NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2019

_____

NALEN PIERRE WILLIAMS,

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

The question presented in this case is as follows:

Whether the Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *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 the defendant know his alleged prohibited status at the time of the firearm possession?

PARTIES TO THE PROCEEDING

The petitioner is Nalen Pierre Williams. He is presently incarcerated by the United States Bureau of Prisons at FCI Sheridan, located in Sheridan, Oregon. The named respondent is the United States of America. Mr. Williams has already served most of his term of imprisonment, as the U.S. Bureau of Prisons lists Williams' release date as October 27, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Nalen Pierre Williams, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished. *See United States v. Williams*, 773 F. App'x 379 (9th Cir. 2019), No. 18-30089 (9th Cir. July 30, 2018). *See also* Pet. App. 57a-61a. The district court's Judgment is unpublished. Pet. App. 62a-68a.

JURISDICTION

The judgment of the court of appeals denying a panel rehearing and en banc review was entered on August 23, 2019. Pet. App. 1a. This petition is timely pursuant to Rule 13.1, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit Court of Appeals entered its memorandum decision on June 7, 2019. Pet. App. 57a-61a. The Ninth Circuit granted petitioner's motion to extend time to file the en banc petition to August 5, 2019. Pet. App. 56a. On July 30, 2019, the petitioner filed before the Ninth Circuit his petition for rehearing with suggestion for rehearing en banc. *See* Ninth Cir. Dkt. #42 (Ninth Cir. No. 18-30089). In its August 23, 2019 order, the Ninth Circuit denied Williams' petition for rehearing with suggestion for rehearing en banc. Pet. App. 1a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment specifies that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.] " U.S. Const. amend. V.

18 U.S.C. § 922(g)(1) states in part:

> "[i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

18 U.S.C. § 924(a)(2) states in part:

> "[w]hoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

STATEMENT OF THE CASE

A. The Conviction And Sentence.

The Charges. Count 1 of the indictment charged Nalen Williams with the offense of Felon In Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1). Specifically, Count 1 charged as follows:

> On or about September 15, 2016, in King County, within the Western District of Washington, the defendant, NALEN PIERRE WILLIAMS, having been convicted of the following crimes punishable by imprisonment for a term exceeding one year, to wit:
>
> a. *Murder in the Second Degree,* under cause number 93-1-04779-3, in King County Superior Court, Washington, dated on or about January 14, 1994;
>
> b. *Violation of the Uniform Controlled Substances Act: Delivery of Cocaine,* under cause number 12-1-01325-6, in King County Superior Court, Washington, dated on or about December 7, 2012;
>
> did knowingly possess, in and affecting interstate and foreign commerce, the following firearms, to wit: a Norinco model 213, 9mm-caliber semi-automatic pistol, bearing serial number 311701, and a Marlin model 60, .22-caliber rifle, bearing serial number 18537076, each of which had been shipped and transported in interstate and foreign commerce.
>
> All in violation of Title 18, United States Code, Section 922(g)(l).

Pet. App. 156a-157a.

Count Two (Possession with Intent to Distribute Heroin) alleged that in violation of 21 U.S.C. § 84l(a)(l) & 84l(b)(l)(C), on or about September 15, 2016, in King County, Washington, Nalen Williams knowingly and intentionally possessed with intent to distribute heroin, a Schedule I controlled substance under 21 U.S.C. § 812. Pet. App. 157a.

Count Three charged Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A). Pet. App. 157a-158a.

The Plea Agreement. The plea agreement provides for the dismissal of Count Three. Pet. App. 147a. The parties agreed to the following facts: (1) during the September 15, 2016, execution of a search warrant on Nalen Williams' residence, Williams told the detectives they would find heroin and a gun under the chair, and a "shotgun" in the bedroom, (2) Williams admitted he intended to distribute the heroin to others, (3) the detectives found 8 grams of heroin and $942 cash, (4) next to a box, they found a Norinco model 213, 9mm caliber semi-automatic pistol, (5) in the bedroom, they found a Marlin model 60, .22-caliber rifle, (6) in numerous text messages on Williams' cell phone, people asked to purchase drugs from him, (7) the firearms had been transported in interstate or foreign commerce, and (8) at the time Williams possessed the pistol and rifle, he had been convicted in Washington State of the following crimes punishable by imprisonment for a term exceeding one year: Murder in the Second Degree; and, a Violation of the Uniform Controlled Substances Act, for delivery of cocaine. Pet. App. 150a-151a.

