No. _____

In the Supreme Court of the United States

Christopher Johnson,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented For Review

I. Did the Ninth Circuit Court of Appeals erroneously find Johnson forfeited his sentencing claim, disregarding this Court's claim preservation holding in *Yee v. City of Escondido*, 503 U.S. 519 (1992)?

II. Did the Ninth Circuit Court of Appeals erroneously misinterpret Federal Rule of Criminal Procedure 32 to characterize Johnson's *legal* claim to whether his prior conviction constitutes a crime of violence under the federal Sentencing Guidelines as a *factual* argument?

III. Did the Ninth Circuit Court of Appeals misapply this Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), to find Johnson's prior state wobbler conviction was a felony offense under the federal Sentencing Guidelines?

IV. Should Johnson's guilty plea to violating 18 U.S.C. § 922(g)(1) and the resulting sentence be vacated under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), where all involved understood that, under then-binding precedent, a § 922(g)(1) conviction did not require proof beyond a reasonable doubt that Johnson know his alleged prohibited status at the time of the firearm possession?

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Petition for Certiorari

Petitioner Christopher Johnson respectfully petitions for a writ of certiorari before to the United States Court of Appeals for the Ninth Circuit.

Related Proceedings and Orders Below

1. District Court of Nevada, 2:17-cr-00057-JCM-CWH, *United States v. Christopher Johnson*, final judgment issued January 8, 2018.
2. Ninth Circuit Court of Appeals, 18-10016, *United States v. Christopher Johnson*, final judgment issued on April 9, 2019.
3. Ninth Circuit Court of Appeals, 18-10016, *United States v. Christopher Johnson*, panel rehearing and rehearing en banc denied on June 25, 2019.

Jurisdictional Statement

The Ninth Circuit Court of Appeals issued its published decision in this direct appeal on April 9, 2019, in *United States v. Christopher Johnson*, 920 F.3d 628 (9th Cir. 2019) (Appendix A), and denied panel rehearing and rehearing en banc on June 25, 2019 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). This petition is timely filed pursuant to Supreme Court Rule 13.1.

Relevant Constitutional, Statutory, and Rule Provisions

1. The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law.

2. Section 922(g)(1) of Title 18 of the U.S. Code provides "[i]t shall be unlawful for any person . . . who has been convicted" of a felony to possess a firearm. Section 924(a)(2) provides "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be . . . imprisoned not more than 10 years."

3. Federal Rule of Criminal Procedure Rule 32(i)(3) provides that, at sentencing, a district court "may accept any undisputed portion of the presentence report as a finding of fact," but "must—for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing."

4. Section 4B1.2(a) of the United States Sentencing Guidelines states, *inter alia*, a "crime of violence" is "any offense under federal or state law, punishable by imprisonment for a term exceeding one year.

Statement of the Case

A. District Court Proceedings

On February 21, 2017, a federal grand jury in the District of Nevada indicted Johnson on one count of being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1), 924(a)(2). EOR 26-27. The indictment alleged Johnson, on January 21, 2017,

> having been convicted of crimes punishable by imprisonment for a term exceeding one year, in the State of California, to wit: Make / Pass a Fictitious Check, in the Superior Court of Riverside Count, on or about October 10; and Assault with a Deadly Weapon, in the Superior Court of Riverside Count, on or about April 8, 2014, did knowingly possession [sic] being in and affecting interstate commerce and said firearm having been shipped in and transported in interstate commerce, all in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

EOR 26-27.

The indictment here identified two convictions as punishable by more than a term exceeding one year—making or passing a fictitious check, i.e., forgery, in 2006, and assault with a deadly weapon in 2014. EOR 25. The indictment did not identify a firearm, let alone allege Johnson knowingly possessed one, nor did it allege Johnson knew of his status regarding having been convicted of a crime punishable by imprisonment for term exceeding one year. EOR 26-27.

