NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMAL BOWENS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. 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 what is now an essential element of the § 922(g) crime was not pled and proved beyond a reasonable doubt at trial.

2. Whether the correct interpretation of Rehaif is that a defendant must know of his possession of a firearm and also that he knew he had the relevant status when he possessed it, or that the defendant must know that he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

LIST OF PARTIES

The parties to the proceedings are Jamal Bowens and the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jamal Bowens, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is in Appendix A, submitted herewith electronically.

JURISDICTION

On September 12, 2019, a three-judge panel of the Sixth Circuit Court of Appeals entered its opinion in United States v. Bowens, 938 F.3d 790 (6th Cir. 2019). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

"It shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance . . . to . . . possess in or affecting commerce, any firearm or ammunition . . . ." 18 U.S.C. § 922(g)(3).

"Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in the title, imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2).

STATEMENT OF THE CASE

Officers with the Memphis Police Department found Mr. Bowens in the backseat of a vehicle with Lee Hope. There was a marijuana blunt between the two men. There was a firearm at Mr. Bowens' feet and Mr. Hope had a firearm on his person. Officers then searched Facebook and saw various posts containing pictures of Mr. Bowens in possession of a firearm. There were also posts containing pictures of Mr. Bowens appearing to smoke an unknown substance. These posts contained comments concerning getting high and smoking dope, some of which were lyrics to rap songs.

Based upon the Facebook posts, the government charged Mr. Bowens (and his codefendant Hope) with being an unlawful user of a controlled substance in possession of a firearm. Mr. Bowens pled not guilty to the following charge: "Jamal Bowens then being an unlawful user of a controlled substance as defined in Title 21, United States Code, Section 802, did knowingly possess in and affecting interstate commerce firearms, specifically, a Rossi .357 caliber revolver and a Smith & Wesson .40 caliber pistol, in violation of Title 18, United States Code, Section 922(g)(3)." (See United States v. Bowens, No. 2:17-cr-20296-SHL, Indictment (Penalty Copy), R. 2, at Page ID # ("PID#") 3.) Notably, the indictment only alleged that Mr. Bowens knowingly possessed firearms; it did not allege that he knew of his status as a controlled substance user. Moreover, Mr. Bowens maintained that the government could not prove that he was the unlawful user of a controlled substance throughout the case.

Mr. Bowens went to trial and his jury was instructed as follows:

> The government must prove each of the following elements beyond a reasonable doubt in order to sustain its burden of proving JAMAL BOWENS guilty as to Count 1 . . . :
>
> First, that the defendant you are considering was an unlawful user of any controlled substance. Marijuana is a controlled substance;

> Second, that the defendant you are considering knowingly possessed a firearm specified in the indictment; and
>
> Third, that the specified firearm crossed a state line prior to the alleged possession. It is sufficient for this element to show that the firearm was manufactured in a state other than Tennessee. The government and the defendant have agreed that the firearms specified in the indictment were manufactured outside the state of Tennessee, thereby affecting interstate commerce as required by 18 U.S.C. 922(g)(3) . . . .
>
> The term "unlawful user of a controlled substance" contemplates the regular and repeated use of a controlled substance in a manner other than as prescribed by a licensed physician. The one time or infrequent use of a controlled substance is not sufficient to establish the defendant as an "unlawful user." Rather, the defendant must have been engaged in use that was sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use of a controlled substance.

(United States v. Bowens, No. 2:17-cr-20296-SHL, Jury Instr., R. 51, PID# 106.) Though the jury was instructed as to what an unlawful user of a controlled substance was, the jury was not instructed that it must find that Mr. Bowens knew he was the unlawful user of a controlled substance at the time.

After Mr. Bowens was sentenced, this Court decided Rehaif v. United States, 139 S. Ct. 2191 (2019), which held that, to prove a violation of 18 U.S.C. §§ 922(g) and 924(a)(2), 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 2191. Hence, during the time of Mr. Bowens' direct appeal, he sought the benefit of the intervening Rehaif decision, which overruled circuit precedent.