The plea agreement described the elements of the felon-in-possession offense as follows:

> **Elements of the Offenses.** The elements of the offenses are as follows:
>
> Count One: *Felon in Possession of a Firearm*:
>
> (1) The defendant knowingly possessed a firearm;
>
> (2) At the time he possessed the firearm, the defendant had been previously convicted of a crime punishable by imprisonment for a term exceeding one year;
>
> (3) The firearm had been shipped or transported in interstate or foreign commerce.

Pet. App. 147a.

The parties agreed to a four-level upward adjustment under Guideline 2K2.l(b)(6)(B), because Williams possessed a firearm in connection with another felony offense, and to a three-level acceptance of responsibility adjustment under USSG § 3El.l(a) and (b). Pet. App. 151a. The parties disagreed regarding the base offense level, and acknowledged that the government would assert the base offense level is 24, pursuant to USSG § 2K2.1(a)(2). Pet. App. 151a. The government agreed to recommend a sentence no higher than 84 months imprisonment, and that the defendant is free to recommend any appropriate sentence. Pet. App. 152a.

The Plea Colloquy. Consistent with the indictment, the district court directed the Assistant United States Attorney to read as part of the plea colloquy the elements of the felon-in-possession offense, presented to Nalen Williams as follows:

> As to Count 1, Felon in Possession of a Firearm: Element 1, the defendant knowingly possessed a firearm; Element 2, at the time he possessed the firearm, the defendant had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; and Element 3, the firearm had been shipped or transported in interstate or foreign commerce.

Pet. App. 140a. At the court's direction, the Assistant United States Attorney proffered the relevant facts as follows:

> The .9 millimeter caliber pistol and .22 caliber rifle had been transported in interstate or foreign commerce. At the time Mr. Williams possessed these firearms, he had previously been convicted of the felony crimes of Murder in the Second Degree and Delivery of Cocaine.

Pet. App. 142a.

The Sentencing Proceedings. Probation stated that the total offense level is 15, the criminal history category IV, yielding a 30-to-37 month Guidelines range. Presentence Report, ¶79. Probation recommended a 60-month term of imprisonment, well-above the Guidelines range. Pet. App. 80a. The government recommended an 84-month sentence. ER 241. Defense counsel requested an 18-month sentence. Pet. App. 135a.

Near the start of the hearing, the court announced a Guidelines range of 30 to 37 months, based on the offense level of 15 and the criminal history category of IV. Pet. App. 77a. The district court applied the four-level upward adjustment pursuant to Guideline 2.1(b)(6)(B), and the three-level downward adjustment for acceptance of responsibility. Pet. App. 76a-77a. Describing the sentence as "reasonable, sufficient, but no more than necessary to carry out the objectives of sentencing," the district court sentenced Williams to 52-months imprisonment, three years supervised release, and a $200 special assessment. Pet. App. 119a-120a.

B. The Direct Appeal.

Nalen Williams raised the following claims on direct appeal: (1) the district court's factual findings regarding Williams' second degree murder conviction were in error because the record before the court does not support the findings, (2) the district court erred in adding three points to Williams' offender score for the second degree murder conviction, even though the Washington Supreme Court in *In re Personal Restraint Petition of Andress*, 147 Wash.2d 602, 603, 56 P.3d 981, 982 (2002), held that felony murder convictions based on assault under the prior statute are facially and constitutionally invalid, (3) the district court's findings were insufficient and resulted in procedural error because they failed to clarify the applicable Sentencing Guidelines criminal history category and sentencing range, failed to resolve the dispute regarding whether Williams' criminal history is over-represented or under-represented, and failed to establish that the court applied the Guidelines as the starting point or anchor, and (4) the Statement of Reasons form must be amended because it conflicts with the district court's statements during the sentencing hearing and contains highly prejudicial information which is patently false. *See* Ninth Cir. Dkt. #12 (Ninth Cir. No. 18-30089).

The Ninth Circuit panel's June 7, 2019 memorandum decision affirmed the sentence, but remanded the case with the limited purpose of allowing the district court to correct the Statement of Reasons form. Pet. App. 29a-30a.

