NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC HALL,

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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QUESTIONS PRESENTED FOR REVIEW

1. Whether Tennessee's burglary statutes are generic where the State can obtain a conviction by proving only attempted burglary because the element of "entry" is satisfied by a mere showing of the use of an instrument in an attempt to make entry.

2. Whether the judgment below should be vacated and the case remanded 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 Mr. Hall made an unknowing and therefore, involuntary plea.

LIST OF PARTIES

The parties to the proceedings are Eric Hall and the United States.

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JOINT PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

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

JURISDICTION

On December 19, 2019, a three-judge panel of the Sixth Circuit Court of Appeals entered its opinion in United States v. Hall, No. 19-5531, 2019 U.S. App. LEXIS 37968 (6th Cir. Dec. 19, 2019). This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

1. The Armed Career Criminal Act

> [T]the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B).

2. Tennessee's burglary statute

> (a) A person commits burglary who, without the effective consent of the property owner:
>
> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.
>
> (b) As used in this section, "enter" means:
>
> (1) Intrusion of any part of the body; or
>
> (2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.

Tenn. Code Ann. § 39-14-402(a), (b).

3. Tennessee's aggravated burglary statute

Aggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402. Tenn. Code Ann. § 403.

4. 18 U.S.C. § 922(g)(1)

"It 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. § 922(g)(1).

5. 18 U.S.C. § 924(a)(2)

"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

Mr. Hall pled guilty to being a felon in possession of a firearm in 2015. See Hall, 2019 U.S. App. LEXIS 37968, at *1. He was sentenced under the enhanced penalty provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), which mandate a minimum sentence of 180 months imprisonment. Id. Three of his ACCA qualifying convictions were for Tennessee aggravated burglary and burglary. While his case was on direct appeal, this Court issued its ground breaking decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the "residual clause" definition of "violent felony," and Mathis v. United States, 136 S. Ct. 2243 (2016), which gave further guidance on the modified categorical approach. Upon agreement of the parties, the Sixth Circuit panel granted Mr. Hall leave to supplement his appellate brief. See Hall, 2019 U.S. App. LEXIS 37968, at *2. The panel vacated Mr. Hall's sentence and remanded to the district court with instructions to hold the case in abeyance pending the outcome of United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc) ("Stitt I"). Id. This was because during this time, the Sixth Circuit determined to revisit en banc the question of whether Tennessee aggravated burglary constituted a "violent felony" for ACCA purposes. See United States v. Stitt, 637 F. App'x 927 (6th Cir.), rehr'g en banc granted, United States v. Stitt, 646 F. App'x 454 (6th Cir. 2016). The en banc court held that Tennessee aggravated burglary could not constitute a "violent felony" for ACCA purposes due to the overbreadth of the definition of "habitation," which included vehicles adapted for overnight accommodation. See Stitt I, 860 F.3d at 857, 860. When the court in Stitt I concluded that Tennessee's aggravated burglary statute swept more broadly than generic burglary, it also noted that the decision conflicted with its prior decision in United States v. Nance, 481 F.3d 882 (6th Cir. 2007) (holding that Tennessee aggravated burglary is generic), so the court overruled Nance. See Stitt I, 860 F.3d at 860-61.

After the Sixth Circuit's en banc decision in Stitt I, but before the district court set Mr. Hall's resentencing hearing, the government petitioned for and received a writ of certiorari from this Court to consider Stitt I. Hall, 2019 U.S. App. LEXIS 37968, at *2. In late 2018, this Court held that burglary of a structure or vehicle that had been adapted for overnight use qualified as the enumerated violent felony of burglary for ACCA purposes. United States v. Stitt, 139 S. Ct. 399, 403-04 (2018) ("Stitt II").

The district court subsequently set Mr. Hall's sentencing hearing. See Hall, 2019 U.S. App. LEXIS 37968, at *2-3. At the hearing, Mr. Hall presented an alternative argument that Tennessee aggravated burglary still did not qualify as a violent felony for ACCA purposes because Tennessee's interpretation of the "entry" element was overly broad when compared to generic burglary. Id. at *3. This argument applied equally well to Mr. Hall's Tennessee burglary conviction.

This issue was raised by § 2255 Petitioners, as well as direct appellants like Mr. Hall, across the State of Tennessee and throughout the Sixth Circuit. The first panel to rule upon the issue was the panel in Brumbach v. United States, 929 F.3d 791 (6th Cir. 2019). The Brumbach panel held that by overruling Stitt I, this Court reversed the rationale by which the Sixth Circuit had overruled Nance. Brumbach, 929 F.3d at 794. The Brumbach panel reasoned that it would therefore necessarily follow that Nance's holding was once again the law of the circuit. Id.

The Brumbach panel went on to also note that Tennessee's aggravated burglary statute directly references Tennessee's simple burglary statute. Id. (citing Tenn. Code Ann. § 39-14-402 ("Aggravated burglary is a burglary of a habitation as defined in §§ 39-14-401 and 39-14-402.")). The panel observed that after Stitt II, courts in the Sixth Circuit had cited United States v. Ferguson, 868 F.3d 514, 515 (6th Cir. 2017) (relying on United States v. Priddy, 808 F.3d 676, 684 (6th Cir.

2015)), which held, broadly, that "convictions under subsections (a)(1), (a)(2), or (a)(3) of the Tennessee burglary statute [Tenn. Code Ann. § 39-14-402] fit within the generic definition of burglary and are therefore violent felonies for purposes of the ACCA.") Id. The panel found that Ferguson was binding precedent, and any concerns about the relationship between Ferguson, Priddy and Nance had been resolved by Stitt II. Id. at 795.

With regard to the argument about the meaning of "entry," the Brumbach panel found that it was bound by Nance because the Sixth Circuit holds that one panel cannot overrule the published decision of another panel. Id. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or the Circuit Court sitting en banc overrules the prior decision. Id. (citing Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985)).

