No. 22-710

In the Supreme Court of the United States

JAMES D. PIERON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
DAVID A. HUBBERT
Deputy Assistant Attorney General
S. ROBERT LYONS
JOSEPH B. SYVERSON
GREGORY S. KNAPP
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed reversible error when it determined that a jury instruction regarding the statute of limitations was not warranted in light of the evidence presented at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

In the Supreme Court of the United States

No. 22-710

JAMES D. PIERON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is available at 2022 WL 3867562. The order of the district court (Pet. App. 9a-43a) denying petitioner's motions for judgment of acquittal and for a new trial is not published in the Federal Supplement but is available at 2020 WL 7353650.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2022. On November 16, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including January 27, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of tax evasion, in violation of 26 U.S.C. 7201. Judgment 1. The district court sentenced petitioner to 15 months of imprisonment, to be followed by two years of supervised release. Judgment 1-2. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner, a citizen of the United States, earned taxable income from a currency trading company that he operated in Switzerland. Pet. App. 1a. In 2011, petitioner filed United States income tax returns for the 2008 and 2009 tax years, reporting taxes due of $268,445 and $125,490, respectively. *Id.* at 2a. Despite having several bank accounts with six-figure balances, petitioner did not pay those taxes. *Id.* at 2a, 13a.

Instead, petitioner attempted to deceive the Internal Revenue Service (IRS) about his ability to pay. In January 2012, after the IRS issued demands for payment, petitioner proposed an installment agreement in which he would pay just $1500 per month to settle his tax liabilities—a "payment schedule [that] would run more than a quarter-century." Pet. App. 2a. Along with the proposed installment plan, petitioner submitted a false Form 433-F (Collection Information Statement) that substantially understated the value of his assets. *Id.* at 5a, 14a-15a. In August 2012, petitioner submitted a false Report of Foreign Bank and Financial Accounts (FBAR), understating the balance of one of his accounts by at least $500,000. *Id.* at 5a, 15a. And in 2014, with his taxes still unpaid, petitioner submitted another false Form 433-F. *Id.* at 15a-16a.

2. In July 2018, a grand jury in the Eastern District of Michigan returned an indictment charging petitioner

with one count of willfully attempting to evade payment of his 2008 and 2009 income taxes, in violation of 26 U.S.C. 7201. Pet. App. 2a-3a, 9a. The government filed a bill of particulars setting forth several acts of evasion that petitioner committed between approximately 2008 and 2014. D. Ct. Doc. 5 (Aug. 1, 2018). Those acts included petitioner's use of nominee bank accounts to conceal his assets and his submission of the false Forms 433-F and FBAR to the IRS. *Id.* at 2-7; see Pet. App. 6a, 10a-11a.

Before trial, petitioner filed a motion to dismiss the indictment. D. Ct. Doc. 14 (Oct. 12, 2018). Among other things, the motion briefly argued that the "indictment must be dismissed because it is outside of the statute of limitations." *Id.* at 6 (capitalization and emphasis omitted); see 26 U.S.C. 6531(2) (specifying six-year statute of limitations "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof"). Petitioner contended that the statute of limitations had expired, at the latest, in January 2018, several months before the indictment was filed in July 2018. See D. Ct. Doc. 14, at 7. The district court denied the motion, explaining that petitioner had "entered into two tolling agreements extending the statute of limitations" and "cannot now argue that the charges are untimely." D. Ct. Doc. 31, at 5 (Nov. 27, 2018).

The case proceeded to trial, at which the district court instructed the jury that, to find petitioner guilty of tax evasion, it had to find beyond a reasonable doubt that (1) income tax was due from petitioner; (2) petitioner committed an affirmative act to evade his tax obligation; and (3) petitioner acted willfully. D. Ct. Doc. 49, at 8 (Mar. 7, 2019). At petitioner's request, the court further instructed that the good faith of petitioner was

a defense to tax evasion "because good faith is simply inconsistent with willfully attempting to evade or defeat any tax." *Id.* at 9. The court declined, however, to give an additional instruction petitioner proposed that would have advised the jury that it needed to find that petitioner "committed an affirmative act of tax evasion after January 9, 2012," which was the date set by the statute-of-limitations tolling agreement between the parties. Pet. App. 6a; Gov't C.A. Br. 7.