C. The United States Supreme Court's Decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), Issued Fourteen Days After The Ninth Circuit Panel's Memorandum Decision Affirming Nalen Williams' Sentence.

The panel issued its memorandum decision in the case at bar on June 7, 2019. Fourteen days later, on June 21, 2019, the Supreme Court in *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019), held that the phrase "knowingly violates" in 18 U.S.C. § 924(a)(2) applies to prosecutions under 18 U.S.C. § 922(g), and requires proof beyond a reasonable doubt that the defendant not only knew he possessed a firearm, but also that he knew he belonged to the relevant category of persons barred from possessing a firearm. In other words, *Rehaif* held that the word "knowingly" in § 924(a)(2) applies both to the defendant's conduct and to the defendant's status. *Id.* at 2194. The Supreme Court's decision in *Rehaif* makes clear that this *mens rea* requirement applies to the nine categories of individuals, including convicted felons, set forth in § 922(g). *Id.* at 2195-99.

D. Williams' Petition For Rehearing With Suggestion For Rehearing En Banc.

On July 30, 2019, the petitioner filed before the Ninth Circuit his petition for rehearing with suggestion for rehearing en banc. Pet. App. 2a-55a. *See* Ninth Cir. Dkt. #42 (Ninth Cir. No. 18-30089). Williams presented two claims. First, he asserted that the district court and the panel misapprehended a critical portion of the state court record relating to the petitioner's Washington State second degree murder conviction. Pet. App. 8a. Specifically, Williams argued that the district court's finding and the panel's conclusion that he was motivated by a "drug deal

gone bad" are irrefutably contrary to the Washington Court of Appeals' opinion set forth in the sentencing record addressing the murder conviction. Pet. App. 8a, 14a-19a.

Second, Williams argued that the Ninth Circuit panel's decision conflicts with the United States Supreme Court's opinion in *Rehaif v. United States*, 139 S. Ct. 2191, 2194, 2200 (2019), which, contrary to the precedent of all the circuits, held that for prosecutions under 18 U.S.C. § 922(g) and § 924(a)(2), the government must not only prove that the defendant knew he possessed a firearm, but also that he knew he belonged to the relevant category of persons barred from possessing a firearm. Pet. App. 7a-11a. Williams asserted that his conviction and sentence for Felon In Possession of a Firearm (Count 1) under 18 U.S.C. § 922(g)(1) cannot stand pursuant to *Rehaif*.

Williams argued that although he did not raise either before the district court or in his opening and reply briefs the issue later addressed in *Rehaif*, the Ninth Circuit recognizes that where there are extraordinary circumstances, review may be granted. Pet. App. 11a-14a. *See United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015). Williams argued that his claim should be reviewed because the question of how *Rehaif* should be interpreted and applied is a matter of first impression and an issue of great importance impacting thousands of cases. Pet. App. 7a-8a. The petitioner cited Justice Alito's dissenting opinion in *Rehaif*, in which he noted that tens of thousands of prisoners are serving sentences for violating 922(g), and asserted that the majority opinion's "practical effects will be far reaching and cannot be ignored." *Rehaif*, 139 S. Ct. at 2200, 2212-13 (Alito, J., dissenting). Pet. App. 13a.

Citing *Varney v. Sec'y of Health & Human Servs.*, 859 F.2d 1396, 1398 (9th Cir. 1988), the petitioner further argued that he did not willfully delay raising the claim. Pet. App. 13a. He explained that the Supreme Court did not issue *Rehaif* until after the panel issued its

memorandum decision, and the Supreme Court did not grant a writ of certiorari in *Rehaif* until January 11, 2019, after Williams filed his opening brief on November 12, 2018.[1] *See United States v. Rehaif*, Sup. Ct. Docket, No. 17-9560. Pet. App. 13a. In addition, Williams detailed that prior to the Ninth Circuit panel's memorandum decision in his case, the law in the Ninth Circuit, and in every other circuit, was clear that in a § 922(g) prosecution the government need not prove the defendant's knowledge of his prohibited status. Pet. App. 13a-14a. Williams noted that Justice Alito protested that the *Rehaif* majority "casually overturns the long-established interpretation of an important criminal statute, 18 U.S.C. § 922(g), an interpretation that has been adopted by every single Court of Appeals to address the question." *Rehaif*, 139 S. Ct. at 2201. Pet. App. 14a. The petitioner provided that *Rehaif* overruled Ninth Circuit precedent holding that the mens rea element in § 922(g)(1) and § 924(a)(2) applied only to the possession element, not to status. *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003) (citing *United States v. Miller*, 327 F.3d 788 (9th Cir. 1997)). Pet. App. 14a.