Johnson ultimately pled guilty, without a plea agreement, on July 6, 2017. EOR 49-65. Prior to his doing so, the district court explained there were three elements to be convicted of a § 922(g)(1) offense: "first, the defendant knowingly possessed the firearm; second, the firearm had been shipped or transported from one state to another; third, at the time the defendant possessed the firearm, the defendant had been previously convicted of a crime punishable by a term of imprisonment exceeding one year." EOR 55-56. Thus, at the time Johnson pled guilty, neither the government nor the district court asserted that the government needed to prove or that the government could prove Johnson knew he had been convicted of a crime punishable by more than a year of year of imprisonment at the time of the alleged firearm possession or had a prohibited status.

The probation officer who prepared the presentence investigation report (PSR) assigned Johnson a base offense level of 20 under U.S.S.G. § 2K2.1(a)(4)(A), the level that applies if a defendant has one prior conviction for a crime of violence. PSR ¶ 18. In order to be considered a crime of violence under the Guidelines, the offense must be "punishable by imprisonment for a term exceeding one year." U.S.S.G. § 4B1.2(a).

The alleged crime of violence was the 2014 California conviction identified as a predicate conviction in the indictment for assault with a deadly weapon, which was punished under Cal. Penal Code § 245(a)(1). PSR ¶ 33; EOR 26-27. The PSR summarized this prior conviction, without providing specific attribution to any source:

Date of Arrest	Conviction/Court	Date Sentence Imposed/ Disposition	Guideline	Pts
03/12/2014 (Age 29)	Assault With a Deadly Weapon - Not a Firearm (felony, 245(A)(1) PC)/ Superior Court of California, Riverside, CA; Docket No.: RIF1402055	04/08/2014: ***Sentenced to 6 months jail***, suspended and placed on 3 years probation.	4A1.1(c)	1

PSR ¶ 33 (emphasis added). The PSR summarized the second crime identified in the indictment as a predicate conviction as follows:

Date of Arrest	Conviction/Court	Date Sentence Imposed/ Disposition	Guideline	Pts
01/19/2006 (Age 21)	Make/Pass a Fictitious Check (felony, 476 (A) PC)/ Superior Court of California, Riverside, CA; Docket No.: RIF129071	10/02/2006: ***Sentenced to 120 days jail***, suspended placed on 36 months probation.	4A1.1(c)	0

PSR ¶ 30 (emphases added).

Applying a three-level reduction for acceptance of responsibility, the PSR assigned Johnson a total offense level of 17. PSR ¶¶ 25-27. With an assigned criminal history category of III, the resulting advisory Guidelines range was 30-37 months in prison. PSR ¶ 75.

Johnson filed written objections to the PSR's calculations, arguing a Cal. Penal Code § 245(a)(1) assault conviction does not qualify as a crime of violence. EOR 66-79. To support his overall claim that the assault conviction failed to "meet the relevant definition in U.S.S.G. § 4B1.2," Johnson argued the Guidelines define a

"crime of violence "to include any offense under federal, state, or local law, *punishable by imprisonment for a term exceeding one year,* that 'has as an element, the use, attempted use, or threatened use of physical force against the person of another.'" EOR 67-73 (quoting U.S.S.G. § 4B2.1(a)(1)) (emphasis added). Without the crime-of-violence enhancement, Johnson asserted his correct base offense level was 12, producing a Guidelines range of 15-21 months guideline range of imprisonment. EOR 67.

Because the 2004 California forgery conviction did not receive any criminal history points and was not used to enhanced Johnson's offense level, Johnson did not challenge the PSR's characterization of that offense as a "felony." PSR ¶ 30.

At sentencing on January 8, 2018, Johnson never conceded his prior assault conviction met the definition necessary to qualify as a crime of violence predicate under U.S.S.G. § 4B1.2, which includes the requirement that the prior was punishable by imprisonment over one year. Rather, Johnson's trial counsel noted she filed objections to PSR's errors, agreeing those objections were not "to the report itself" but "to the sentencing part of it." EOR 12. Johnson's trial counsel, though referring to the PSR's characterization of the assault conviction as a "felony," maintained the offense was not a crime of violence and rested on the written PSR objections. EOR 16.

With little analysis and without the government providing the district court any state court records for the assault conviction, the district court applied the crime-of-violence enhancement based on the assault conviction, adopting the PSR's

calculations, and sentenced Johnson to 30 months in prison and three years of supervised release. EOR 19-20.