The district court thus found that Mr. Hall's argument was foreclosed by binding precedent. See Hall, 2019 U.S. App. LEXIS 37968, at *3. Mr. Hall's initial sentence of 180 months was reinstated. Id.

Mr. Hall appealed his new 180 months sentence, arguing that Tennessee's burglary statute was overbroad along the entry element. Mr. Hall recognized that the Sixth Circuit had denied en banc review of the issue in Brumbach. See Brumbach v. United States, No. 18-5703/18-5705, 2019 U.S. App. LEXIS 28017 (6th Cir. Sept. 16, 2019). Indeed, Mr. Hall's panel found itself bound by Brumbach. See Hall, 2019 U.S. App. LEXIS 37968, at *5-6. Mr. Hall's intent was to preserve the issue for this Court's potential discretionary review.

While this direct appeal was pending, this Court issued its decision in Rehaif, which held that, to prove a violation of 18 U.S.C. § 922(g), 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." Rehaif, 139 S. Ct. at 2191. The Sixth Circuit panel granted leave for Mr. Hall to supplement his brief to raise arguments that his conviction should be vacated in light of the Rehaif decision.

The panel evaluated the issue under plain error review because it was not raised before the district court. See Hall, 2019 U.S. App. LEXIS 37968, at *6. Mr. Hall argued that because his indictment did not contain the knowledge of status element, meaning the government never had to prove this element, there was actually no federal crime charged. Id. at *7-8. The Sixth Circuit panel rejected this argument under the plain error review standard, finding that there was overwhelming evidence showing that Mr. Hall knew he was a felon at the time he changed his plea. Id. Thus, the panel found he could not show that failing to correct the error would affect the fairness, integrity, or public reputation of the judicial proceedings. Id.

Mr. Hall argued also that his plea was constitutionally involuntary because he did not know of the mens rea status element when he pled guilty. See Hall, 2019 U.S. App. LEXIS 37968, at *6-7 He took the position that this error was structural, but the Sixth Circuit panel rejected this argument, as well, on the same plan error grounds. Id.

REASONS FOR GRANTING THE PETITION

There are two reasons to grant this Petition. In both instances, the Sixth Circuit panel has decided an important question of federal law that has not been, but should be, settled by this Court. Each of these reasons will be addressed in turn.

I. TENNESSEE AGGRAVATED BURGLARY, NOTWITHSTANDING THIS COURT'S RULING ON TENNESSEE'S "HABITATION" REQUIREMENT, FAILS TO QUALIFY AS A VIOLENT FELONY DUE TO TENNESSEE'S BROAD DEFINITION OF "ENTRY"

Over a decade ago, this Court declared that attempted burglary is a not a "violent felony" under the ACCA's enumerated clause because it does not meet the generic definition of burglary set forth by the Court in Taylor v. United States, 495 U.S. 575, 598 (1990): "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." James v. United States, 550 U.S. 192, 198 (2007). Tennessee's reading of the word "entry" in its burglary statutes permits convictions based merely upon attempted burglary. For federal courts to allow use of such convictions to establish a requisite violent felony for ACCA purposes is in direct conflict with James.

Moreover, this Court has recently reiterated that, "[W]e made clear in Taylor that Congress intended the definition of burglary to reflect the generic sense in which the term was used in the criminal codes of most States at the time the Act was passed." See Stitt II, 139 S. Ct at 406 (internal quotations and citation omitted). The Brumbach panel's decision, the decision that controls Mr. Hall's fate herein, conflicts with the decisions from this Court that have repeatedly held that proper application of the categorical approach entails evaluating how, in 1986, the year the ACCA was amended to its current form, a majority of the States defined "entry" in their burglary statutes. See, e.g., Stokeling v. United States, 139 S. Ct. 544, 552 (2019) ("In 1986, a significant majority of the States defined nonaggravated robbery as requiring force that overcomes a victim's resistance.");

United States v. Castleman, 572 U. S. 157, 167 (2014) (reading "physical force" to include common-law force, in part because a different reading would render 18 U. S. C. §922(g)(9) "ineffectual in at least 10 States"); United States v. Voisine, 136 S. Ct. 2272, 2280-81 (2016) (declining to interpret § 921(a)(33)(A) in a way that would "risk rendering §922(g)(9) broadly inoperative" in 34 States and the District of Columbia). Because the Sixth Circuit is deciding this important federal question in a way that conflicts with relevant decisions from this Court, Mr. Hall and similarly situated defendants all over the State of Tennessee desperately need this Court's intervention. Mr. Hall presents the following for this Court's consideration in support of their urgent request.

A. Generic burglary requires an entry by the person or by an instrument being used to commit the intended felony.

The issue is whether a prior conviction for a Tennessee aggravated burglary offense (and in some of Petitioners' cases, a simple burglary offense) qualifies as an ACCA predicate under the "categorical approach," which requires the Court to compare the statutory elements of the Tennessee offense with the elements of "generic" burglary. Descamps v. United States, 570 U.S. 254, 257 (2013). "The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." Id. Tennessee's burglary offenses do not qualify as ACCA predicates because the "entry" element is broader than those of the generic offense.

That mismatch is due to Tennessee's unusual definition of "entry." Because generic burglary requires an entry, a mere attempted burglary – e.g., when someone merely tries unsuccessfully to make entry – does not qualify as generic burglary. James, 550 U.S. at 198. Even though the traditional and modern majority rule on "entry" requires the making of an actual entry by a person or instrument to commit the intended crime therein, Tennessee's unusual rule does

not. Tennessee treats some attempted burglaries as if they were completed burglaries, and for that reason the Tennessee burglary offense does not qualify as a generic burglary or, hence, as an ACCA predicate.

With respect to the crime of burglary, what counts as making "entry"? Common law and a majority of jurisdictions make it clear that an entry is made when, for example, any part of the person, such as a hand, crosses the threshold of the structure as that person is trying to commit the felony. Commonwealth v. Cotto, 752 N.E.2d 768, 771 (Mass. App. 2001).

