No. _____

IN THE

Supreme Court of the United States

_____

DAN REED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. Whether the "knowingly" provision of 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of a 18 U.S.C. § 922(g) crime? This Court recently granted certiorari to address this question in *Rehaif v. United States,* No. 17-9560.

2. Whether expert testimony concerning a defendant's intellectual disability and mental health conditions – such as Petitioner's full-scale IQ of 61 and diagnosis of schizophrenia paranoid type – is relevant and admissible to support a justification defense to a § 922(g) crime?

3. Whether a mandatory-minimum sentence of 15 years in prison violates the Due Process Clause and the Eighth Amendment, because the sentencing court is afforded no discretion to impose a lower sentence based on the defendant's intellectual disability and mental health conditions?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dan Reed respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDERS BELOW

The opinion of the Eleventh Circuit, *United States v. Reed*, No. 17-12699, 2018 WL 5116330 (11th Cir. 2018), is provided in the petition appendix at 1a-5a ("Pet. App."). The district court's decision to exclude the defense's expert from testifying at trial and denial of the defense's motion to reconsider are provided at Pet. App. 6a-9a. The district court's sentencing decision is provided at Pet. App. 10a-15a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on October 19, 2018. *Id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 922(g) of Title 18 of the U.S. Code provides, in relevant part:

> It shall be unlawful for any person–
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . [or]
>
> (5) who, being an alien . . . is illegally or unlawfully in the United States . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition.

Section 924(a)(2) of Title 18 provides:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .

STATEMENT OF THE CASE

1. Petitioner Dan Reed is intellectually disabled. His full-scale IQ is 61, a score so low that 99.5% of people would score higher than him. Doc. 177 at 98. Mr. Reed also has a documented history of mental health conditions, including schizophrenia paranoid type. *Id.* at 93-95; Doc. 161 at 21. On January 26, 2015, Mr. Reed was nearly 50 years old, but was living with his mother and dependent on her care. Doc. 177 at 195-98; Doc. 179 at 55; *see* PSR page 2.

2. The federal government prosecuted Mr. Reed for being a convicted felon in possession of a firearm on January 26, 2015, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 16a. The government also sought a 15-year mandatory-minimum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). *See* Docs. 155, 161, 182.

3. At trial, the district court concluded that there was sufficient evidence for the jury to be instructed on the justification defense and instructed the jury accordingly. Doc. 179 at 34-38, 46-47. Witnesses, including Mr. Reed, had testified concerning threats against Mr. Reed leading to his possession of the firearm. *See* Doc. 177 at 122, 149-60, 167-68, 189, 195-208; Doc. 179 at 13-32.

The court, however, excluded the entire testimony of the defense's expert, neuropsychologist Dr. Robert Cohen. Pet. App. 6a-9a. The defense intended to present Dr. Cohen to testify concerning the objective measures of Mr. Reed's intellectual disability and mental health conditions – i.e., his IQ and schizophrenia – and their typical effect on the perception of threats and ability to consider reasonable alternatives. Doc. 66 at 7-12; Doc. 170 at 15-17. The court excluded the expert's testimony, stating that "a defendant's subjective perception of threats and subjective ability to consider reasonable alternatives is not relevant to a justification defense." Pet App. 6a. The court denied the defense's motion to reconsider, commenting that it was "troubled by [its] ruling, but that's my understanding of the current state of the law." Pet. App. 9a.

As a result, the jury was merely told, by Mr. Reed's mother, that Mr. Reed had "stopped learning" after an adverse reaction to aspirin as a child and that he was a "schizophrenia child." Doc. 177 at 207-09. The jury was not told that Mr. Reed's IQ is lower than 99.5% of the population. Nor did the jury hear about Mr. Reed's extremely impaired verbal comprehension or have explained to them the typical effects of schizophrenia paranoid type. The jury found Mr. Reed guilty of the felon-in-possession offense. Doc. 90.