The panel evaluated the issue under plain error review because it was not raised before the district court. The panel found that in light of Rehaif, the failure to instruct the jury that Mr. Bowens must have known that he was an unlawful user of a controlled substance in order to be

found guilty of violating § 922(g)(3) may have been an error. See Bowens, 938 F.3d at 796 (emphasis added). The panel nonetheless rejected Mr. Bowens' argument under Rehaif.

The panel relied upon a statement of the holding at the latter part of the Rehaif decision indicating that in prosecutions under § 922(g), "the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." Id. at 797 (quoting Rehaif, 139 S. Ct. at 2200.) The panel assumed that Rehaif applied to prosecutions under § 922(g)(3), but found that any error from not instructing the jury on this knowledge requirement was not plain because Mr. Bowens could not show that, but for the error, the outcome of his case would not have been different. Id. The panel reasoned that the jury surely would have found that Mr. Bowens knew he was an unlawful user of a controlled substance based upon the evidence presented at trial. Id.

The panel went on to also reject Mr. Bowens' interpretation of this Court's holding in Rehaif, which is that the government must prove that Mr. Bowens knew of his status as a prohibited person when he possessed the firearm. Id. The panel acknowledged that under this reading, a different jury instruction might have made a difference. Id. The panel concluded, however, that this was not required by Rehaif. Id.

The panel found that Mr. Bowens' reading of Rehaif ran headlong into the legal maxim that ignorance of the law is no excuse. Id. The panel reasoned that Rehaif did not graft an ignorance of the law defense onto § 922(g) by which every defendant could escape conviction if he was unaware of this provision of the United States Code. Id. The panel again noted the end of the Rehaif opinion, which states that, "the government must prove . . . that [a defendant] knew he belonged to the relevant category of persons barred from possessing a firearm." Id. (quoting Rehaif, 139 S. Ct. at 2200). Despite also recognizing that the knowledge the government would

have to prove in this case encompassed questions of federal drug law, the panel still held that the government must only prove that defendants knew they were unlawful users of a controlled substance, but not that they knew unlawful users of controlled substances were prohibited from possessing firearms." Id. at 797-98.

Mr. Bowens seeks review of both of these findings.

REASONS FOR GRANTING THE PETITION

This Court clearly stated in Rehaif: "We hold that the word 'knowingly' applies both to 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." Rehaif, 139 S. Ct. at 2194. The Sixth Circuit panel deciding Mr. Bowen's case reluctantly "assumed" that Rehaif is applicable to § 922(g)(3) cases, but then stated that there was no plain error even though Mr. Bowens' knowledge of his relevant status was not pled nor proven beyond a reasonable doubt before a jury.

It cannot be disputed, however, that a criminal defendant is entitled by the Sixth and Fourteenth amendments to a jury determination that he is guilty beyond a reasonable doubt of every element of the crime with which he is charged. Apprendi v. New Jersey, 530 U.S. 466, 476-77 (2000) (citing United States v. Gaudin, 515 U.S. 506, 510 (1995); Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); In re Winship, 397 U.S. 358 (1970)). In Mr. Bowens' case, the scienter element required by Rehaif was not considered by the jury because it was never pled. Thus, there was no crime alleged, and there was no jury determination that Mr. Bowens was guilty beyond a reasonable doubt of every element of the crime charged. While it is true that an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or a verdict unreliable, Neder v. United States, 527 U.S. 1, 9 (1999), "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). A court cannot conclude that an erroneous jury charge that specifically excluded an element of the offense, particularly an element that the defendant maintained the government could not prove since the inception of the litigation, was harmless beyond a reasonable doubt.

Perhaps the more confusing question, however, is just how to interpret this Court's Rehaif holding. Did the Court mean, as Mr. Bowens' maintains, that the government must prove that he knew of his status as a prohibited person while in possession of a firearm, or did the Court mean that though possession and status must be proved, knowledge of the prohibited nature of such status is irrelevant. To prevent the landfall of litigation that is coming on this issue, the Court may wish to dispose of the question here and now, and Mr. Bowens' case provides an ideal example for doing so.

In further support of each of these issues, Mr. Bowens provides as follows:

A. The indictment failed to charge a crime and therefore, the jury was not required to find all elements of the § 922(g)(3) offense beyond a reasonable doubt.