B. Ninth Circuit Arguments

Johnson timely filed a notice of appeal to the Ninth Circuit Court of Appeals challenging the enhanced base offense level. EOR 1. As a procedural error, he challenged the district court's applied crime-of-violence enhancement. Johnson's arguments included that Cal. Penal Code § 245(a)(1) is a "wobbler" statute that, depending on the punishment imposed, is either a misdemeanor or a felony offense. Opening Brief (OB), pp. 5-18.

While acknowledging it would be inappropriate for the Ninth Circuit to engage in fact-finding, government counsel stated she "can represent to this Court" the state court docket in Johnson's case contained entries indicating a "felony settlement conference" and "felony plea form." Answering Brief (AB), 19 n.7. Yet neither the state court docket or alleged documents were offered into the record by the government. Forced to rebut the government's representations, Johnson asked the Ninth Circuit to take judicial notice of certain state court documents—the complaint, plea agreement, sentencing memorandum and sentencing transcript—wherein the state court announced it would "pronounce[]" "judgment," and then sentenced Johnson to 180 days in jail. App. Dkt. 24, Ex. A, pp. 1-2. Because a misdemeanor conviction cannot not serve as a predicate crime of violence under U.S.S.G. § 4B1.2's definition, Johnson requested remand. *See* OB, pp. 8-18; Reply Brief (RB), pp. 1-13.

Johnson also argued this Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), abrogated prior Ninth Circuit decisions on the treatment of wobblers and that his assault conviction is thus a misdemeanor, not a felony. *See* OB, pp. 19-23; RB, 14-19; App. Dkt. 34, 28(j) Letter, Jan. 17, 2019. *Moncrieffe* held that, where a predicate offense is defined with reference to the range of permissible punishment, an offense qualifies as a predicate only if it is "necessarily" punishable by a minimum prescribed sentence of more than a year of imprisonment—i.e., if it imposes felony punishment in every case. Johnson's assault conviction does not satisfy this test.

Finally, Johnson discovered during his appeal that the forgery conviction characterized by the indictment and PSR as a felony was in fact *not* a felony. Instead, the forgery offense "wobbled" to a misdemeanor offense for which Johnson received a 120-day suspended sentence and 3 years' probation. EOR 17; PSR ¶ 30. Because Johnson's forgery and assault convictions were the only two convictions underlying the indictment alleged to render Johnson a prohibited person under 18 U.S.C. § 922(g), Johnson argued he had *no* felony convictions and could lawfully possess a firearm. *See Johnson* oral argument, 8:10 to 9:20.[1]. The government agreed an open remand was appropriate if Johnson were successful in challenging the felony status of his assault conviction. *Id.* at 12:35 to 13:00.

1 Available at https://www.ca9.uscourts.gov/ media/view_video.php?pk_vid=00000 14894.

C. Ninth Circuit's Decision

The Ninth Circuit treated Johnson's appellate *arguments* supporting his overall claim that his assault conviction is not a crime of violence as new *claims* not previously raised in the district court. In doing so, the Ninth Circuit conflated claims with arguments, and factual findings with issues of law:

> Pursuant to Rule 32(i)(3)(A), the district court "may accept any undisputed portion of the presentence report as a finding of fact." The PSR clearly characterized Johnson's assault-with-a-deadly-weapon conviction as a felony. As discussed above, not only did Johnson fail to challenge that description, his counsel affirmatively represented to the court that he had two prior felony convictions, including the CPC § 245(a)(1) conviction at issue here. Additionally, Johnson and his attorney confirmed, in open court, the factual accuracy of the PSR. Because Johnson did not dispute that he had a felony conviction, the district court was entitled, under Rule 32, to accept as a fact the PSR's characterization of his offense of conviction.