4. At sentencing, the district court concluded that Mr. Reed qualified for the ACCA's 15-year mandatory-minimum sentence. The court, however, made clear it would have imposed a lower sentence, had it had any discretion, based on Mr. Reed's intellectual disability and mental health impairments. Pet. App. 11a. The court further concluded that a 15-year "armed career criminal" sentence is "completely out of proportion to the seriousness of this offense." *Id*. at 13a. In pronouncing the 15-year sentence, the court recounted the change from the mandatory

sentencing guidelines and urged that such a change was now needed with respect to statutory mandatory-minimum sentences, stating:

> When punishment is unjust, our legal system has failed, and our legal system has failed Mr. Reed. Instead of providing him with the help he needs, we simply brand him as a serious criminal, lock him up, out of sight, out of mind for 15 years. This sentence does not bring respect for the law. It breeds disrespect for the law.
>
> When I first came here 16 years ago, I came from a background of commercial litigation. As I observed and imposed sentences, I concluded that mandatory guidelines were wrong and often led to unjust sentences. So I spoke up, and I wrote opinion after opinion, reversed after reversal.
>
> But ultimately I was vindicated by the U.S. Supreme Court by *Booker* and its progeny, and today our sentencing system is much better than it was as a result of some courageous judges, the efficacy of defense counsel, and others who recognized the injustice of mandatory guideline sentences, and improvements were made.
>
> It's now time to once again speak out against the harsh mandatory minimum sentences that have no place in the court of justice, and today's sentence is exhibit No. 1.
>
> So it's with a heavy heart and with disappointment in our system of justice and those who prosecuted this case that I sentence Mr. Reed to 180 months in federal prison.

Id. at 13a-14a (referencing *United States v. Booker*, 543 U.S. 220 (2005)).

5. The Eleventh Circuit affirmed. The court of appeals determined that Dr. Cohen's testimony was inadmissible under Federal Rules of Evidence 702 and 704, and that the exclusion of Dr. Cohen's testimony had not impaired Mr. Reed's justification defense. Pet. App. 3a. The court also rejected Mr. Reed's Due Process Clause and Eighth Amendment challenges to his mandatory-minimum sentence based on its prior precedent. Pet. App. 4a. (citing *United States v. Smith*, 775 F.3d 1262, 1266 (11th Cir. 2014); *United States v. Holmes*, 838 F.2d 1175, 1177 (11th Cir. 1988)).

6. Following the Eleventh Circuit's decision in Mr. Reed's case, this Court granted certiorari in *Rehaif v. United States*, No. 17-9560. In Mr. Reed's case, whether he knew he was a convicted felon at the time of his firearm possession was neither charged in the indictment nor proven to the jury beyond a reasonable doubt. *See* Pet. App. 16a-17a, 26a-27a.[1]

REASONS FOR GRANTING THE WRIT

I. Mr. Reed Respectfully Requests that His Case Be Held Pending this Court's Decision in *Rehaif v. United States*, No. 17-9560

This Court has granted certiorari in *Rehaif v. United States* on the important question of whether the "knowingly" provision of 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of a 18 U.S.C. § 922(g) crime. The petition for a writ of certiorari in *Rehaif* relied extensively on then-Judge Gorsuch's opinions in *United States v. Games-Perez*, explaining that the "knowingly" provision should apply to the status elements of § 922(g) including, as there, whether the defendant was a convicted felon. 667 F.3d 1136, 1142-46 (10th Cir. 2012) (Gorsuch, J., concurring in judgment); 695 F.3d 1104, 1116-17 (10th Cir. 2012) (Mem) (Gorsuch, J., dissenting from denial of rehearing en banc).

Mr. Reed was convicted after a jury trial of being a convicted felon who knowingly possessed a firearm. The indictment did not charge, and the government did not prove to the jury beyond a reasonable doubt, that Mr. Reed also knew he was a convicted felon at the time of the possession. *See* Pet. App. 16a-17a, 26a-27a. Should this Court decide in *Rehaif* that the knowingly provision of § 924(a)(2) applies to the status elements of § 922(g), Mr. Reed's conviction cannot stand.

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[1] The parties' stipulation at trial also did not address whether Mr. Reed knew he was a convicted felon at the time of the firearm possession. *See id.* at 28a-30a.