How does the law address a situation where only an instrument – such as a coat hanger or a screwdriver – crosses the threshold of the structure? For purposes of defining an "entry," the law on burglary has long made a distinction based on the defendant's purpose in using the threshold-crossing instrument. As discussed below, if that instrument is used in an effort to commit the intended felony inside the structure (e.g. a coat hanger used to snag an item), then an "entry" is made when the instrument crosses the threshold and thus a burglary is committed, assuming the other elements are established. However, if that instrument is used only in an effort to make entry (e.g., a screwdriver used to pry at the door), then no "entry" is made even when the instrument crosses the threshold, and a mere attempted burglary is committed. In short, the controlling distinction is between an instrument used in an effort to commit the intended felony ("instrument-for-crime rule"), versus an instrument used only in an attempt to make entry (the "any-instrument rule").

This distinction started with the common law. The common law adopted the instrument-for-crime rule. Cotto, 752 N.E.2d. at 771 (summarizing common law sources); see Commonwealth v. Burke, 467 N.E.2d 846, 849 (Mass. 1984) (quoting Rex v. Hughes, 1 Leach 406, 407 (1785)); Russell v. State, 255 S.W.2d 881, 884 (Tex. Crim. App. 1953) (adhering to

common-law rule as stated in Hughes); Walker v. State, 63 Ala. 49, 51 (1879) (citing 1 Matthew Hale, The History of the Pleas of the Crown, 555 (1736)).

As of 1986, when Congress enacted the ACCA, the vast majority of states defined burglary in their respective codes as requiring an entry, without any statutory definition of "entry." Because a court should presume that an undefined statutory term comports with the common law, Morissette v. United States, 342 U.S. 246, 263 (1952), it would naturally follow that the vast majority of states were following the instrument-for-crime rule as of 1986. Indeed, almost every single court that had interpreted "entry" by 1986 had endorsed the common law's instrument-for-crime rule, typically citing either the common law or one of the many treatises stating that the blackletter rule is the instrument-for-crime rule. See, e.g., State v. Hodges, 575 S.W.2d 769, 772 (Mo. Ct. App. 1978); People v Davis, 279 N.E.2d 179, 180 (Ill. Ct. App. 1972); State v. Liberty, 280 A.2d 805, 808 (Me. 1971); State v. O'Leary, 107 A.2d 13, 15-16 (N.J. 1954); Foster v. State, 220 So.2d 406, 407 (Fla. Dist. Ct. App. 1969); Mattox v. State, 100 N.E. 1009 (Ind. 1913); State v. Crawford, 80 N.W. 193, 194 (N.D. 1899); Walker, 63 Ala. at 51; People v. Tragani, 449 N.Y.S.2d 923, 925-28 (N.Y. Sup. Ct. 1982) ("it must be assumed that the drafters . . . really envisioned . . . an adoption by the courts of common-law, common-usage, and common-sense definitions of both bodily and instrumental entry"); see also Nev. Rev. Stat. § 193.0145 (1985); Wash. Rev. Code § 9A.52.010(2) (1985).[1]

[1] Prior to 1986, three additional states also indicated they would follow the instrument-for-crime rule: State v. Sneed, 247 S.E.2d 658, 659 (N.C. App. 1978); Stamps v. Commonwealth, 602 S.W.2d 172, 173 (Ky. 1980); Sears v. State, 713 P.2d 1218 (Alaska Ct. App. 1986). After 1986, three additional states clearly followed that rule, giving no reason to think that they were adopting a rule that was new: State v. Williams, 873 P.2d 471, 473-74 (Ore. App. 1994); Iowa J.I. Crim. § 1300.12; and OUJI-CR § 5-18 (Oklahoma). And, after 1986, two additional states indicated they would follow that rule, with no hint they were adopting a rule that was new: State v. Faria, 60 P.3d 333, 339 (2002) and People v. Rhodus, 303 P.3d 109, 113 (Colo. App. 2012).

Accordingly, the leading modern treatise on the subject – Wayne R. LaFave, Substantive Criminal Law – reports that the instrument-for-crime rule is the blackletter rule on burglary "entry." Id. § 21.1(b) (2 ed. 2003); see also Taylor, 495 U.S. at 580, 593, 598 & nn.3-4 (placing significant reliance on LaFave's treatise to define generic burglary).[2]

As of 1986, states deviating from that rule were few. By statute, four states had defined "entry" to include entry by any instrument, thereby adopting, against the grain, the any-instrument rule. See 11 Del. Code § 829(c)[3]; Ariz. Rev. Stat. Ann. § 13-1501(3); Tex. Penal Code Ann. § 30.02(b); Utah Code Ann. § 76-6-201(4). Plus, just two courts had authoritatively interpreted "entry" – when it was undefined by statute – to mean any instrument, rather than an instrument in use for the intended felony. One was an intermediate court of appeals in New Mexico that, after acknowledging the common-law and majority rule, simply announced that in its "opinion" an any-instrument rule was better. State v. Tixier, 551 P.2d 987, 989 (N.M. Ct. App. 1976). The other was the Tennessee Supreme Court, which issued binding language endorsing the any-instrument rule without explaining why it was doing so.[4] State v. Crow, 517 S.W.2d 753, 755 (Tenn. 1974).

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[2] Professor LaFave explains: "If the actor . . . used some instrument which protruded into the structure, no entry occurred unless he was simultaneously using the instrument to achieve his felonious purpose. Thus there was no entry where an instrument was used to pry open the building, even though it protruded into the structure; but if the actor was also using the instrument to reach some property therein, then it constituted an entry." Id. § 21.1(b).

[3] In Bailey v. State, 231 A.2d 469 (Del. 1967), the Delaware Supreme Court interpreted a materially-equivalent precursor to 11 Del. Code § 829(c). Id. at 469. The court acknowledged that the common law followed the instrument-for-crime rule. Id. at 470. Nevertheless, in light of the statute's broader language, it adopted the any-instrument rule.