The district court found that the proposed statute-of-limitations instruction was not warranted in light of the evidence that had come in at trial. See Pet. App. 46a-47a. At the charge conference, petitioner objected to the omission of his proposed instruction. *Id.* at 46a. Overruling the objection, the court explained that it "d[id] not understand there to be disputes of fact concerning events as outlined in the bill of particulars that would have been * * * actionable within the statute of limitations." *Id.* at 47a. Petitioner did not further object or identify any factual disputes raised at trial as relevant to the court's decision or the limitations issue more generally. See *ibid.*

The jury found petitioner guilty. Pet. App. 3a.

3. The district court denied petitioner's motions for a judgment of acquittal or, in the alternative, a new trial. Pet. App. 9a-43a.

The district court rejected petitioner's argument that there was insufficient evidence supporting a finding that his submission of the Forms 433-F and the FBAR—which undisputedly occurred within the limitations period—constituted affirmative acts of tax evasion. See Pet. App. 24a-28a. The court also rejected petitioner's argument that omission of his proposed limitations instruction required a new trial. *Id.* at 28a-31a.

The court explained that "no binding authority required [petitioner's] proposed instruction," and that "[e]ven assuming the instruction was correct," petitioner "cannot show that the failure [to give it] substantially impaired his defense" because "the Government introduced compelling evidence that [petitioner] continued to evade his taxes after January 9, 2012." *Id.* at 28a-29a, 31a.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-7a.

The court of appeals agreed with the district court that petitioner's submission of the false Forms 433-F and FBAR was "compelling evidence" that his tax evasion continued into the limitations period. Pet. App. 5a. And the court of appeals found it unnecessary to determine whether the district court abused its discretion in declining to give an instruction on the statute of limitations because "any error as to the district court's failure to give the instruction was harmless." *Id.* at 6a (citing *Skilling* v. *United States*, 561 U.S. 358, 414 (2010), and Fed. R. Crim. P. 52(a)).

The court of appeals observed that "the 433-F forms that [petitioner] filed in 2012 and 2014 * * * were patently misleading; and [petitioner] made little effort to persuade the jury otherwise." Pet. App. 6a. It accordingly found "no reason to think that the jury might have overlooked his 2012 and 2014 433-F forms or otherwise found them non-evasive." *Ibid.* "Moreover," the court added, "the jury had every reason to think that [petitioner's] August 2012 [FBAR] (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." *Ibid.* And the court then stated that because "[t]he government has shown by a preponderance of evidence that the district court's decision not to give

[petitioner's] proposed instruction neither affected nor 'substantially swayed' the verdict," petitioner was not entitled to a new trial. *Ibid.* (quoting *United States* v. *Kettles*, 970 F.3d 637, 643 (6th Cir.), cert. denied, 141 S. Ct. 924 (2020)).

ARGUMENT

Petitioner contends (Pet. 9-22) that the unpublished decision below applied an insufficiently demanding standard of harmless error to his claim that the jury should have been instructed about the statute of limitations. But the district court did not abuse its discretion in declining to give such an instruction in the circumstances of petitioner's trial, and even if it did, any instructional error was harmless in light of the compelling evidence that petitioner committed acts of tax avoidance during the limitations period. The court of appeals' resolution of that issue does not conflict with any decision of this Court or of another court of appeals. And this case would be an especially poor vehicle for addressing the appropriate harmless-error standard for instructions both because it involves an affirmative defense and because petitioner failed to press his current argument regarding the proper harmlessness standard below. Accordingly, the petition for a writ of certiorari should be denied.