(1) The general principles governing indictments.

An indictment must allege the essential elements of an offense. See United States v. Parisi, 365 F.2d 601, 604 (6th Cir. 1966), vacated on other grounds sub nom. O'Brien v. United States, 386 U.S. 345 (1967). An indictment is required to inform the defendant of "the nature and cause of the accusation" as required by the Sixth Amendment of the United States Constitution. See United States v. Piccolo, 723 F.3d 1234, 1238 (6th Cir. 1983). This rule guarantees two principle protections, and is measured by two criteria: (1) whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and (2) whether, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. United States v. Gioiosa, No. 90-3097, 1991 U.S. App. LEXIS 2254, at *8 (6th Cir. Feb. 7, 1991) (citing Russell v. United States, 369 U.S. 749, 763-764 (1962)); see also Hamling v. United States, 418 U.S. 87, 117 (1974) ("[A]n indictment is sufficient if it, first, contains the

elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."). Additionally, the Fifth Amendment's indictment requirement ensures that a grand jury only return an indictment when it finds probable cause to support all the necessary elements of a crime. See, e.g., Williams v. Haviland, 467 F.3d 527, 531-32 (6th Cir. 2006) (discussing how the Fifth Amendment guarantee of indictment by a grand jury in federal prosecutions was not incorporated by the Fourteenth Amendment to apply to the States); see also Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972) (discussing the historical powers of the grand jury when determining whether there is probable cause that a crime has been committed).

(2) The Rehaif decision.

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." See 139 S. Ct. at 2195. By a vote of 7-2, the 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. Id. at 2194. 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.

The 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." Id. at 2195 (citation omitted). Rather than "find [any] convincing reason to depart from the ordinary presumption in favor of scienter," the Curt found that the statutory text supported it. 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. The Court saw "no basis to interpret 'knowingly' as applying to the second § 922(g) element [on possession] but not the first [on status]. "To the contrary, we think 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. Rehaif has thus clarified that there is no prosecutable, stand-alone violation of § 922(g).

(3) Mr. Bowens' Indictment was insufficient.

The indictment here did not state an offense for two mutually-reinforcing reasons. First, while the grand jury alleged that Mr. Bowens was in fact an unlawful user of a controlled substance, it did not allege that he knew he was an unlawful user of a controlled substance when he possessed the firearms. Yet, Rehaif held that such knowledge is an essential element.

Second, the indictment cited § 922(g)(3), but not § 924(a)(2). Yet, Rehaif made clear that § 922(g) is not a free-standing offense. Rather, the offense depends on both § 922(g) (which prohibits certain conduct by certain persons) and § 924(a)(2) (which criminalizes the "knowing violation" of that prohibition). In short, the grand jury failed to charge an essential element: knowledge of status. It failed to cite the key statute requiring that mens rea and criminalizing the conduct. And, it included no other counts or allegations ameliorating those fatal deficiencies.

The insufficiency of the indictment in this case is like the insufficiencies found in United States v. Martinez, 800 F.3d 1293 (11th Cir. 2015). There, the grand jury charged the defendant with knowingly transmitting an interstate threat, in violation of 18 U.S.C. § 875(c). Id. at 1294. In Elonis v. United States, 135 S. Ct. 2001 (2015), this Court held that § 875(c) requires proof of the defendant's subjective intent, abrogating the Eleventh Circuit's contrary precedent. The Eleventh Circuit held the indictment was insufficient because it failed to allege an essential element

of the offense. Id. at 1295. Specifically, it "fail[ed] to allege Martinez's mens rea or facts from which her intent [could] be inferred, with regard to the threatening nature of her e-mail . . . Martinez's indictment [did] not meet the Fifth Amendment requirement that the grand jury find probable cause for each of the elements of a violation of § 875(c)." Id.

Here, as in Martinez, a Supreme Court decision has abrogated Sixth Circuit precedent and made clear that a particular mens rea is an element. In fact, the indictment in this case is even more deficient because it did not cite § 924(a)(2), the statute supplying the missing mens rea.

(4) Even if plain error review is invoked, plain error is satisfied.

