed the gun to Mr. Little in the front seat and asked him to throw the gun out of the window, but Mr. Little refused to do so. JA98-99, JA121, JA145. Mr. Little put the gun in the back before anyone exited the car. JA98, JA145-146. Mr. Johnson asked those in the car to take the charge for him, but no one agreed. JA99-100, JA122, JA146-147.

At the close of the evidence, Mr. Johnson's counsel moved for judgment of acquittal, and the district court denied the motion. JA192.

Charge conference, jury instructions, and verdict

After consulting with the parties in the charge conference, the court said it would ask the jury first to decide the assault charge in Count 4 before considering the firearm charge in Count 3. The court instructed the jury it was to consider Count 4 first, "because that's the underlying crime for which you're not permitted to use a firearm." JA237.

The court charged the jury:

> So Count 4 of the superseding indictment charges on October 16, 2020 in this District the Defendant did knowingly and intentionally forcibly assault, resist, oppose, impede, intimidate and interfere with victims PMB and MTM.
>
> * * *
>
> The essential elements of that crime—the essential elements of Court 4 are, and the Government has to prove those beyond a reasonable doubt, are first that the Defendant forcibly assaulted victims one and two. An assault in the law does not require injury. So the expression of force illegally against a person is an assault. You don't have to like shoot at somebody but hit them, if you follow. Assault is the commission of an act that would or could cause violence and injury and death. So first the Defendant forcibly assaulted victims one and two. Second, at the time of this forcible assault, victims one and two were officers or employees of the United States. Third, that victims one and two were engaged in official duties at the time of the assault. Fourth, that the assault was made while using a deadly or dangerous weapon and, fifth, that the assault was done in a voluntary and intentional manner by the Defendant. The phrase deadly or dangerous weapon means any instrument capable of inflicting serious bodily harm or causing death of a person. Both the physical capabilities of the object used and the manner in which the object is used may be considered by the jury in determining whether the object is deadly or a dangerous weapon. The term forcibly assaults means any deliberate an intentional attempt or threat to inflict physical injury upon another with force or strike when that attempt or threat is coupled with an apparent present ability to do so. Although forcible assault may be committed by a defendant without touching, striking or doing bodily harm to another. The Government

> must prove that the actions of the Defendant were of such a nature to put the person against whom they are directed in fear of immediate bodily harm.

JA237-239.

The jury convicted Mr. Johnson of both Count 3 and Count 4. JA16, JA247.

Sentencing and judgment

The Probation Office prepared a presentence investigation report. JA293-307. The Probation Office determined that the Sentencing Guidelines range for the assault conviction was 24 to 30 months. JA303. The Probation Office stated that the Guidelines range for Mr. Johnson's firearm conviction was a minimum ten-year term of imprisonment to be imposed consecutively to any other term of imprisonment. JA302.

At the sentencing hearing, the district court agreed with the Government that an obstruction of justice enhancement was warranted based on Mr. Johnson's conduct after the shooting. JA332. The revised Guidelines range for the assault charge was 30 to 37 months. JA332-333.

The Government argued for an upward variance to a sentence of 240 months' imprisonment. JA333-335. Mr. Johnson's counsel argued for a sentence at the bottom of the applicable Guidelines range, including the mandatory minimum sentence on the firearm charge, of 150 months. JA335-336.

The court announced its intent to vary or depart upward, and indicated that it would "make parts of the presentence report the grounds for my consideration of an upward variance or upward departure." JA337-338. The court sentenced Mr.

Johnson to 78 months' imprisonment on the assault charge, with a consecutive ten-year sentence on the firearm charge, for a total term of 198 months, and five years of supervised release. JA340.

Mr. Johnson timely filed a notice of appeal. JA14, JA266-267.

Appeal

On appeal, Mr. Johnson argued that the superseding indictment charging him with assault of a federal officer was defective because it did not include the element of the offense that the defendant acted "forcibly." App. 2. Mr. Johnson did not object to the sufficiency of the indictment below, *see id.* at 3, but he argued it was plain error to proceed to trial under an indictment that did not plead all of the elements of the offense, his substantial rights were affected when he was tried based on a defective indictment, and permitting the verdict to stand seriously affected the fairness, integrity, or public reputation of judicial proceedings.

Mr. Johnson also argued that the district court erred when it denied his motion for judgment of acquittal on Counts 3 and 4 because the Government did not prove that he assaulted the federal law enforcement officers as alleged in Count 4. *Id.* at 2.[2] Finally, Mr. Johnson argued that the district court imposed a procedurally unreasonable sentence when it sentenced him to a term of imprisonment substantially above the Guidelines range without explaining or justifying that sentence. *Id.* The Fourth Circuit affirmed. *Id.*

[2] The Government's failure to prove the elements of Count 4, the predicate offense for possession of a firearm in furtherance of a crime of violence as charged in Count 3, required vacatur of his convictions on Counts 3 and 4.