[4] An intermediate California court had so interpreted "entry" but did so by misreading the holding of a previous California precedent. Compare People v. Osegueda, 210 Cal. Rptr. 182, 185-86 (Cal. App. Dep't Super. Ct. 1984), with People v. Walters, 249 Cal. App. 2d 547, 551 (Cal. App. 2nd App. Dist. 1967).

So, as of 1986, just six jurisdictions had deviated from the long-standing and traditional instrument-for-crime rule.

In sum, as of 1986, the common law, the clear majority of jurisdictions, and the LaFave treatise and others all took the very same approach to burglary's entry requirement: they all followed the instrument-for-crime rule. Accordingly, a "generic" burglary requires an entry by the person or by an instrument in use to commit the felony.

B. Tennessee adopted the broader, any-instrument rule.

Under Tennessee precedent, it was not necessary that the defendant actually "enter" a structure at all; crossing the threshold with an instrument in an effort to make entry would suffice. The best proof of this fact is the Tennessee Supreme Court's decision in State v. Crow, 517 S.W.2d 753 (Tenn. 1974). In Crow, the proof at trial showed that a police officer had found a building's door had been damaged. Id. at 754. The door's glass window had been broken and there were "pry marks" around the lock. Id. The officer then found Crow hiding in nearby bushes with a tire tool, screwdriver, and knife. Id. On further inspection, it was ascertained that two layers of burlap, which the owner had attached to the inside of the door frame, had been cut about ten inches in the area of the lock. Id.

Based on this proof, Crow was convicted at trial of burglary. Crow, 517 S.W.2d at 754-55. The intermediate appellate court reversed finding proof of an "entry" lacking. Id. at 753. The Tennessee Supreme Court acknowledged both the majority and minority rules. Id. at 754 (citing Wharton's for majority rule and, for the minority rule, stating that some cases hold "entry of the hand or an instrument to be sufficient to supply the element of entry"). Ultimately, the Crow court held that the proof sufficed to show an entry because the jury could find as follows:

> that the defendant broke the glass and split the burlap with the knife, tire tool or screw driver, and thus entered the business house with an instrument, and/or that

> he reached his gloved hand through the burlap in an effort to find a flip lock that would admit him to the premises; that being unable to open the door, without a key, he had retreated to the bush[.]

Id. at 755 (emphasis added). Although the jury instruction issued by the trial court in Crow stated as much, the Tennessee Supreme Court also observed that cases existed "holding entry of the hand or an instrument to be sufficient to supply the element of entry," and, ultimately, it held that it sufficed that Crow may have simply broken the window and cut the burlap inside the door frame using a tool in an attempt to make entry.[5] Id. at 754-55. Thus, according to the Tennessee Supreme Court, it could suffice that the defendant stuck an instrument through a door frame trying, but failing, to make entry. Id. In other words, an attempted, but failed burglary, involved enough of an "entry" to make it a full-fledged "burglary" under Tennessee law.

In Crow's wake followed Ferguson v. State, 530 S.W.2d 100 (Tenn. Crim. App. 1975), where the defendant was convicted on facts sufficient to show only a violation of the minority rule on "entry." In Ferguson, the state's evidence showed that the defendant and another man "knocked a padlock off the front door to the [restaurant] and went back beneath the bridge and returned with some large object which they used to break the glass on an inner door." Id. at 101. At that moment, the men noticed the police coming, and they ran, eluding immediate arrest. Id. These facts sustained a conviction at a jury trial of third-degree burglary, which, like all Tennessee burglary,

[5] The Tennessee Pattern Jury Instructions prior to 1989 reflect that juries were routinely instructed on the entry-only view: "The entering requires only the slightest penetration of the space within the dwelling place by a person with his hand or any instrument held in his hand." T.P.I. Crim. § 11.02(1)(b) (1988). The instructions continue to be ambiguous with regard to the scope of "entry," providing: "'Enter' means an intrusion of any part of the body; or an intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise." T.P.I. Crim. 14.01 (2019). Hence, there was and remains a realistic probability that the State could obtain a conviction for all types of burglary where there was only a mere attempted burglary.

required an "entry." Id. at 102. Citing Crow, the Tennessee Court of Criminal Appeals sustained the conviction. Id.

Indeed, Crow's guidance is reflected in a later published decisions of the state's courts because its considered dicta commands deference from lower courts. Holder v. Tennessee Judicial Selection Comm'n, 937 S.W.2d 877, 882 (Tenn. 1996) ("inferior courts are not free to disregard, on the basis that the statement is obiter dictum, the pronouncement of a superior court when it speaks directly on the matter before it"). Not surprisingly, after Crow, Tennessee appellate courts have often summarized Crow's guidance by stating that simply crossing the threshold with an instrument constitutes an "entry" (i.e, the minority rule). See, e.g., State v. Moore, C.C.A. No. 1, 1990 Tenn. Crim. App. LEXIS 96, at *4 (Tenn. Crim. App. Feb. 7, 1990) ("The 'entry' element [of pre-1989 third-degree burglary] can be accomplished by the penetration of the space within the premises by the hand or an instrument held in the hand."); State v. Summers, C.C.A. No. 65, 1990 Tenn. Crim. App. LEXIS 681, at *3-4 (Tenn. Crim. App. Oct. 10, 1990) ("The 'entry' element of [pre-1989 second-degree] burglary can be accomplished by penetration of the space within the premises by the hand or an instrument held by the hand."); Hall v. State, 584 S.W.2d 819, 821 (Tenn. Crim. App. 1979) ("The 'entry' element of burglary can be accomplished without the accompaniment of any force, such as penetration of the space within the premises by the hand or an instrument held in the hand.").