While this Court has held that a federal court of appeals normally will not correct a legal error made in criminal trial court proceedings unless the defendant first brought the error to the trial court's attention, there is an exception. Henderson v. United States, 133 S. Ct. 1121, 1124 (2013). The exception is the plain error review discussed above. The rule is provided under Federal Rule of Criminal Procedure 52(b), which permits review where there is "[a] plain error that affects substantial rights [to] be considered even though it was not brought to the trial court's attention." Id. In a case such as this, where the question becomes unsettled in the defendant's favor, making the trial court's error "plain," but not until a later time, that being the time encompassing appellate review, the error remains "plain" within the meaning of the Rule. Id.

As explained, there was "error" that is now "clear" under Rehaif. See United States v. Olano, 507 U.S. 725, 732–33 (1993). Moreover, "[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 . . . court amendment." Stirone v. United States, 361 U.S. 212, 219 (1960) (emphasis added). Numerous precedents hold that "[t]he only way to remedy [a] defect[ ] in the indictment [is for the grand jury] to rewrite it." Russell, 369 U.S. at 770.

The grand jury here failed to charge an offense. Thus, no amount of evidence at trial can change the fact that Mr. Bowens is behind bars for a crime that the grand jury never charged. It is "self-evident" that convicting a defendant of an unindicted crime seriously affects the fairness, integrity, and public reputation of judicial proceedings. See, e.g., United States v. Madden, 733 F.3d 1314, 1323 (11th Cir. 2013); United States v. Floresca, 38 F.3d 706, 714 (4th Cir. 1994) (en banc) ("[C]onvicting a defendant of an unindicted crime affects the fairness, integrity, and public reputation of judicial proceedings in a manner most serious."). It is likely for this reason that Judge Alito in his dissent in Rehaif stated that those defendants on direct review after Rehaif will likely be entitled to a new trial. See Rehaif, 139 S. Ct. at 2212-13 (Alito, J., dissenting).

The other problem with the panel's finding of no plain error in this case is that it is axiomatic that an appellate court cannot substitute its judgment for that of the jury. See, e.g., Dennis v. Denver & R.G.W.R. Co., 375 U.S. 208, 210 (1963). The Sixth Circuit follows this legal tenet. See United States v. Hilliard, 11 F.3d 618, 620 (6th Cir. 1993). With no proof at all regarding the knowledge element of the § 922(g)(3) offense presented, and with no instruction directing the jury that this was even an element they should consider, it is mere speculation to try to determine whether the jury would have found such knowledge at this point. Basing the denial of Mr. Bowens' appeal upon speculative findings that the jury would have found that Mr. Bowens knew of his status as a controlled substance user, versus proof beyond a reasonable doubt, constitutes a grave miscarriage of justice.

Given these circumstances, there is a reasonable probability that the outcome of the proceeding would have been different. See Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016). It was error to fail to charge, and instruct the jury that Mr. Bowens knew he possessed the firearm and knew he had the relevant status when he possessed it in order to be found guilty of

violating 18 U.S.C. § 922(g)(3). Hence, there was a plain error that affected Mr. Bowens' substantial rights. As such, it seriously affected the fairness and integrity of the proceedings.

B. This Court's aid in interpreting the Rehaif holding is required.

Mr. Bowens recognizes that this Court in Rehaif specifically chose not to express any view about what precisely the government must prove to establish a defendant's knowledge of status in respect to the other § 922(g) provisions not in issue. Rehaif, 139 S. Ct. at 2200. The question here, however, is not precisely what the government must prove with respect to the various status requirements under § 922(g). It turns instead on whether the defendant must know of his status when he possesses the firearm. At the beginning of the Rehaif opinion, the Court stated that the knowledge requirement applies both to the defendant's conduct and his status, and therefore, to convict a defendant, 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 2194 (emphasis added). At the end of the opinion, the Court stated that the government must prove both that the defendant knew he possessed a firearm and knew he belonged to the relevant category of persons barred from possession of that firearm. Id. at 2200. The latter statement says nothing about knowledge of status at the time of possession. Mr. Bowens' position turns on how the holding was stated in the first instance. His panel relied upon the statement of the holding at the end of the case.