Johnson, 920 F.3d at 634 (citing Fed. R. Crim. P. 32). The Ninth Circuit held that, under Rule 32, "Johnson's concessions in the district court foreclose[d] his argument that his conviction was not a felony." *Id.*

The Ninth Circuit alternatively addressed Johnson's arguments challenging the felony status of his assault conviction under *Moncrieffe*. Johnson argued, under *Moncrieffe,* California's treatment of his wobbler assault offense via Cal. Penal Code § 17(b) does not proscribe felony punishment in every case; it is discretionary; and he did not receive felony punishment in his case. *Johnson*, 920 F.3d at 637-38. Thus, his assault conviction was not categorically a crime of violence under U.S.S.G § 4B1.2 because, as a wobbler for which he received a 6-month sentence of incarceration, it is not an offense punishable by more than one year in prison in

every case. *Id.* at 637. The Ninth Circuit found inapplicable what it termed "*Moncrieffe*'s upshot"—that "a state felony conviction for *conduct* potentially subject to both felony and misdemeanor punishment under the [Controlled Substances Act] CSA cannot be a predicate offense under the categorical approach." *Id.* at 638 (emphasis in original). Relying on prior circuit law, the Ninth Circuit believed it must "look solely to whether the actual sentence the court imposed converted Johnson's conviction to a 'misdemeanor for all purposes' under [Cal. Penal Code] § 17(b)." *Johnson*, 920 F.3d at 635.

The Ninth Circuit affirmed Johnson's sentence, publishing its opinion. *Johnson*, 920 F.3d at 639. Johnson timely petitioned for panel rehearing and rehearing en banc. App. Dkts. 36, 37, 38. An Amicus Brief was filed on Johnson's behalf by the Ninth Circuit Federal Public and Community Defenders in support of his petition. App. Dkts. 39, 41. The Ninth Circuit denied Johnson's petition without a written opinion. App. Dkt. 42.

Reasons for Granting the Petition

I. The Ninth Circuit's decision contravenes this Court's holding in in *Yee v. City of Escondido*, by stripping litigants of properly preserved claims on appeal.

Johnson's claim in the district court and before the Ninth Circuit was identical: the prior assault conviction under Cal. Penal Code § 245(a)(1) is not a crime of violence as defined by U.S.S.G. § 4B1.2. The Ninth Circuit rejected this assertion, holding his *arguments* were "foreclosed," "belated," and constituted "newly minted" claims. *Johnson*, 920 F.3d at 631, 634. The Ninth Circuit's conflation of *arguments* with *claims* directly contravenes this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), and requires intervention by this Court, as this critical distinction is essential to all appellate litigants and ensures proper appellate review.

Only claims may be deemed waived or forfeited, not arguments. In *Yee*, this Court "rejected[ed] respondent's contention" that the petitioners' argument was not properly before it even though petitioners did not raise that argument below. 503 U.S. at 534. This Court held, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* (citing *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 78, n.2, (1988); *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983); *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)). Thus, when petitioners argued that the rent control ordinance at issue "constitute[d] a taking in two different ways, by physical occupation and by regulation," they were not raising "separate claims." *Yee*, 503 U.S. at 534-35. Rather, petitioners were raising "separate

arguments in support of a single claim—that the ordinance effects an unconstitutional taking." *Id.* at 535. Because petitioners raised the overall taking claim in the state courts they were free to "formulate[] any argument they liked in support of that claim." *Id.*

Johnson's sentencing claim here—which he raised in the district court and in the Ninth Circuit—was that the prior assault conviction does not meet the relevant crime-of-violence definition in U.S.S.G. § 4B1.2. Arguing the assault conviction does not qualify because it is a misdemeanor offense or because the underlying statute of conviction fails categorical analysis are not separate claims. They are merely alternative arguments supporting the single claim that the conviction fails to qualify as a predicate crime of violence offense under § 4B1.2. Johnson's arguments were not foreclosed under *Yee*, and the Ninth Circuit should have reviewed, de novo, his appellate claim that the government failed to prove a qualifying crime of violence.

By deeming Johnson's sentencing *arguments* were foreclosed *claims*, the Ninth Circuit stripped Johnson of the proper appellate standard of review. Intercession by this Court is necessary to ensure the Ninth Circuit correctly applies the critical distinction between arguments and claims in compliance with *Yee*. Otherwise, appellate litigants risk being deprived of appellate review of their preserved claims.

II. The Ninth Circuit erroneously interpreted Federal Rule of Criminal Procedure 32 and, in doing so, characterized Johnson's *legal* claim challenging whether his prior conviction is a crime of violence under the federal Sentencing Guidelines as a *factual* argument.