1. As a threshold matter, although the court of appeals did not elect to reach the issue, the district court did not abuse its discretion by denying a statute-of-limitations instruction in the circumstances of this case. See *United States* v. *Park*, 421 U.S. 658, 675 (1975) (reviewing jury instructions for abuse of discretion); *United States* v. *Volkman*, 797 F.3d 377, 385 (6th Cir.) ("We review a denial of a proposed jury instruction for an abuse of discretion."), cert. denied, 577 U.S. 934

(2015); Pet. C.A. Reply Br. 17 (acknowledging that "denial of requested instructions is reviewed for abuse of discretion").[1]

"Commission of [a] crime within the statute-of-limitations period is not an element" of an offense. *Smith* v. *United States*, 568 U.S. 106, 112 (2013) (emphasis omitted). Instead, the statute of limitations provides an affirmative defense, "and it is up to the defendant to raise the limitations defense." *Ibid.* "When a defendant presses a limitation 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).

Here, the district court's "understand[ing]" that there were no "disputes of fact concerning events as outlined in the bill of particulars that would have been * * * actionable within the statute of limitations," Pet. App. 47a, amounted to a finding that petitioner failed to press the statute of limitations defense at trial. In a single paragraph, petitioner asserts (Pet. 19) that he sufficiently raised the statute-of-limitations defense by

---

[1] To the extent that petitioner suggests the court of appeals did find error here, that suggestion is misplaced. See Pet. i (resting first question presented on the premise that the court of appeals "found constitutional error but deemed it harmless"); cf. Pet. 8 (asserting that the court of appeals "concluded that the district court's error was harmless"). While the court of appeals acknowledged that petitioner had made a "serious argument * * * that the district court should have instructed the jury" on the limitations period, it found it unnecessary to decide whether the district court abused its discretion in declining to do so because "any error" on that score "was harmless." Pet. App. 5a-6a; see pp. 8-11, *infra*.

making a pretrial motion to dismiss and "proffer[ing] a jury instruction on the issue." But the district court denied that motion based on the tolling agreement between the parties, see D. Ct. Doc. 31, at 5, and petitioner did not thereafter raise any questions about the existence or effect of the tolling agreement at trial. See Gov't C.A. Br. 34. Nor did petitioner offer the jury any other reason to believe that the government's claims were untimely.

When "a defendant fails to press a limitations defense, the defense does not become part of the case and the Government does not otherwise have the burden of proving that it filed a timely indictment." *Musacchio*, 577 U.S. at 248. A defendant is not automatically entitled to an instruction on a substantive matter of law that is neither addressed to the government's burden to prove the elements of the offense nor germane to a disputed issue at trial. As this Court long ago recognized, a district court is "under no obligation (indeed it would simply have been confusing the minds of the jury) to give any instruction upon a matter which was not really open for their consideration." *Davis* v. *United States*, 165 U.S. 373, 378-379 (1897) (upholding denial of manslaughter instruction where "there was nothing upon which any suggestion of any inferior degree of homicide could be made").

2. In any event, the court of appeals correctly determined that even assuming an instruction on the statute of limitations was warranted, "any error as to the district court's failure to give the instruction was harmless." Pet. App. 6a (citing *Skilling* v. *United States*, 561 U.S. 358, 414 (2010) and Fed. R. Crim. P. 52(a)).

a. Most trial errors are subject to harmless-error review on appeal. See *Rose* v. *Clark,* 478 U.S. 570, 579

(1986). Where a reviewing court identifies a federal constitutional error, it may generally decline to reverse if it determines that the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Where a reviewing court identifies a non-constitutional error, a "more forgiving standard of review" applies, *Fry* v. *Pliler*, 551 U.S. 112, 116 (2007), under which the court will decline to reverse unless it finds that the error "had substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). That latter standard is the appropriate one here.

The Constitution affords "a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995). Given that right, this Court has applied *Chapman*'s harmless-error standard where a district court provided erroneous jury instructions that misstated an element of the offense, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 501, 504 (1987); shifted the burden of proof on an element, *e.g.*, *Rose,* 478 U.S. at 579-580; or omitted an element altogether, *Neder* v. *United States*, 527 U.S. 1, 10-11 (1999).