Mr. Reed therefore respectfully requests that this Court hold his petition pending the Court's decision in *Rehaif*. *See, e.g., Diaz-Morales v. United States*, No. 15-6783 (holding case pending *Mathis v. United States*, 136 S. Ct. 2243 (2016)). Although this issue was not raised below, this Court is not precluded from holding Mr. Reed's case. *See, e.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (deciding issue not raised below). The issue is squarely before the Court, which will review the decision of the Eleventh Circuit in *Rehaif*. *See United States v. Rehaif*, 868 F.3d 907 (11th Cir. 2017), *vacated and replaced by*, 888 F.3d 1138 (11th Cir. 2018), *cert. granted*, No. 17-9560, 2019 WL 166874 (Jan. 11, 2019). Even had Mr. Reed raised the issue below, Eleventh Circuit precedent foreclosed the issue against him. *See Rehaif*, 888 F.3d at 1144 (following, as binding precedent, *United States v. Jackson*, 120 F.3d 1226 (11th Cir. 1997)).

Moreover, there is a reasonable probability of a different outcome in Mr. Reed's case if the government had to prove at trial that he knew he was a convicted felon at the time of the firearm possession. Among other things, Mr. Reed has a full-scale IQ of 61, which is in the 0.5 percentile – meaning 99.5% of the population would test higher than him. Doc. 177 at 98. Further, Mr. Reed was convicted, and ultimately sentenced to a 15-year sentence, without any proof or jury finding that he knew he was a convicted felon at the time of the possession. Mr. Reed therefore respectfully asks that his case be held pending the Court's decision in *Rehaif*.

II. This Court's Review is Needed To Resolve Whether a Defendant's Intellectual Disability and Mental Health Conditions Are Admissible at Trial to Support a Justification Defense

In the decision below, the Eleventh Circuit held that an expert's entire testimony concerning a defendant's intellectual disability and mental health conditions was irrelevant and inadmissible at trial to support a justification defense to a § 922(g) charge. Pet. App. 3a. In Mr.

Reed's case, the jury was instructed it could find that Mr. Reed had been justified in possessing the unloaded firearm on January 26, 2015; witnesses had testified concerning the threats leading to him possessing the unloaded firearm. *See* Doc. 179 at 34-38, 46-47. But Mr. Reed was precluded from presenting expert testimony relevant to the jury's determination of whether Mr. Reed acted reasonably under the circumstances – i.e., his intellectual disability and mental health impairments and their typical effects.

The Eleventh Circuit's decision is wrong and is at odds with other courts' decisions, including the D.C. Circuit's decision in *United States v. Nwoye*, 824 F.3d 1129, 1136 (D.C. Cir. 2016), which permit the expert testimony of a defendant's battered woman's syndrome (a mental health condition) to support a duress defense.[2] In *Nwoye*, the D.C. Circuit concluded:

> We agree with the majority of the courts that expert testimony on battered woman syndrome can be relevant to the duress defense. The reason, put simply, is that the duress defense requires a defendant to have acted reasonably under the circumstances, and expert testimony can help a jury assess whether a battered woman's actions were reasonable.

824 F.3d at 1136. As the D.C. Circuit explained, women with battered women's syndrome "often" perceive threats differently (such as being "hypervigilant to cues of impending danger"), which is relevant to the imminent-harm prong of the duress defense. *Id*. at 1137. Additionally, women with battered women's syndrome may face impediments to leaving the abusive relationship and therefore not take advantage of the "otherwise reasonable-sounding opportunity to avoid committing the alleged crime," which is relevant to the reasonable-alternative prong of

[2] The government recognized below that the defenses of justification and duress are "overlapping concepts with the same analysis." Br. United States at 20 n.1 (quoting *United States v. Flores*, 572 F.3d 1254, 1266 n.4 (11th Cir. 2009)) (internal quotation marks omitted). As relevant here, the justification defense requires, among other factors, that the defendant have been "under unlawful and present, imminent, and impending threat of death or serious bodily injury" and "had no reasonable legal alternative to violating the law." *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000).

the duress defense. *Id.* at 1137-38. The court thus concluded that expert testimony on battered women's syndrome is admissible as relevant to a duress defense. *Id.* at 1138.