The Fourth Circuit agreed with Mr. Johnson that "forcibly" is an element of a § 111 offense and must be alleged in the indictment charging that offense. *Id.* at 6. But the Fourth Circuit ruled that the superseding indictment was not defective because it concluded Mr. Johnson had adequate notice even though the superseding indictment charged Mr. Johnson with "feloniously" assaulting the federal officers, where the indictment further alleged that he used a deadly and dangerous weapon in the commission of that offense. *Id.* The Fourth Circuit also rejected Mr. Johnson's argument that the defect in the indictment affected his substantial rights, ruling that the district court adequately instructed the jury that it had to find the assault was committed with force. *Id.* at 7-9. The Fourth Circuit further concluded that by convicting Mr. Johnson, the jury necessarily found that he had fired eight shots, "a finding that inherently included a finding of force." *Id.* at 9.

The Fourth Circuit also concluded that the Government presented sufficient evidence to convict Mr. Johnson of assaulting the federal officers, *id.* at 9-11, and that the district court did not commit procedural error in sentencing Mr. Johnson, *id.* at 12-16.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question presented was argued and reviewed in Mr. Johnson's appeal. Mr. Johnson's claim therefore is appropriate for this Court's consideration.

REASONS FOR GRANTING THE WRIT

Mr. Johnson respectfully contends that the Fourth Circuit's decision conflicts with relevant decisions of this Court. *See* S. Ct. R. 10(c).

DISCUSSION

I. THE SUPERSEDING INDICTMENT CHARGING MR. JOHNSON WITH ASSAULT OF A FEDERAL OFFICER WAS DEFECTIVE BECAUSE IT DID NOT INCLUDE THE ESSENTIAL ELEMENT THAT HE ACTED "FORCIBLY" BUT INSTEAD CHARGED THAT HE ACTED "FELONIOUSLY."

"In federal prosecutions, '[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury' alleging all the elements of the crime." *Harris v. United States*, 536 U.S. 545, 549 (2002) (quoting U.S. Const. amend. V) (alteration in *Harris*). This Court has "identified two constitutional requirements for an indictment: 'first, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1984)) (alterations in *Resendiz-Ponce*). "In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, secondly, in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Russell v. United States*, 369 U.S. 749, 763-64 (1962) (quotations

omitted); *see Hagner v. United States*, 285 U.S. 427, 431 (1932) ("The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.") (quotation omitted). Thus, the Court has consistently and repeatedly made clear that an indictment must allege all the elements of the charged crime. *E.g.*, *United States v. Resendiz-Ponce*, 549 U.S. at 107 ("indictment must set forth each element of the crime that it charges") (quoting *Almendarez–Torres v. United States*, 523 U.S. 224, 228 (1998)); *United States v. Carll*, 105 U.S. 611, 612, (1881) (indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished"); *United States v. Cook*, 84 U.S. 168, 174 (1872) ("no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offence is composed").

Section 111 of Title 18 makes it a crime to "forcibly" assault a federal officer while engaged in the performance of official duties. 18 U.S.C. § 111(a)(1), (2); *see United States v. Feola*, 420 U.S. 671, 673 & n.1 (1975). The grand jury charged in Count 4 of the superseding indictment that Mr. Johnson "did knowingly and feloniously" assault the federal officers." JA23. The district court's advice at the arraignment did not correct that deficiency. The court stated: "In Count 4 you're

charged with assaulting, resisting, opposing, impeding, intimidating, or interfering with an officer or employee of the United States and aiding and abetting in that. How do you plead to that; guilty or not guilty?" JA28.

The Fourth Circuit conceded that "'forcibly' is an element of a § 111 offense and must be alleged in any indictment charging that offense." App. 6. The Fourth Circuit also recognized that the "forcibly" element was "omitt[ed]" in the superseding indictment *Id.* at 7. The Fourth Circuit's ruling that the superseding indictment was not defective, notwithstanding the failure to allege an essential element, *see id.* at 7, was erroneous for two reasons: first, alleging all the essential elements of a crime is a constitutional requirement; adequate "notice" does not replace the requirement to allege all elements; and second, the Fourth Circuit's conclusion that Mr. Johnson received adequate notice that he was charged with forcibly assaulting the officers, because he was charged with using a "deadly and dangerous weapon" in the commission of the offense, ignores that the superseding indictment in fact charges that Mr. Johnson acted "feloniously."