As discussed above, however, "[c]ommission of the crime within the statute-of-limitations period is not an element of the * * * offense." *Smith*, 568 U.S. at 112 (emphasis omitted). "A statute-of-limitations defense does not call the criminality of the defendant's conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution." *Ibid.* Accordingly, the government "is not constitutionally required" to prove that the offense occurred within the limitations period. *Ibid.* (holding that conviction for conspiracy does

not require the government to prove non-withdrawal within the limitations period). And when a defense simply "'excuses conduct that would otherwise be punishable,' but 'does not controvert any of the elements of the offense itself,' the Government has no *constitutional* duty to overcome the defense beyond a reasonable doubt." *Id.* at 110 (quoting *Dixon* v. *United States*, 548 U.S. 1, 6 (2006)) (emphasis added; brackets omitted).

Any error in denying petitioner's proposed jury instruction was therefore, at most, statutory error, not constitutional error. The "substantial and injurious effect" standard, see *Kotteakos*, 328 U.S. at 750, would therefore apply. *Fry*, 551 U.S. at 116 (citation omitted).

b. Petitioner's contrary arguments (Pet. 9-22) lack merit. His starting premise that "once properly invoked, compliance with the statute of limitations becomes an additional element of the crime," Pet. 10, cannot be squared with this Court's recognition that "[c]ommission of the crime within the statute-of-limitations period is *not* an element of the * * * offense." *Smith*, 568 U.S. at 112 (emphasis altered); see *Musacchio*, 577 U.S. at 247-248. And petitioner identifies no support for his theory that the elements of an offense can change based on a jury instruction that a defendant requests after he has been indicted. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 107 (2007) ("'[A]n indictment must set forth each element of the crime that it charges.'") (citation omitted).

Petitioner's attempt (Pet. 12-13, 16-18) to analogize this case to *Yates* v. *United States*, 354 U.S. 298 (1957), is likewise mistaken. The Court's decision in *Yates* reversed "a conviction resting on multiple theories *of guilt* when one of those theories is not unconstitutional, but

is otherwise legally flawed" and it "was impossible to say" which one the jury relied on. *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per curiam) (emphasis added; brackets, citation, and internal quotation marks omitted); see *Skilling*, 561 U.S. at 413-414 (similar reference to "theories of guilt"). As discussed above, however, a limitations defense does not address a defendant's "guilt." Instead, "although the statute of limitations may inhibit prosecution, it does not render the underlying conduct noncriminal." *Smith*, 568 U.S. at 111-112.

Contrary to petitioner's suggestion (Pet. 12-13), *Yates*'s holding does not indicate that an erroneous denial of a statute-of-limitations instruction must be reversed unless it is harmless beyond a reasonable doubt. Although the error in *Yates* involved a limitations bar, see 354 U.S. at 311, "neither [an earlier decision cited in *Yates*] nor *Yates* had reason to address whether the instructional errors they identified could be reviewed for harmlessness," *Hedgpeth*, 555 U.S. at 60—let alone what standard would apply. Cf. *Yates*, 354 U.S. at 311-312 (addressing government's argument that "the error was harmless" and only setting aside verdict "[i]n these circumstances" after doing so). And this Court's harmlessness jurisprudence, as well as its statute-of-limitations jurisprudence, have since been clarified in the manner discussed above in cases that directly addressed them. See pp. 6-10, *supra*.[2]