Based on the D.C. Circuit's reasoning, Mr. Reed's expert testimony was admissible as relevant to support his justification defense. Dr. Cohen's expert testimony would have assisted the jury in understanding how a person's intellectual disability and mental illnesses affect the perception of threats – prong one of the justification defense. *See id.* at 1137. In Mr. Reed's case, Dr. Cohen would have testified that Mr. Reed's full-scale IQ was 61, a score lower than 99.5% of the population. Doc. 177 at 97-98. Dr. Cohen would have also explained that intellectual disability is "a condition [a person is] born with" and that Mr. Reed had tested as mentally retarded since the age of 6. Doc. 177 at 95; Sealed Doc. 107 at 2. Further, Dr. Cohen would have described to the jury that a person with an intellectual disability will have low functioning in other areas, including "[e]motional control, behavioral ability to control [one's] behavior, ability to plan ahead, to reason, to make good judgments." Doc. 177 at 96. Notably, Dr. Cohen's testimony would have accorded with this Court's recognition that intellectually disabled individuals "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (prohibiting the death penalty for mentally retarded individuals).

Additionally, Dr. Cohen's testimony would have assisted the jury in understanding how a person's intellectual disability and mental illnesses affect the ability to consider reasonable alternatives – the third prong of the justification defense. *See Nwoye*, 824 F.3d at 1137-38. Dr. Cohen had reviewed Mr. Reed's documented long-term mental illnesses, including a history of hallucinations and diagnoses of psychotic disorder, schizoaffective disorder, paranoid

schizophrenia, and major depression. Doc. 177 at 93-94. Dr. Cohen would have been able to explain to the jury that such conditions affect a person's "view of reality." Doc. 177 at 94.[3]

The Eleventh Circuit's decision that expert testimony concerning a defendant's intellectual disability and mental health impairments is not relevant and admissible cannot be squared with the D.C. Circuit's decision in *Nwoye*. Mr. Reed therefore respectfully requests this Court's review to resolve this important issue.

Mr. Reed's case is a good vehicle to resolve this divergence. The Eleventh Circuit suggested that other evidence had been presented to jury to support Mr. Reed's justification defense. Pet. App. 3a. The exclusion of the expert's testimony, however, eviscerated Mr. Reed's defense. Without the expert's testimony, the jury was left with Mr. Reed's mother's rudimentary description of his condition – that he had "stopped learning" after taking aspirin as a child, was "schizophrenic," and was "a little different from other children." *Id.* (internal quotation marks omitted). Such testimony was incomparable to Dr. Cohen's concrete testimony that Mr. Reed's IQ is so low that 99.5% of the population would score higher than him. In addition, the officer's testimony that Mr. Reed was "venting" on the day in question did not inform the jury of Mr. Reed's intellectual disability and mental health conditions. *See id.* And, Mr. Reed himself was clearly not qualified to testify to his IQ testing, his mental retardation and mental illnesses, or the typical effects of those conditions. *See id.*

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[3] The defense made clear below that it would not elicit Dr. Cohen's testimony as to the ultimate issue. *See* Fed. R. Evid. 704(b) (providing that an expert in a criminal case "must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense") (emphases added). Rule 704(b) does not preclude the entirety of the expert's testimony, but merely precludes this statement. *See, e.g., United States v. Valle*, 72 F.3d 210, 216 (1st Cir. 1995); *United States v. Watson*, 260 F.3d 301, 308-09 (3d Cir. 2001); *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir. 1988). This aspect of the Eleventh Circuit's decision is thus incorrect. *See* Pet. App. 3a.

Moreover, mental retardation, schizophrenia paranoid type, and the typical effects of those conditions, are not matters within the understanding of the average layperson. Indeed, this Court relies upon medical experts to inform its decision on what it means to be intellectually disabled. *See, e.g., Hall v. Florida*, 572 U.S. 701, 710, 721-23 (2014).[4] Without the expert's testimony, Mr. Reed was prevented from fully presenting his justification defense. Mr. Reed therefore respectfully seeks this Court's review.