First, the Fourth Circuit's ruling that an indictment need not allege all essential elements of a crime is flatly inconsistent with an unbroken line of cases from this Court. *See supra* pp. 11-12. The Fourth Circuit cites one of those cases, *United States v. Hamling*, and also cites Rule 7(c)(1) of the Federal Rules of Criminal Procedure. *See* App. 4; Fed. R. Crim. P. 7(c)(1) ("The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the

government."). Contrary to the Fourth Circuit's opinion, "notice" is not enough, *see* App. 6-7; the indictment must "contain[] the elements of the offense charged *and* fairly inform[] a defendant of the charge against which he must defend." *United States v. Resendiz-Ponce*, 549 U.S. at 108 (emphasis added); *Hamling v. United States*, 418 U.S. at 117 (same); *see Russell v. United States*, 369 U.S. at 763 (criteria for measuring "sufficiency of an indictment" include "whether the indictment contains the elements of the offense intended to be charged, *and* sufficiently apprises the defendant of what he must be prepared to meet") (emphasis added); *Hagner v. United States*, 285 U.S. at 431 ("sufficiency of an indictment" requires that "it contain[] the elements of the offense intended to be charged, *and* sufficiently apprise[] the defendant of what he must be prepared to meet") (emphasis added). The Fourth Circuit's ruling ignores the "'substantial safeguards' to a criminal defendant which an indictment is designed to provide." *Russell v. United States*, 369 U.S. at 763 (quoting *Smith v. United States*, 360 U.S. 1, 9 (1959)).

Second, the Fourth Circuit not only disregards this Court's case law, it also disregards the allegation in the superseding indictment that Mr. Johnson "feloniously" assaulted the two federal officers. *See* JA23. The Fourth Circuit focuses on "the omission of the word "forcibly" before the word "assault," *see* App. 6, but the court does not address how the inclusion of the word "feloniously" affects the requirement that the indictment "fairly inform," *Hamling v. United States*, 418 U.S. at 117 or "sufficiently apprise," *Hagner v. United States*, 285 U.S. at 431, Mr. Johnson of the charge he had to defend.

"Feloniously," according to Black's Law Dictionary, can mean "[o]f, pertaining to, or having, the quality of [a] felony," or "acting with intent to commit a felony," or "done with a deliberate intention of committing a crime." *United States v. Simmons*, 247 F.3d 118, 121 (4th Cir. 2001) (quoting *Black's Law Dictionary* 555 (5th ed. 1979)) (alterations in *Simmons*). Thus, acting "feloniously" does not require the use of force. In contrast, the Fourth Circuit said "forcibly" means "effected with force." App. 5 (quoting *Merriam-Webster's Collegiate Dictionary* 489 (11th ed. 2020)). The Fourth Circuit surmised that "the indictment apparently substituted 'feloniously' for 'forcibly,'" *id.* at 4, but the court's conclusion that Mr. Johnson had "notice that he was charged with an assault *effected by force*", *id.* at 6, improperly ignores the plain text of the superseding indictment. "Every ingredient of the offence must be accurately and clearly expressed." *United States v. Reese*, 92 U.S. 214, 232 (1875). The Fourth Circuit erred in concluding that Mr. Johnson had adequate notice that he was charged with forcibly assaulting federal officers when he was charged with feloniously assaulting the officers.

II. MR. JOHNSON'S CONVICTION OF ASSAULTING A FEDERAL OFFICER WAS PLAIN ERROR THAT AFFECTED HIS SUBSTANTIAL RIGHTS.

When a defendant challenges the sufficiency of an indictment for the first time on appeal, the appellate court reviews for plain error. *See United States v. Cotton*, 535 U.S. 625, 631 (2002); App. 4. The Court will correct an unpreserved error if (1) an error was made; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 731-32 (1993).

As shown above, Mr. Johnson's conviction of assaulting federal officers was plain error where the superseding indictment omitted the essential element that Mr. Johnson committed the assault "forcibly" and instead alleged that he committed the assault "feloniously." *See supra* pp. 11-15.

"[I]n most cases[,]" to show that a plain error affected the defendant's substantial rights, the defendant must establish that the error was "prejudicial." *United States v. Olano*, 507 U.S. at 734. The substantial rights prong of the *Olano* test is met if the defendant shows that there is "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Greer v. United States*, 593 U.S. 503, 504 (2021) (quotation omitted). Contrary to the Fourth Circuit's conclusion, App. 7-9, Mr. Johnson's substantial rights were affected because, as further explained below, there is a reasonable probability that, but for the error in the indictment, the jury would not have convicted Mr. Johnson of assault.

The Fourth Circuit found that "the district court clearly instructed the jury that the crime with which Johnson was charged must be committed with forcible assault, and it defined what forcible assault meant." *Id.* at 8. But the Fourth Circuit's foreshortened discussion of the jury instructions omits that the district court and the prosecutor described the assault charge without including the "forcibly" element.