---

[2] To the extent that petitioner would read language in *Griffin* v. *United States*, 502 U.S. 46 (1991), as holding that reversal is required when a prosecution "is time barred," *id.* at 59, any such effort would be misguided. *Griffin* did not itself involve a time bar; its statement that "[j]urors 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

c. Petitioner also fails to demonstrate any conflict between the court of appeals' harmlessness determination and the decision of any other court of appeals. See Pet. 24-28. Notwithstanding petitioner's claim (Pet. 21) that "this Court's settled precedent" requires a determination of harmlessness beyond a reasonable doubt, he identifies no case applying such a standard to the assertedly erroneous denial of a statute-of-limitations instruction. Instead, his claim of a circuit conflict relies on decisions of the Fifth, Eleventh, and D.C. Circuits that he describes as "effectively treating" the omission of a statute-of-limitations instruction "as structural [error]" that would require automatic reversal, without any harmlessness inquiry at all. Pet. 25; see Pet. 14. But even he does not view such an approach as correct, and he provides no sound reason to think that those decisions actually adopted it. See Pet. 28 (acknowledging that none of them "expressly state[d] that the error was 'structural'").

In *United States* v. *Pursley*, 22 F.4th 586 (2022), the Fifth Circuit remanded the case for determination of a factual question (involving the time during which the statute of limitations might have been suspended under 18 U.S.C. 3292) that "both parties conceded that the district court" (not the jury) "should determine * * * in the first instance." 22 F.4th at 591. In *United States* v. *Edwards*, 968 F.2d 1148 (1992), cert. denied, 506 U.S. 1064 (1993), the Eleventh Circuit reversed based on the existence of "an evidentiary foundation" through which

---

time barred," *ibid.* (emphasis added), was simply a distinction of *Yates*, which involved the substantive disentanglement of two theories of guilt, only one of which was barred, see 354 U.S. at 311-312. It does not displace later decisions expressly addressing the affirmative-defense character of a limitations defense.

a "properly instructed" jury "could have found that [certain] offenses occurred outside of the limitations period." *Id.* at 1153. And in *United States* v. *Wilson*, 26 F.3d 142 (1994), cert. denied, 514 U.S. 1051 (1995), the government "readily admit[ted]" that a count of conviction "would be time barred" if the D.C. Circuit disagreed with the district court's conclusion that the defendant had waived a limitations defense. *Id.* at 154.

3. At all events, the unusual statute-of-limitations context, as well as the corresponding threshold absence of any abuse of discretion by the district court, see pp. 6-8, *supra*, counsel against further review in this case. Indeed, as petitioner recognizes (Pet. 11 n.1), this Court has not itself even held that a statute-of-limitations defense, when properly put at issue, actually requires a jury finding beyond a reasonable doubt, as his entire argument presupposes. In addition, the decision below is itself unpublished and nonprecedential, see Pet. App. 1a, and petitioner does not suggest that it is reflective of general practice within the Sixth Circuit. See Pet. 20 (arguing that the decision below applied a preponderance-of-the-evidence standard based on inapposite precedent); see also *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

This case would be an unsuitable vehicle for further review for additional reasons as well. First, petitioner never pressed his current argument in the court of appeals. Petitioner instead asserted that a failure to provide a statute-of-limitations instruction "cannot, as a matter of Supreme Court precedent, *ever* be cured by looking at evidence and deeming the issue harmless," Pet. C.A. Reply Br. 22—a position that he has now

abandoned. The court of appeals accordingly had no opportunity to address the argument that petitioner now presses (Pet. 9-22) as the basis for not only certiorari, but an extraordinary grant of summary reversal.

Second, the court of appeals would have found any error here harmless even under petitioner's proposed standard. The court, while reciting a preponderance-of-the-evidence standard, nevertheless made clear that it "s[aw] no reason to think that the jury might have overlooked [petitioner's] 433-F forms or otherwise found them non-evasive," and found that "in the context of the trial record as a whole, the jury had every reason to think that [his 2012 FBAR] (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." Pet. App. 6a. And it "agree[d] with the district court that 'the Government introduced compelling evidence that [petitioner] continued to evade his taxes after January 9, 2012.'" *Id.* at 5a. There is accordingly no sound basis for concluding that the outcome in this case would change if the question presented were resolved in petitioner's favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
DAVID A. HUBBERT
Deputy Assistant Attorney General
S. ROBERT LYONS
JOSEPH B. SYVERSON
GREGORY S. KNAPP
Attorneys

MAY 2023