Despite these arguments, on August 23, 2019, the Ninth Circuit entered its order denying Williams' petition for rehearing with suggestion for rehearing en banc. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

A. Nalen Williams' Guilty Plea To Violating 18 U.S.C. § 922(g)(1), And The Resulting Sentence, Must Be Vacated Pursuant To *Rehaif United States*, 139 S. Ct. 2191 (2019), Which The Supreme Court Issued After The Ninth Circuit Panel's Memorandum Decision Affirming Williams' Sentence.

Under 18 U.S.C. § 922(g), nine categories of persons – including the category of persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year – 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

[1] United States v. Nalen Pierre Williams, Ninth Cir. No. 18-30089, Dkt. #12.

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), the Supreme 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." *Rehaif*, 139 S. Ct. at 2195. By a 7–2 vote, this Court answered affirmatively, "hold[ing] that the word 'knowingly' [in § 924(a)(2)] applies "both to the defendant's conduct and to the defendant's status." *Id.* at 2194. Similarly, *Rehaif* specifies that the government "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 2200.

The Supreme Court in *Rehaif* 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." *Rehaif*, 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 supported the presumption. *Id.* The Supreme 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, this Court concluded that, by specifying that a defendant may be convicted only if that person 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. In light of *Rehaif*, issued fourteen days after the Ninth Circuit issued its memorandum decision in the case at bar, Williams' conviction and sentence cannot stand.

B. Williams' Indictment Is Fatally Flawed Because It Failed To Allege A Federal Offense.

Under *Rehaif*, the indictment charging Nalen Williams was fatally flawed. Indeed, the indictment merely alleged that Williams, having "been previously convicted of a crime punishable by imprisonment for a term exceeding one year," "knowingly possessed a firearm" which "had been shipped or transported in interstate or foreign commerce." Pet. App. 156a. These allegations do not state a federal offense. Significantly, the grand jury alleged only that Williams knowingly possessed a firearm, but it did *not* allege that he knew of his status as a felon. Pet. App. 156a-157a.

Consistent with the indictment, the court advised Williams at the plea colloquy that the elements of the felon-in-possession offense (Count 1) were (1) "the defendant knowingly possessed a firearm," (2) "at the time he possessed the firearm, the defendant had previously been convicted of a crime punishable by imprisonment for a term exceeding one year," and (3) "the firearm had been shipped or transported in interstate or foreign commerce." Pet. App. 50a. Here, the court failed to advise Williams that the elements of the offense include that the defendant knew of his status as a felon. Similarly, the government did not proffer any facts showing that Williams knew that he was a felon at the time. Instead, the government merely related that "the .9 millimeter caliber pistol and .22 caliber rifle had been transported in interstate or foreign commerce," and that "[a]t the time Mr. Williams possessed these firearms, he had previously been convicted of the felony crimes of Murder in the Second Degree and Delivery of Cocaine." Pet. App. 50a.

Rehaif held that knowledge of one's prohibited status is an essential element of the offense. The only mens rea alleged in the indictment was that Williams knowingly possessed a firearm. Under *Rehaif*, the indictment does not charge a crime. This deficiency is fatal.

C. Williams' Guilty Plea Is Constitutionally Invalid Because The Petitioner 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 has "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.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Where the defendant, defense counsel, and the court did not correctly understand the essential elements of the crime charged, the defendant's plea is constitutionally invalid. *Id.* at 618-19. Because this scenario played out in the case at bar, Williams' conviction and sentence must be reversed as constitutionally infirm.

Consistent with Circuit law at the time, the district court advised Williams only that he was charged with knowingly possessing a firearm and that at the time of possession he "had been previously convicted of a crime punishable by imprisonment for a term exceeding one year." Pet. App. 50a. The district court did not advise Williams that the government was required to prove he knew that 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 Williams' knowledge of whether he had previously been convicted of a crime punishable by a term of imprisonment exceeding one year. Pet. App. 124a-145a.