In his legal claim at sentencing, Johnson objected to the crime of violence enhancement. However, the Ninth Circuit misinterpreted Federal Rule of Criminal Procedure 32 to interpret this claim as a factual argument. The Ninth Circuit held the prior offense legally qualified as a crime of violence under U.S.S.G. § 4B1.2 because the probation officer characterized the prior Cal. Penal Code § 245(a)(1) assault conviction as a "felony" in the PSR and Johnson did not specifically object to that characterization. *Johnson*, 920 F.3d at 634. This interpretation both expands Rule 32 beyond its text and the term "felony."

Rule 32(i)(3)(A) states only that a sentencing court "may accept any undisputed portion of the presentence report as a finding of fact." Fed. R. Crim. P. 32(i)(3)(A). A district court's ability to accept undisputed factual portions of the PSR under Rule 32 does not permit it to avoid its obligation to undertake required legal analysis to enhance a defendant's sentence, especially when a defendant objects to the enhancement.

Yet, the Ninth Circuit penalized Johnson for what it termed his failure to "challenge the factual accuracy of the PSR's description of his [Cal. Penal Code] § 245(a)(1) conviction as a felony." *Johnson*, 920 F.3d at 635. The Ninth Circuit deemed the probation officer's characterization of Johnson's assault conviction as a "felony" to be a factual finding to which Johnson had an obligation to object in order to preserve his legal crime-of-violence enhancement claim on appeal. *Id.* This was improper.

Whether a conviction qualifies as a federal crime of violence for enhancement purposes under the Sentencing Guidelines is a quintessential legal question requiring application of the categorical approach. To apply a contested crime-of-violence enhancement, the district court was required to decide whether the assault conviction sufficiently and necessarily matched the required elements of the generic in every case, "while ignoring the particular facts of the case." *See, e.g.,* M*athis v. United States,* 136 S. Ct. 2243, 2248-49 (2016); *Descamps v. United States*, 570 U.S. 254, 260-61 (2013); *Moncrieffe*, 569 U.S. at 190-91. The Ninth Circuit incorrectly characterized Johnson's legal claim on appeal as a factual argument.

In this case, Cal. Penal Code § 245(a)(1) is a wobbler statute, requiring legal analysis to determine whether it is a felony or misdemeanor for crime-of-violence purposes. The probation officer's characterization of the conviction as a felony in the PSR was irrelevant. Even the label a particular state may assign to a crime "has no relevance." *Mathis*, 136 S. Ct. at 2251; *see also Quarles v. United States*, 139 S. Ct. 1872, 1877 (2019) (noting it is not "exact definition or label" that defines whether the statute qualifies as a predicate offense).

Section 4B1.2(a) requires that, in order to qualify as a crime of violence in the first instance, a prior state or federal offense must be "punishable by imprisonment for a term exceeding one year. . . ." The firearm Guideline application note defines a "'[f]elony conviction'" as "a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, *regardless of whether such offense is specifically designated as a felony* and regardless of the

actual sentence imposed." U.S.S.G. § 2K2.1 cmt. n.1 (emphasis added). Thus, to *legally* qualify as a crime of violence under U.S.S.G. §§ 2K2.1 and 4B1.2, the conviction must first be punishable by imprisonment for a term exceeding one year and then must fall under either the elements clause or the enumerated offenses clause. As such, whether the prior offense is punishable by imprisonment for over a year is part of the legal analysis courts must decide in the first instance when calculating the guideline range. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018).

That the probation officer characterized the conviction as a felony is insufficient under the categorical approach. Rather, the question of whether a prior conviction qualifies as a felony is a question of law for the courts to decide as part of the crime-of-violence analysis, not probation officers. Courts must therefore look exclusively to the statute at issue to determine whether the prior offense is punishable by more than one year—not the PSR and not the underlying facts.

Johnson argued that the prior conviction under Cal. Penal Code § 245 does not qualify as a "felony" defined under U.S.S.G. § 2K2.1, because the offense was not "punishable by death or imprisonment for a term exceeding one year." *See* U.S.S.G. § 2K2.1 cmt. n.1. Johnson's legal claim that his prior offense did not qualify as a crime of violence was not a factual challenge to the PSR. Rather, Johnson's claim was a legal challenge to the district court's ruling that his prior assault conviction constituted a felony crime of violence under the Guidelines.