While it is apparent that this Court makes every attempt to be crystal clear when issuing opinions, the law is a funny thing, and the practice of law is filled with lots of people with creative legal minds who quickly run amok with their own interpretations. As ardently as the panel reasoned that Mr. Bowens' reading of Rehaif's knowledge requirement was in error, however, Mr.

Bowen maintains his position with the same passion. This is precisely why this Court's aid in interpreting the case is required so quickly after its issuance.

It is, of course, Mr. Bowens' position that this Court's Rehaif opinion must mean that a defendant must know that his status as an unlawful user prevents him from possessing a firearm while he is in possession. Otherwise, the opinion would be meaningless. Indeed, when the Rehaif defendant took this issue before the Eleventh Circuit, his position was that the district court erred by instructing his jury that the government need not prove that he knew he was in the United States illegally or unlawfully because the phrase "knowingly violates," requires proof that a defendant know at the time that he possessed the firearm that he was in the United States illegally or unlawfully. See United States v. Rehaif, 888 F.3d 1138, 1142 (11th Cir. 2018) (emphasis added). When the Eleventh Circuit rejected this argument, it noted generally that criminal law does not require a defendant to know his own status, and that no court of appeals had required the government to establish a defendant's knowledge of his status in the analogous context of felon-in-possession prosecutions. Id. at 1145-46. The Eleventh Circuit, therefore, upheld Rehaif's conviction. This Court's reversal of the Eleventh Circuit's opinion in Rehaif, implicitly supports the Rehaif defendant's original argument that the government is required to prove that, at the time he possessed the firearm, he knew he was in the United States illegally or unlawfully. Transposing this onto Mr. Bowens case, it means that the government was required to prove that at the time he possessed the firearms, he knew he was an unlawful user of a controlled substance, as this phrase is judicially defined.

Even Mr. Bowens' panel struggled with this question, noting that the knowledge the government would have to prove encompassed questions of federal drug law. Bowens, 938 F.3d at 797-98. Yet, the panel found that this position would run head-long into the maxim that

ignorance of the law is no excuse. Id. at 797. This Court in Rehaif, however, rejected a similar "ignorance of the law" argument raised by the government. The Rehaif majority explained that the maxim, "ignorance of the law is no excuse," normally applies where a defendant has the requisite mental state in respect to the elements of the crime but claims to be "unaware of the existence of a statute proscribing his conduct." See 139 S. Ct at 2198 (quoting 1 W. LaFave & A. Scott, Substantive Criminal Law §5.1(a), p. 575 (1986)). In contrast, explained the majority, the maxim does not normally apply where a defendant "has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct," thereby negating an element of the offense. Id. (citations omitted). The majority found that much of the confusion surrounding the ignorance-of-the-law maxim stems from "the failure to distinguish [these] two quite different situations." Id. (quoting LaFave, Substantive Criminal Law §5.1(d), at 585.)

The majority explained the distinction further by reference to the case of Liparota v. United States, 471 U.S. 419 (1985). Id. In Liparota, the Court considered a statute that imposed criminal liability on "whoever knowingly uses, transfers, acquires, alters, or possesses" food stamps "in any manner not authorized by the statute or the regulations." Id. (quoting Liparota, 471 U. S. at 420 (quotation altered)). The Liparota Court held that the statute required scienter not only in respect to the defendant's use of food stamps, but also in respect to whether the food stamps were used in a "manner not authorized by the statute or regulations." Id. (quoting Liparota, 471 U.S. at 425, n. 9). The Liparota Court therefore required the Government to prove that the defendant knew that his use of food stamps was unlawful. Id.

The majority found that Rehaif was similar to Liparota. Id. The majority reasoned that the defendant's status as an alien "illegally or unlawfully in the United States" referred to a legal

matter, but the legal matter was what the commentators referred to as a "collateral" question of law. Id. The majority reasoned that a defendant who does not know that he is an alien "illegally or unlawfully in the United States" does not have the guilty state of mind that the statute's language and purposes require. Id.

The exact same reasoning is applicable here. For instance, while Mr. Bowens was required to know that his use was "unlawful," and that the substance used was "controlled," these are collateral questions of law like those described in Rehaif. A defendant who does not know that his possession of a firearm while an unlawful user of a controlled substance would not have the same guilty state of mind that the statute's language and purpose require.