III. This Court's Review Is Needed To Resolve Whether A Mandatory-Minimum Sentence Violates The Due Process Clause And The Eighth Amendment, Because The Sentencing Court Is Afforded No Discretion To Impose A Lower Sentence Based On The Defendant's Intellectual Disability And Mental Health Conditions

At sentencing, the district court criticized the mandatory-minimum sentence provided by the Armed Career Criminal Act and called Mr. Reed's case "exhibit No. 1" against such mandatory-minimum sentences. Pet. App. 13a-14a. The court made clear it would have imposed a lower sentence, had it had any discretion, based on Mr. Reed's intellectual disability and mental health impairments. *Id.* at 11a. The court further concluded that a 15-year "armed career criminal" sentence is "completely out of proportion to the seriousness of this offense." *Id.* at 13a. Nonetheless, the district court was statutorily required to sentence Mr. Reed, a man in his 50s, to 15 years in prison.

Petitioner respectfully seeks this Court's review to determine whether the mandatory-minimum sentence under the ACCA violates the Due Process Clause and Eighth Amendment,

[4] Mr. Reed recognizes that the Sixth Circuit in *United States v. Johnson*, 416 F.3d 464, 469-70 (6th Cir. 2005), decided that a defendant's intellectual disability was irrelevant and inadmissible to support his duress defense. The Sixth Circuit did not "accept that mental retardation is a 'physical debilitation' akin to tangible, verifiable, physical disabilities such as blindness, deafness, partial paralysis, a missing limb, or the like." *Id.* at 469. Such view, however, does not accord with this Court's decisions recognizing intellectually disabled individuals as an identifiable class. *See Hall*, 572 U.S. at 710, 721-23; *Atkins*, 536 U.S. at 318.

because a district court is afforded no discretion to impose a lower sentence based on a defendant's intellectual disability and mental health impairments. This Court has recognized the reduced culpabilities of intellectually disabled individuals. *See Atkins*, 536 U.S. at 306-07, 317-20 (ruling that the execution of mentally retarded persons, due to their reduced culpabilities, violates the Eighth Amendment); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("impaired intellectual functioning is inherently mitigating"); *cf. Graham v. Florida*, 560 U.S. 48, 67-75 (2010) (concluding that life without parole for juvenile nonhomicide offenders, in light of the "lessened culpability" of juveniles, violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 465, 470-74 (2012) (striking down mandatory life sentence for juvenile offenders, based upon their reduced culpability). Like the mandatory-life sentencing schemes that this Court struck down in *Graham* and *Miller*, the ACCA's mandatory-minimum sentence "prevent[s] the sentencer from taking account of the[] central considerations" that the intellectually disabled are less culpable than other individuals. *Miller*, 567 U.S. at 474, 476-79. Mr. Reed accordingly seeks this Court's review to address the constitutionality of the ACCA's mandatory-minimum sentencing scheme.

In making this request for review, Mr. Reed notes that another Due Process Clause and Eighth Amendment challenge to a mandatory-minimum scheme – the stacking of 18 U.S.C. § 924(c) sentences – is currently pending before this Court. *See* Petition for a Writ of Certiorari, *Rivera-Ruperto v. United States*, No. 18-5384 (filed July 27, 2018). In *Rivera-Ruperto*, Judges of the First Circuit asked this Court to revisit *Harmelin v. Michigan*, 501 U.S. 957 (1991). *See United States v. Rivera-Ruperto*, 884 F.3d 25, 26, 36-48 (1st Cir. 2018) (Barron, Howard, Torruella, Lynch, Thompson, Kayatta, JJ., concurring in the denial of rehearing en banc). Should this Court grant the petition in *Rivera-Ruperto*, the Court's decision may affect the standards governing Due Process Clause and Eighth Amendment challenges to mandatory-minimum

sentencing schemes. Mr. Reed would therefore ask that his case be considered with or held pending the resolution of the petition in *Rivera-Ruperto*.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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