Because Johnson challenged the district court's legal crime-of-violence ruling—not a factual finding--Rule 32 had no application in this case.

The Ninth Circuit's expanded and erroneous reading of Rule 32(i)(3)(A), if permitted to stand, would allow district and appellate courts to subvert their legal obligations under the categorical approach to determine in the first instance whether an offense constitutes a crime of violence. The Ninth Circuit did, however, ultimately address the merits of Johnson's sentencing claim. As such, the Ninth Circuit's published decision unnecessarily expands Rule 32 beyond its text. The published decision misapplying Rule 32 is both superfluous and erroneous. The result will, as it has for Johnson, further corrupt the distinction between factual and legal disputes, relieving district courts of their obligations under the categorical approach. Johnson therefore requests this Court correct the Ninth Circuit's decision regarding Rule 32.

III. The Ninth Circuit erroneously limited application of *Moncrieffe v. Holder*, 569 U.S. 184 (2013), to only cases involving drug wobbler convictions.

Johnson argued that the California assault conviction was not a crime of violence because it "wobbled" to a misdemeanor conviction. California assault with a deadly weapon may be punished "by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." Cal. Penal Code § 245(a)(1). Johnson argued this Court's *Moncrieffe* decision abrogated the Ninth Circuit's prior case law on the treatment of wobblers for crime-

of-violence purposes and required application of *Moncrieffe*'s directives. The Ninth Circuit disagreed, finding *Moncrieffe* inapplicable.

In *Moncrieffe*, this Court reviewed the generic federal offense of "illicit trafficking in a controlled substance" under the Immigration and Nationality Act (INA). 569 U.S. at 192. Though the INA does not define this general offense, it does include a "drug trafficking crime" as defined in 18 U.S.C. § 924(c) as "any felony punishable under the Controlled Substances Act" (CSA). *Id.* (internal quotation marks omitted). *Moncrieffe* also noted the INA's definition of a "felony" is "an offense for which the maximum term of imprisonment authorized is more than one year." *Id.* (internal quotations omitted).

Against this background, the government argued in *Moncrieffe* that the petitioner's prior conviction for possessing marijuana with intent to distribute under Ga. Code Ann. § 16-13-30(j)(1) qualified as an "aggravated felony" under the INA. 569 U.S. at 188-89. This Court disagreed, finding Ga. Code Ann. § 16-13-30(j)(1) did not meet the definition for a felony because it could wobble, i.e., it "could correspond to either the CSA felony or the CSA misdemeanor." *Id.* at 194.

Applying the categorical approach, this Court presumed, as it must, that the petitioner's conviction rested on the least of the acts criminalized by the Georgia statute, and only then determined whether the generic federal offense necessarily encompassed those acts. *Moncrieffe*, 569 U.S. at 190-91 (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)). Doing so, this Court found the Georgia "conviction could correspond to either the CSA felony or the CSA misdemeanor.

Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony." *Moncrieffe,* 569 U.S. at 194–95.

Instead of applying *Moncrieffe*'s holding, the Ninth Circuit limited *Moncrieffe*, stating its "upshot" "is inapplicable here." *Johnson*, 920 F.3d at 638. The Ninth Circuit narrowly confined *Moncrieffe* to CSA-related cases, i.e., drug cases—ignoring *Moncrieffe*'s broader holding that categorical analysis requires the statute in question to necessarily "prescribe," i.e. require, "felony punishment" and must be punished as a felony. *Moncrieffe,* 569 U.S. at 196 ("In other words, not only must the state offense of conviction meet the "elements" of the generic federal offense defined by the INA, but the CSA must punish that offense as a felony.").

Johnson's assault conviction is a wobbler. It is punishable as both a misdemeanor and a felony. There is no dispute on that point. That the Ninth Circuit ignored *Moncrieffe's* holding that an offense not "necessarily" requiring punishment as a felony is not a categorically qualifying offense. Under *Moncrieffe*, the wobbler assault conviction is not a crime of violence, as it does not necessarily require felony punishment. Johnson therefore requests this Court correct the Ninth Circuit's decision as it erroneously limits *Moncrieffe*.