Yet, this Court in *Rehaif* establishes that a defendant's knowledge of his felony status is an essential element of the offense. *Rehaif* specified that it is "the defendant's status, and not his conduct alone, that makes the difference," and that [w]ithout knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful." *Rehaif*, 139 S. Ct. at 2197. 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 (emphasis supplied). Because no one at the plea hearing, least of all Nalen Williams, understood the essential elements of the offense, his plea was involuntary and unconstitutionally invalid.

The Ninth Circuit has repeatedly held that "[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 that the plea of guilty be vacated. *United States v. Portillo-Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999). Similarly, the Supreme Court provided 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). Williams therefore requests this Court address his *Rehaif* claim in the first instance.

D. The Supreme Court Has Granted Similar *Rehaif* Claims, And The Solicitor General Has Agreed To 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 Williams' case, the Solicitor General agreed that "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.[2] In light of the foregoing, the same result is warranted here. Accordingly, Williams respectfully requests this Court address Williams' *Rehaif* claim in the first instance.

E. Even Though Williams Did Not Raise The *Rehaif* Claim Until He Filed His En Banc Petition, Review Should Be Granted Because The Error Is Plain, The Supreme Court Issued *Rehaif* Just Fourteen Days After The Ninth Circuit Affirmed Williams' Sentence, And The Circuits Had Uniformly Rejected The Position That Knowledge Of Status Was Not An Element Of The Felon-In-Possession Offense.

Nalen Williams did not raise a knowledge-of-status claim before the district court, and first cited *Rehaif* in his petition for rehearing with suggestion for rehearing en banc. Significantly, however, the Supreme Court issued *Rehaif* just fourteen days after the Ninth Circuit panel issued its memorandum decision affirming Williams' sentence. Notably, *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). The Ninth Circuit's sister circuits have also rejected the claim that knowledge of status constitutes an element of the offense. *See Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, J., dissenting) (citing cases).[3]

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[2] *Stacy* will be distributed for conference before this Court on October 11, 2019.

[3] *See United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *United States v. Huet*, 665 F.3d 588, 596 (3rd Cir. 2012); *United States v. Langley*, 62 F.3d 602, 604-608 (4th Cir. 1995) (en banc); *United States v. Rose*, 587 F.3d 695, 705-706 & n. 9 (5th Cir. 2009) (per curiam); *United States v. Dancy*, 861 F.2d 77, 80-82 (5th Cir. 1988) (per curiam); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999); *United States v. Miller*, 105 F.3d 552,

But Williams' failure to raise the issue until he filed his en banc petition does not bar relief. Indeed, this Court held that 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*;[4] (3) the error affected Williams' substantial rights, as "[t]he right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment;"[5] and (4) convicting Williams 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). Accordingly, "a court's subject-matter jurisdiction may be raised at any point." *Peretz v. United States*, 501 U.S. 923, 953 (1991). *See also 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). Williams therefore requests that this Court allow the Ninth Circuit to address his *Rehaif* claim.

This relief is warranted because a GVR is not a decision on the merits. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001). *See also State Tax Commission v. Van Cott*, 306 U.S. 511, 515-

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555 (9th Cir. 1997); *United States v. Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012); *United States v. Capps*, 77 F.3d 350, 352-354 (10th Cir. 1996); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008).

[4] *See Henderson v. United States*, 568 U.S. 266 (2013).

[5] *See Stirone*, 361 U.S. at 219.

516 (1939). Accordingly, procedural obstacles to reversal – such as the consequences of non-preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (*per curiam*) (GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres-Valencia v. United States*, 464 U.S. 44 (1983) (*per curiam*) (GVR utilized over government's objection where error was conceded, and the government's harmless error argument should be presented to the Court of Appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990) (Stevens, J., dissenting) (speaking approvingly of a prior GVR in the same case, where the Court remanded for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945) (remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals). Notably, in *Hall v. United States*, 139 S. Ct. 2771 (2019) (mem.), this Court granted a GVR, even though the petitioner first raised the *Rehaif* claim in counsel's letter submitted after the filing of the certiorari petition. *See Donovan Letrell Hall v. United States*, Supreme Court No. 17-4487, June 21 2019 letter of counsel. If there is doubt about the outcome in light of the procedural hurdles to relief, this Court should vacate and remand.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit, vacate the judgment below, and remand for reconsideration in light of *Rehaif*. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted,

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October 16, 2019