In its opening instructions, the district court described Count 4 without mentioning that the Government had to prove that the assault was committed

forcibly: "In Count 4 the defendant is charged with assaulting, resisting, opposing, impeding, intimidating or interfering with an officer or employee of the United States and aiding and abetting in that." JA37. The court did not say in that opening instruction that Count 4 required the jury to find that Mr. Johnson committed the assault forcibly. *See* JA37.

In its final instructions to the jury, the district court repeatedly referred to Count 4 of the superseding indictment, which did not include the "forcibly" element. *See* JA237, JA241. The court made clear that it was providing the defective indictment for the jury to consider when it explained the verdict form: "In Count 4, we the jury find the Defendant, Mr. Johnson, on Count 4 of the superseding indictment either guilty or not guilty, and the indictment is attached to the verdict sheet." JA237. In its instructions on the charge of using and carrying a firearm during and in relation to a crime of violence (Count 3), the court expressly relied on Count 4 as it was alleged in the indictment. The court told the jury that, to convict Mr. Johnson of Count 3, the jury would have to find:

> That the Defendant committed a crime of violence *as alleged in Count 4 of the superseding indictment*, that during and in relation to the commission of the crime the Defendant knowingly used or carried a firearm and that the carrying or use of the firearm was during and in relation to the crime *identified in Count 4 of the superseding indictment*.

JA241 (emphases added). The crime alleged or identified in Count 4 of the superseding indictment did not require a finding that assault was committed "forcibly." *See* JA23. The law assumes that "jurors can be relied upon to follow the trial judge's instructions." *Samia v. United States*, 599 U.S. 635, 646 (2023).

If the jurors followed the trial judge's instructions that did not include the "forcibly" element, they could have convicted Mr. Johnson of Count 3 or Count 4 without finding that he committed the assault in Count 4 forcibly. *See* JA241.

Because " jury instructions are to be judged as a whole," *Hamling v. United States*, 418 U.S. at 107, the mention of "forcibly" in some instructions did not eliminate prejudice to Mr. Johnson from the defective indictment.

The Government contributed to the confusion when the prosecutor drew the jury's attention to an incomplete list of the elements of the offense in closing argument. *See* JA220. The Government's counsel asked the jury to focus on the plea agreement of Mr. Johnson's co-defendant, Willard Lee Acklin, Jr., and the elements of the offense to which Mr. Acklin pleaded guilty—the same assault offense in which Mr. Johnson was also charged. JA220. The Government's counsel asked to "zoom in on the elements" of Mr. Acklin's plea agreement, JA220, and explained to the jury that the court had accepted Mr. Acklin's plea agreement as to Count 4 of the superseding indictment, the same count where Mr. Johnson was charged with assault, JA221. The prosecutor then read the elements of that offense to the jury:

> The elements of the plea agreement, on or about October 16th, 2020 in the Eastern District of North Carolina, Pitt County, North Carolina, the Defendant aiding and abetting his co-defendant did knowingly and feloniously assault, resist, oppose, impede, intimidate and interfere with special agents whose initials are given, PGM and Task Force Officer, MTM, both of the Federal Bureau of Investigation while both officers were engaged in the performance of their duties and used a deadly weapon and dangerous weapon in the commission of said offense. Again, aiding and abetting his co-defendant who was Mr. Johnson.

JA221. In describing Mr. Acklin's plea agreement and the elements of Count 4, the Government's counsel did not mention that the jury had to find that the assault was committed forcibly. *See* JA220-221. The jury instructions and the Government's argument compounded—rather than cured—the error in the indictment.

In finding that Mr. Johnson's substantial rights were not affected, the Fourth Circuit also concluded the jury "necessarily found that Johnson fired eight shots, a finding that inherently included a finding of force." App. 9. To the contrary, the jury appeared to view the evidence as less than clear, prompting a question during deliberations: "Is Defendant Johnson guilty of Count 4 if he handed the gun to Scooter and knew Scooter would shoot at the car?" JA245. In response, the district court noted Mr. Johnson was charged with aiding and abetting and gave an aiding and abetting instruction. JA245-46.

In sum, Mr. Johnson's substantial rights were affected by the omission of "forcibly" from the indictment because there is a reasonable probability that the outcome would have been different but for the plain error. *See Greer v. United States*, 593 U.S. at 504.

CONCLUSION

For the foregoing reasons, Petitioner Ikeviaun Quamonn Johnson respectfully requests that the Court grant this petition and issue a writ of certiorari to review the opinion of the Fourth Circuit in this case.

This the 25th day of April, 2025.

Respectfully submitted,

/s/ Paul K. Sun, Jr.
Paul K. Sun, Jr.
Counsel of Record
N.C. State Bar No. 16847
Kelly Margolis Dagger
ELLIS & WINTERS LLP
Post Office Box 33550
Raleigh, North Carolina 27636
(919) 865-7000 – Telephone
(919) 865-7010 – Facsimile

Counsel for Petitioner
Ikeviaun Quamonn Johnson