Indeed, the definition of unlawful user, which "contemplates the regular and repeated use of a controlled substance," versus "the one time or infrequent use of a controlled substance," is vague at best.[1] One person's perception of regular use is another's perception of infrequent use, particularly as regards marijuana, the use of which is legal in many States, and legal for medical purposes in Tennessee. This arguably runs afoul of the Fifth Amendment's guarantee of due

[1] The circuit courts have uniformly refused to consider a facial vagueness challenge to this statute. See United States v. Cook, 914 F.3d 545, 550-51 (7th Cir. 2019); United States v. Bramer, 832 F.3d 908, 909 (8th Cir. 2016); United States v. Patterson, 431 F.3d 832, 836 (5th Cir. 2005); United States v. Bennett, 329 F.3d 769, 777 (10th Cir. 2003); United States v. Purdy, 264 F.3d 809, 811 (9th Cir. 2001); United States v. Edwards, 182 F.3d 333, 335–36 (5th Cir. 1999). Instead, in every single case, the court has held that whatever "unlawful user" means, it covered the individual defendant. In a Fifth Circuit case where the majority accepted the government's concession that an unlawful user would have to use "with regularity and over an extended period of time," a dissenting judge argued that "only Congress can define what constitutes 'regular use' and what constitutes 'an extended period of time'; and neither the prosecutor nor the jury should be permitted to determine those matters on an ad hoc case by case basis." United States v. Herrera, 313 F.3d 882, 889 (5th Cir. 2002) (DeMoss, J., dissenting). The dissent complained that "the term 'user' is so open-ended that the ordinary citizen cannot know when his conduct in using a controlled substance may result in forfeiture of his rights under the Second Amendment." Id. Judge Moss is right. A vague statute like § 922(g)(3) gives police and prosecutors immense power to interpret and apply the law according to their "personal predilections." Kolender v. Lawson, 461 U.S. 352, 358 (1983).

process because it fails to give ordinary people fair notice of the conduct it punishes and is so standardless that it invites arbitrary enforcement. See Kolender, 461 U.S. at 357-58. The vague definition of "unlawful user" does not need to be compounded by a reading of Rehaif that does not require that a defendant know that he had the relevant status when he possessed the firearm.

Note that the underlying facts in Rehaif indicate that the defendant knew of his illegal alien status because his student visa had expired and he had been notified by his school that he would soon be in illegal status. Similarly, the government here put on evidence which tended to show that Mr. Bowens was unlawfully using a controlled substance. Nonetheless, this Court reversed the Eleventh Circuit in Rehaif because the scienter element was neither pled nor proven in the case. The Sixth Circuit should be reversed here on the same grounds.

In sum, that the government was not required to prove that Mr. Bowens knew he possessed a firearm, and also that he knew he had the relevant status when he possessed it, means that Mr. Bowens was convicted when he did not have the guilty state of mind that the statute's language and purposes require. This is against Rehaif's holding.

CONCLUSION

For all of the foregoing reasons, Petitioner Jamal Bowens respectfully prays that this Court will grant certiorari to review the judgment of the Sixth Circuit in his case.

Before closing, Mr. Bowens notes that in his petition for certiorari, the defendant in United States v. Stacy, 771 F. App'x 956 (11th Cir. 2019), cert. pet. filed, July 29, 2019 (S. Ct. No. 19-5383), argued for the first time on certiorari review that his indictment was defective and his plea involuntary, pursuant to the holding in Rehaif. On August 30, 2019, the Solicitor General of the United States agreed that certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of Rehaif. (See Stacy v. United States, S. Ct. No. 19-5383, Resp. Memo. (filed Aug. 30, 2019).) This Court did indeed grant certiorari in Stacy. See Stacy v. United States, No. 19-5383, 2019 U.S. LEXIS 6352, at *1 (Oct. 15, 2019). Mr. Bowens requests that his Petition be granted, his case vacated, and his case remanded for further consideration in light of Rehaif, as well.

DATED: 21st day of November, 2019.

Respectfully submitted,

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