In 1989, the Tennessee enacted a new burglary statute that, although bringing many changes to classifications and nomenclature (replacing, e.g., "second-degree" with "aggravated"), served to solidify the endorsement of the minority entry-only rule. The aggravated burglary statute provides that "[a]ggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402." See Tenn. Code Ann. § 39-14-403(a). Subsection 401 contains the definition of

"habitation" addressed in Stitt II. Section 402 is the entire Tennessee burglary statute. Section 402(a) defines "burglary" as follows:

> A person commits burglary who, without the effective consent of the property owner:
>
> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402(a)(1)-(4).

The legislature defined "entry" in terms indistinguishable from those of the codes in Delaware, Arizona, Texas and Utah, cited above: "'enter' means: (1) Intrusion of any part of the body; or (2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise." Tenn. Code Ann. § 39-14-402(b). Accordingly, by using the "any" instrument language, the Tennessee code makes it clear that, when adopting its new criminal code, Tennessee kept the any-instrument rule.

C. **Tennessee's appellate courts have accepted the minority rule and treat mere attempts as burglary.**

Case law confirms that Tennessee courts understand this definition of entry to be as expansive as the Tennessee Supreme Court's explanation of the concept in Crow. In a more recent aggravated-burglary case, the Tennessee Court of Criminal Appeals cited Crow as support for its point that "entry of a hand or an instrument is sufficient" to constitute an "entry." State v. Johnson, No. M2010-02664-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 293, at *11-12 (Tenn. Crim. App.

May 20, 2012); see also State v. House, No. W2012-01272-CCA-R3-CD, 2013 Tenn. Crim. App. LEXIS 567, at *14 (Tenn. Crim. App. June 21, 2013) (ordinary burglary; parenthetically stating that "entry of a hand or an instrument is sufficient"). With respect to the "entry" requirement, the law in Tennessee has been the same ever since Crow issued in 1974: a conviction can be sustained based on the minority rule.

The cases thus make clear that, when Mr. Hall was convicted of his aggravated burglary and burglary crimes, he could have been convicted on the theory that he made "entry" by merely sticking an instrument into a door-frame in an effort to open the door. See United States v. Burris, 912 F.3d 386, 406 (6th Cir. 2019) (en banc) ("sentencing courts must 'presume that the conviction rested upon nothing more than the least of the acts criminalized'" (quoting Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013)).

On this point, all that Mr. Hall must show is that there is a "realistic probability" that someone could be convicted of burglary in Tennessee when they merely crossed the threshold with an instrument used only in the effort to make entry. See Gonzales v. Duenas-Alverez, 549 U.S. 183, 193 (2007). That can be established by showing, for example: (1) a previous case where someone in Tennessee was convicted of burglary on such evidence, see id.; United States v. McGrattan, 504 F.3d 608, 615 (6th Cir. 2007) (relying on nonprecedential case law to infer certain conduct would support a certain type of conviction under Ohio law); or, (2) that the properly interpreted state law would support such a conviction. United States v. Lara, 590 F. App'x 574, 584 (6th Cir. 2014) (finding a "realistic probability" of a conviction under a certain theory even though there was no reported example of such a conviction).

As the foregoing discussion indicates, Mr. Hall can make the showing both ways. First, in Crow and Ferguson, burglary convictions were sustained on a record that showed with certainty

only that the defendant had crossed the threshold with an instrument used to make entry, not to commit the felony therein. That fact suffices to satisfy the Duenas standard.

Second, the correctly-interpreted law would sustain an entry-only view for use of any instrument. Crow defined the entry requirement using "any instrument" language. Following Crow, Tennessee appellate courts and the pre-1989 pattern jury instructions likewise used such "any instrument" language. And, after 1989, that "any instrument" language was codified. There is thus, a reasonable probability that someone has been convicted in Tennessee on the entry-only view of burglary because Tennessee has repeatedly used the "any instrument" language to define "entry." Because Mr. Hall could have been convicted for what were really just attempted burglaries, his convictions cannot qualify as generic "burglary" convictions.

D. Any counterargument conflicts with James.

Generic burglary incorporates the instrument-for-crime rule, yet Tennessee follows the broader any-instrument rule. Thus, a prior conviction for Tennessee burglary – whether aggravated or not – does not constitute generic burglary and does not count as an ACCA predicate. Descamps, 570 U.S. at 257.

Both Congress and this Court have recognized that a completed burglary and an attempted burglary are two different crimes. Congress rejected an amendment to define the ACCA's "violent felony" to include attempted burglary, thereby restricting the ACCA to completed burglary. See James, 550 U.S. at 200. Accordingly, the James Court held that Florida attempted burglary does not qualify as a generic burglary. Id. at 197.

Moreover, James made it clear that the degree of dangerousness could not be of controlling significance. The Florida attempt offense required the defendant to fail in a burglary after having made an "'overt act directed towards entering or remaining in a structure[.]'" Id. at 202 (quoting

Florida law). Due to this required overt act, the James Court presumed the offense was at least as dangerous, if not more dangerous, than a completed generic burglary. Id. at 203-04. But, that degree of danger did not render the Florida attempt offense (which could be sticking a screwdriver through a doorframe) a generic burglary since a federal sentencing court's task is to define "burglary" as understood by Congress in 1986, not to classify as "burglary" any dangerous crime that is similar to burglary. See id. at 197. In sum, James establishes that generic burglary does not include attempted burglary, and that attempts that are as dangerous as burglary are covered by the residual clause. Id. at 197, 202-04; see also Taylor, 495 U.S. at 600 n.9 (explaining the residual clause might cover break-in crimes falling beyond scope of "burglary"). Any counter-argument thus implicitly invites the Court to compensate for the loss of the residual clause by ignoring an age-old distinction between burglary and attempted burglary and by, consequently, lumping the two crimes together. The Court should decline this invitation.

E. The concerns about Sixth Circuit precedent holding that Tennessee's burglary statutes are generic were not resolved by this Court in Stitt II.