IV. Johnson's guilty plea to violating 18 U.S.C. § 922(g)(1) and the resulting sentence must be vacated under *Rehaif United States*, 139 S. Ct. 2191 (2019), as everyone involved understood that, under then-binding precedent, a § 922(g)(1) conviction did not require proof beyond a reasonable doubt that Johnson actually knew his alleged prohibited status at the time of the firearm possession.

Under 18 U.S.C. § 922(g), nine categories of persons—with persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year being the first—are prohibited from possessing a firearm or ammunition by virtue of their status. While § 922(g) prohibits firearm and ammunition possession, that statutory provision does not actually criminalize such conduct. Instead, it is 18 U.S.C. § 924(a)(2) that criminalizes such conduct, by stating whoever "knowingly violates" § 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." Under *Rehaif United States*, 139 S. Ct. 2191 (2019), this Court now mandates that a valid prosecution depends on both § 922(g) and § 924(a)(2).

In *Rehaif*, this Court addressed "whether, in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm." 139 S. Ct. at 2195. By a vote of 7–2, this Court answered affirmatively, "hold[ing] that the word 'knowingly' [in § 924(a)(2)] applies to both the defendant's conduct and to the defendant's status. To convict a defendant, the government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* at 2194; *see id.* at 2200 (repeating that holding).

The *Rehaif* Court relied on the "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." 139 S. Ct. at 2195 (citation omitted). Rather than "find [any] convincing reason to depart from the ordinary presumption in favor of scienter," the Court found that the statutory text "support[ed] the presumption." *Id.* The Court emphasized that "[t]he term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." *Id.* And the Court saw "no basis to interpret 'knowingly' as applying to the second § 922(g) element [on possession] but not the first [on status]." *Id.* Rather, the Court believed that, by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." *Id.* at 2196.

A. Johnson's indictment is fatally flawed because it failed to allege a federal offense.

Under *Rehaif*, the indictment in this case was fatally flawed. It merely alleged Johnson, "having been convicted of crimes punishable by imprisonment for a term exceeding one year . . . did knowingly possession [sic]" being in and affecting interstate commerce and said firearm having been shipped in and transported in interstate commerce" violating 18 U.S.C. §§ 922(g)(1) and 924(a)(2). EOR 26-27. These allegations do not state a federal offense.

Here, the grand jury alleged only that Johnson been convicted of crimes punishable by imprisonment for a term exceeding one year. The indictment did *not*

allege: (1) Johnson possessed a firearm; or that (2) Johnson *knew* he had been convicted of a crime punishable by more than one year at the time of the alleged firearm possession.[2] *Rehaif* held knowledge of one's prohibited status is an essential element of the offense. The only mens rea alleged here was that Johnson knowingly possessed something—not even a firearm is identified in the indictment. Under *Rehaif*, the indictment does not charge a crime. These complementary deficiencies are fatal.

Admittedly, Johnson did not raise this argument below. *Rehaif* was issued the day after his petition for rehearing was denied in this direct appeal. Moreover, *Rehaif* abrogated long-held Ninth Circuit precedent that knowledge of status was not an element. *See United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003). In fact, every other circuit also so held prior to *Rehaif*. *See Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, J., dissenting) (citing cases).

But Johnson's failure to raise the issue does not bar relief. This Court holds it is "fatal error" to permit an individual to be "convicted on a charge the grand jury never made against him." *Stirone v. United States*, 361 U.S. 212, 219 (1960). Moreover, all four prongs of plain-error review are satisfied : (1) there is error; (2) that error is now "plain" under *Rehaif*, *see Henderson v. United States*, 568 U.S. 266 (2013); (3) the error affected Johnson's substantial rights, as "[t]he right to have the

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[2] The indictment's failure to even allege a firearm was possessed compounds the gravity of the *Rehaif* defect. The government's concession that the indictment wrongfully asserted the forgery conviction was a prohibiting offense also compounds the error. *See Johnson* oral argument, 8:10 to 9:20, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=00000 14894.

grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment," *Stirone*, 361 U.S. at 219; (4) convicting Johnson of an unindicted offense seriously affected the fairness, integrity, and public reputation of judicial proceedings.

In addition, "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Thus, "a court's subject-matter jurisdiction may be raised at any point." *Peretz v. United States*, 501 U.S. 923, 953 (1991); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). The "[f]ailure of an indictment to state an offense is, of course, a fundamental defect which can be raised at any time." *United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976). In analyzing defective indictments, the "key question" is "whether an error or omission in an indictment worked to the prejudice of the accused." *United States v. Velasco-Medina*, 305 F.3d 839, 847 (9th Cir. 2002).

Johnson therefore requests this Court allow the Ninth Circuit to address Johnson's *Rehaif* claim in the first instance.

B. Johnson's guilty plea is constitutionally invalid because Johnson lacked knowledge of all the elements of the § 922(g)(1) offense at the time he entered his plea.

"A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.' *Brady v. United States*, 397 U.S. 742, 748 (1970). [This Court] ha[s] long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.' *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)." *Bousley v. United States*, 523 U.S. 614, 618

(1998). Where the defendant, "nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged," the defendant's "plea would be . . . constitutionally invalid." *Id.* at 618-19. This is exactly the scenario here.

Consistent with Circuit law at the time, the district court advised Johnson only that he was charged with knowingly possessing a firearm and that at the time of possession he had "previously been convicted of a crime punishable by a term of imprisonment exceeding one year." EOR 56-57. The district court did not advise Johnson the government was required to prove he *knew* he had previously been convicted of a crime punishable by a term of imprisonment exceeding one year at the time of his possession. Nor did the government proffer any evidence about Johnson's *knowledge* of whether he had previously been convicted of a crime punishable by a term of imprisonment exceeding one year during the plea hearing at the time of possession. EOR 49-65. Yet *Rehaif* requires Johnson's knowledge of his felony status is was an essential element of the offense. It is "the defendant's *status*, and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful." *Rehaif*, 139 S. Ct. at 2197.

Because no one at the plea hearing, least of all Johnson, understood the essential elements of the offense, his plea was involuntary and unconstitutionally invalid. This is especially true where: (1) the indictment's alleged forgery felony resulted in a 120-day suspended jail sentence and was not actually an offense

punishable by a term of imprisonment exceeding one year; and (2) as argued, the indictment's alleged assault felony resulted in a suspended 6-month jail sentence and should not have been deemed an offense punishable by a term of imprisonment exceeding one year.

The Ninth Circuit has repeatedly held "[t]he defendant's right to be informed of the nature of the charges is so vital and fundamental that it cannot be said that its omission did not affect his substantial rights and the fairness, integrity, or public reputation of judicial proceedings." *United States v. Pena*, 314 F.3d 1152, 1158 (9th Cir. 2003). A district court's failure to explain the nature of the charges to the defendant requires the plea of guilty be vacated. *United States v. Portillo-Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999).

This Court also notes that, where a defendant's guilty plea was neither knowing nor voluntary, and thus constitutionally invalid, the conviction cannot "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004). Johnson therefore requests this Court address Johnson's *Rehaif* claim in the first instance.

C. This Court has granted similar *Rehaif* claims, and the Solicitor General has agreed to a similar request for a *Rehaif* remand in similar circumstances.

After this Court decided *Rehaif*, it granted several petitions for certiorari, vacated the judgments below, and remanded for reconsideration in light of *Rehaif*. *See e.g., Reed v. United States*, 139 S. Ct. 2776 (2019) (mem.); *Allen v. United States,* 139 S. Ct. 2774 (2019) (mem.); *Hall v. United States*, 139 S. Ct. 2771 (2019) (mem.);

Moody v. United States, 139 S. Ct. 2778 (2019) (mem.). In *Christopher Stacy v. United States*, a case similar to Johnson's, the Solicitor General agreed "the appropriate course is to grant the petition for a writ of certiorari, vacate the decision below, and remand for further consideration in light of *Rehaif*." Mem. for the United States, Supreme Court Case No. 19-5383, Aug. 30, 2019.[3] In light of the foregoing, the same result is warranted here. Johnson therefore requests this Court address Johnson's *Rehaif* claim in the first instance.

Conclusion

For the reasons set forth herein, Johnson requests this Court grant this petition for certiorari.

Respectfully submitted,

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3 *Stacy* has been distributed for conference before this Court on October 11, 2019.