The Brumbach panel stated that any concerns about dated Sixth Circuit precedent holding that Tennessee aggravated burglary was generic were resolved by this Court in Stitt II. To come to this finding, the Brumbach panel simply ignored this Court's intervening precedent by holding that Sixth Circuit law simply returned to the status quo after this Court reversed Stitt I. When this Court reversed Stitt I, however, it did not hold that Tennessee aggravated burglary is a generic burglary; it simply held that the fact that Tennessee's definition of "habitation" includes "coverage of vehicles designed or adapted for overnight use [does not] take[] the statute outside the generic burglary definition." Stitt II, 139 S. Ct. at 407. This Court actually made no analysis and reached no conclusion regarding Tennessee's "entry" requirement; nor did it make any determination as to how, in general, a Tennessee aggravated burglary conviction must be classified.

Even prior to Stitt I, the Sixth Circuit recognized that there was some uncertainty in its case law as to whether Tennessee aggravated burglary necessarily counted as a generic burglary, despite Nance's broad statement that it did. See United States v. Brown, 516 F. App'x 461, 465 n.1 (6th Cir. 2013) (doubting that breadth and soundness of that statement). Then, in Stitt I the en banc Court expressly "overrule[d]" Nance, removing its precedential force. Stitt I, 860 F.3d at 861. Meanwhile, this Court did not hold that Nance was correct to say all Tennessee aggravated burglary convictions count as generic burglaries; it held only that Tennessee's definition of "habitation" was not fatally overbroad. Stitt II, 139 S. Ct. at 407. The question is an open one going forward – and so it was open for the Sixth Circuit panels to find in Petitioners' favor. The panel herein erred in finding it was bound by Brumbach because the Brumbach panel erred in finding it was bound by Nance.

To understand Nance, one must understand United States v. Sawyers, 409 F.3d 732 (6th Cir. 2005). Sawyers held that Tennessee facilitation of aggravated burglary does not qualify as a generic burglary. Id. at 738. While doing so, it said that Tennessee aggravated burglary would so qualify. Id. To explain this dicta, the Sawyers panel summarily described what constituted an aggravated burglary under Tennessee law: "Aggravated burglary occurs when an individual enters a habitation 'without the effective consent of the property owner' and, . . . intends to commit a felony . . .'" State v. Langford, 994 S.W. 2d 126, 127 (Tenn. 1999) (citing Tenn. Code Ann. §§ 39-14-402 and 39-14-403)." Sawyers, 409 F.3d at 737 (emphasis added). As the emphasized phrase reflects, the Sawyers panel seems to have assumed that Tennessee law requires proof of entry by a person (entry by "an individual"), without even considering an entry-by-instrument scenario. Sawyers cited no other Tennessee law on the subject. Nor did it consider what the

Tennessee statute means when it says entry can be made by an "object." Tenn. Code Ann. § 39-14-402(b). It did not examine the "entry" issue whatsoever.

The Nance panel then simply adopted Sawyers' dictum. Nance, 481 F.3d at 888. In a five-sentence passage, Nance quoted Sawyers' description of Tennessee law, repeating that aggravated burglary "occurs when an individual enters a habitation," and then Nance concluded that the Tennessee offense "clearly comports with [the] definition of generic burglary 'as committed in a building or enclosed space.'" Id. (emphasis added). Nance's focus was strictly on the locational element, and it left the entry element unexamined. As the panel recognized in Brown, 516 F. App'x at 465, n.1, it seems that Nance does not legitimately serve as a comprehensive holding that all Tennessee aggravated burglary convictions qualify as generic burglary.

In Priddy, the panel cribbed the same incomplete summary of Tennessee law on aggravated burglary, simply saying it occurs "'when an individual enters a habitation.'" Priddy, 808 F.3d at 684 (quoting Langford, supra). Then, without analysis, it repeated Nance's broad statement that Tennessee's aggravated burglary statutes generally "'represent[] a generic burglary.'" Id. (quoting Nance).

Next, in Ferguson, the panel said Priddy "compels th[e] holding" that Tennessee non-aggravated burglary qualifies as a generic burglary, without any discussion of Tennessee law on "entry" or the satisfaction of the generic element of "entry." Rather it simply mentioned, and rejected, an argument about the timing of the mens rea. Ferguson, 868 F.3d at 515. Again, the court's focus was limited to an issue other than the entry element.

This Court has previously held that appellate courts are free to address previously unchallenged and unexamined assumptions and revise their views without having to abrogate precedent. Will v. Mich. Dep't of State Police, 491 U.S. 58, 63 n.4 (1989) ("'this Court has never

considered itself bound [by prior sub silentio holdings] when a subsequent case finally brings the jurisdictional issue before us'" (internal citation omitted; brackets in original)); see also Staley v. Jones, 239 F.3d 769, 776 (6th Cir. 2001) (citing Will, supra, for this rule); Hammons v. Norfolk S. Corp., 156 F.3d 701, 703 n.6 (6th Cir. 1998) (same). Indeed, stare decisis is not a rigid rule that ignores the nuances of the complexities of the law. See Johnson, 135 S. Ct. at 2563 (explaining that stare decisis does not matter for its own sake, and even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience). Instead, "the best approach to stare decisis is to give prior decisions the precedential effect that best fits the decision." 18 Moore's Federal Practice – Civil § 134.03[3].

Moreover, this Court has recognized that a published, non-dictum statement on a point may lack precedential value when "[t]he most that can be said is that the point was in the cases if anyone had seen fit to raise it." Webster v. Fall, 266 U.S. 507, 511 (1925). In short, under this slightly more flexible approach to stare decisis, prior unexamined assumptions lack the weight of precedent.

This principle is aptly applied here. To decide whether Tennessee aggravated burglary (and, in some of the cases, burglary) was categorically generic burglary, the lower court panels would have had to decide, at a minimum, whether the Tennessee offense had the requisite entry element, locational element, and mens rea. But, Sawyers and its progeny left the entry element utterly unexamined. In fact, Sawyers described only an entry involving the offender's person. Not only did those decisions skip over an examination of the entry issue but their inherent assumptions were inaccurate.

Plus, Sawyers was issued in 2005, which was before this Court decided in James that a mere attempted burglary does not constitute a generic burglary. Thus, even if Sawyers had

engaged in some analysis, it would have lacked the benefit of what is now the binding guidance of the James Court. Under James, an entry-only-view burglary, which is nothing more in actuality than an attempted burglary, does not qualify as a generic burglary. The decisions in Sawyers and its progeny merely reiterated Sawyer's unexamined statement, which is at odds with James. Because such previously unexamined assumptions run afoul of this Court's ruling in James, the lower court panel should have considered itself bound by James to correct the error in Nance and other cases that made the same unwarranted assumption about Tennessee's term "entry." See generally Cradler v. United States, 891 F.3d 659, 672 (6th Cir. 2018) (abrogating circuit precedent that classified a Tennessee burglary third degree offense as a "violent felony," because it was in conflict with Supreme Court precedent).

II. PURSUANT TO REHAIF, MR. HALL'S INDICTMENT FAILED TO CHARGE A CRIME AND HE THEREFORE COULD NOT KNOWINGLY OR VOLUNTARILY PLEAD GUILTY

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 must therefore 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. Mr. Hall's indictment said nothing about his relevant status. Yet, the Sixth Circuit panel deciding the case held there was no plain error because Mr. Hall had so many prior felony convictions that he must have known he was a felon when he pleaded guilty, and therefore, he could not show that the error seriously affected the fairness, integrity or public reputation of his criminal proceedings. This was the same reason given for rejection of Mr. Hall's claim that his plea was involuntary at the time he gave it.

This reasoning, however, is flawed because it cannot be disputed 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)). Where the indictment fails to charge a crime, these constitutional rights are violated.

This error was compounded when the panel applied plain error review to Mr. Hall's constitutionally involuntary guilty plea. Pleading guilty without knowledge of the applicable scienter-of-status element constituted a structural error warranting automatic reversal without regard to a showing of prejudice.

A. The indictment failed to charge a crime and therefore, the jury was not required to find all elements of the § 922(g)(1) offense beyond a reasonable doubt.

In Mr. Hall's case, the scienter element required by Rehaif was not considered because it was never pled. This constituted a jurisdictional defect that required dismissal of the indictment.

(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. See 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 Court 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. Hall's indictment was insufficient.

Mr. Hall's indictment charged that he, "having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate commerce a firearm . . . in violation of Title 18, United States Code, Section 922(g)(1)." It did not state an offense for two mutually reinforcing reasons. First, while the grand jury alleged that Mr. Hall was in fact a felon, it did not allege that he knew he was a felon. Yet, Rehaif held that such knowledge is an essential element.

Second, the indictment cited § 922(g)(1), 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) 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 in Mr. Hall's case. 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.

Here, there was "error" that is now "clear" under Rehaif. See, e.g., 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 can change the fact that Mr. Hall 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). Thus, Mr. Hall's panel erred when it found that he could not prevail under plain error review because he could not show that the fairness, integrity or public reputation of the proceedings had been affected.

The other problem with the panel's finding of no plain error in this case is that the panel substituted its judgment regarding the mens rea element for that of the factfinder when it stated that with so many felony convictions, Mr. Hall must have known his status. 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)(1) offense presented, and with no indication that the district court even considered this element, it is mere speculation to try to determine whether a jury would have found such knowledge at this point. By basing its denial of Mr. Hall's appeal upon speculative findings

that the jury (or the district court as factfinder) would have found that Mr. Hall knew of his status, the panel impermissibly substituted its judgment for that of the factfinder.

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 that Mr. Hall 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)(1). Hence, there was a plain error that affected Mr. Hall's substantial rights. As such, it seriously affected the fairness and integrity of the proceedings.

B. Accepting Mr. Hall's guilty plea without proof of the knowledge of status element was a structural error, mandating automatic reversal without a showing of prejudice.

Mr. Hall's panel incorrectly ruled that his constitutionally involuntary guilty plea did not constitute a structural error. Structural errors are those errors that deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . . and no criminal punishment may be regarded as fundamentally fair." Rose v. Clark, 478 U.S. 570, 577–578 (1986).

As the Supreme Court explained in Weaver v. Massachusetts:

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it affect[s] the framework within which the trial proceeds, rather than being simply an error in the trial process itself.

137 S. Ct. 1899, 1908 (2017) (citations and internal quotation marks omitted). Such errors are intrinsically harmful and therefore require "automatic reversal without any inquiry into prejudice." Id. at 1905. In fact, structural errors must be corrected even if there exists "strong evidence of a petitioner's guilt" and no "evidence or legal argument establishing prejudice." Id. at 1906.

Although the "precise reason why a particular [structural] error is not amenable to" a prejudice inquiry varies from error to error, there are three broad rationales. Id. at 1908. First, an error may be structural because "the right at issue is not designed to protect the defendant from erroneous prosecution but instead protects some other interest," in which case "harm is irrelevant to the basis underlying the right." Id. Second, an error will be structural "if the effects of the error are simply too hard to measure," such as when "the precise effect of the violation cannot be ascertained." Id. (internal quotation marks omitted). And, third, an error will be deemed structural if it results in "fundamental unfairness," in which case it "would be futile for the government to try to show harmlessness." Id. In a single case, "more than one of these rationales may be part of the explanation for why an error is deemed structural." Id. Indeed, that is the case here.

The many decisions this Court has issued applying the above principles and rationales motivating the structural error doctrine illustrate that the errors in this case should be considered structural and should result in automatic reversal without regard to prejudice. For example, in Henderson v. Morgan, this Court invalidated a second-degree murder plea because the defendant was not informed about the relevant mens rea requirement, namely, that the underlying assault had to have been "committed with a design to effect the death of the person killed." 426 U.S. 637, 645 (1976). As a result, the Court concluded, the defendant did not have "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Id. (citation omitted). Indeed, the Court explained, in such situations a guilty plea will be constitutionally defective "because [the defendant] has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Id. at 645 n.13. Importantly, the Court assumed "that the prosecutor had overwhelming evidence of guilt available." Id. at 644. Nonetheless, the Court held that "nothing in this record" – not even the defendant's admission that

he did indeed kill the victim – could "serve as a substitute for either a finding after trial, or a voluntary admission, that [the defendant] had the requisite intent." Id. at 646. Indeed, "[d]efense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent." Id. The Court explained: "In these circumstances" – akin to the circumstances of this case – "it is impossible to conclude that [the defendant's] plea to the unexplained charge . . . was voluntary." Id. Vacation of the plea and conviction was required in Henderson, and is required here, regardless of whether any evidence in the record ("overwhelming" or otherwise) might satisfy the missing mens rea element.

This Court applied similar reasoning in Bousley v. United States, 523 U.S. 614 (1998). That case examined an 18 U.S.C. § 924(c) conviction following the Court's intervening decision in Bailey v. United States, 516 U.S. 137 (1995), which narrowed the "use" element of a § 924(c) offense. In Bousley, the Court held that the defendant's pre-Bailey guilty plea was "constitutionally invalid" because "the record reveal[ed] that neither [the defendant], nor his counsel, nor the [district] court correctly understood the essential elements of the crime with which he was charged." 523 U.S. at 618–19. The Court reiterated that a defendant must receive "real notice of the true nature of the charges against him," reaffirming Henderson's declaration that this particular constitutional mandate is "the first and most universally recognized requirement of due process." Id. at 618; see also McCarthy v. United States, 394 U.S. 459, 466 (1969) (explaining that "a guilty plea . . . cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts"). Because the plea in Bousley was constitutionally invalid – due to the lack of mandated notice and resulting absence of a voluntary admission of guilt – so too was the conviction.

As this Court further explained in United States v. Dominguez Benitez, "when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed." 542 U.S. 74, 84 n.10 (2004) (citing Boykin v. Alabama, 349 U.S. 238, 243 (1969)). The Court noted the important distinction between a plea colloquy that simply violates Rule 11 – an error that does require a separate showing of prejudice under plain error review – versus an unknowing and involuntary guilty plea that violates due process itself – which does not. See id. A conviction obtained under the latter circumstances, cannot "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." Id.

In Dominquez Benitez, the Court made clear that "record evidence tending to show that a misunderstanding was inconsequential" or "evidence indicating the relative significance of other facts that may have borne on [the defendant's] choice regardless of any Rule 11 error" is relevant to reversal when Rule 11 is violated. Id. at 84. But the Court also clarified that this is a "point of contrast with the constitutional question whether a defendant's guilty plea was knowing and voluntary." Id. at 84 n.10 (emphasis added). There, such record evidence is not relevant to reversal, because evidence of prejudice and harm is itself irrelevant.

Under this established precedent, Mr. Hall's total lack of notice and understanding and the resulting unconstitutional plea alone mandate automatic reversal. But the structural errors in this case are more extensive even than that. There also was no constitutionally mandated finding of guilt by a judge or jury, nor a valid judicial admission of the elements of the crime by Mr. Hall himself. Indeed, Mr. Hall now stands convicted of a non-existent criminal offense. Thus, Mr. Hall's "factual guilt of [felon in possession of a firearm] has never been established in any fashion

permitted by the Due Process Clause of the Fourteenth Amendment." Henderson, 426 U.S. at 650 (White, J., concurring).

As the four-justice concurrence in Henderson explained, there are "two ways under our system of criminal justice in which the factual guilt of a defendant may be established such that he may be deprived of his liberty consistent with the Due Process Clause[.]" Id. at 647–48. The first, of course, is a verdict by jury (or a decision by judge), "who concludes after a trial that the elements of the crime have been proved beyond a reasonable doubt." Id. "The second is by the defendant's own solemn admission in open court that he is [i]n fact guilty of the offense with which he is charged." Id. Normally, such a judicial admission conclusively establishes a defendant's factual guilt and satisfies due process.

As discussed above, the mandated judicial admission in Henderson was unknowing and therefore inherently constitutionally defective. But even setting that fatal defect aside, the second problem in Henderson, as here, "is that the defendant's guilt [was] established neither by a finding of guilt beyond a reasonable doubt after trial nor by the defendant's own admission that he is in fact guilty." Id. at 649. In Henderson, that was true because "the defendant did not expressly admit that he intended the victim's death (such intent being an element of the crime for which he stands convicted)[.]" Id. Here, Mr. Hall did not expressly admit that "he knew he had the relevant status when he possessed" a firearm – the mandated mens rea for the crime for which he now stands convicted. Rehaif, 139 S. Ct. at 2194. And Mr. Hall's "plea of guilty cannot be construed as an implied admission" that he knew of his status as mandated by § 922(g), because "he was not told

and did not know" that such knowledge "was an element of the offense with which he was charged." Henderson, 426 U.S. at 649 (White, J., concurring).[6]

This error is structural – "it cannot be harmless." Id. at 650 (internal quotation marks omitted). Indeed,

> [i]t should hardly need saying that a judgement of conviction cannot be entered against a defendant no matter how strong the evidence is against him, unless that evidence has been presented to a jury (or judge, if jury is waived) and unless the jury (or judge) finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt.

Id. Accordingly, automatic reversal was otherwise mandated on this ground and no showing of prejudice is required. The Sixth Circuit panel erred when it failed to do so.

[6] In fact, "[t]he charge of [felon in possession of a firearm] was never formally made" because the indictment returned by the grand jury omitted a mandated element of the offense. Henderson, 426 U.S. at 645.

CONCLUSION

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

DATED: 8th day of January, 2020.

Respectfully submitted,

DORIS RANDLE HOLT
FEDERAL DEFENDER

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