No. _____

IN THE

Supreme Court of the United States

DAN REED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Rehaif v. United States*, this Court held that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove that "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. 2191, 2194 (2019). One "relevant status" is that the defendant have a prior conviction for "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

The circuits are expressly split in cases that were tried to a jury and pending on direct appeal when this Court decided *Rehaif*. The questions presented by this petition are:

1. Whether, in determining if a defendant's substantial rights were affected by the failure of the indictment to charge, and the government to prove to the jury, that the defendant knew his relevant status, the courts of appeals may consider the "entire" record, including a presentence report containing facts about a defendant's prior convictions that were not admitted or offered to be admitted at trial.

2. Whether, even if the courts of appeals may consider the entire record, a court of appeals errs by considering only certain non-trial evidence, and not considering evidence on the record tending to show that the defendant lacks the requisite knowledge of his status.

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

United States Supreme Court:

United States v. Dan Reed, No. 18-7490 (June 28, 2019) (granting certiorari, vacating judgment, and remanding for further proceedings in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019)).

United States Court of Appeals (11th Cir.):

United States v. Dan Reed, No. 17-12699

752 F. App'x 851 (Oct. 19, 2018) (original opinion)

941 F.3d 1018 (Oct. 28, 2019) (opinion on remand)

Order (Jan. 8, 2020) (rehearing and rehearing en banc denial)

United States District Court (M.D. Fla.):

United States v. Dan Reed, No. 6:15-cr-162-Orl-31KRS (June 6, 2017)

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS AND ORDERS

On June 28, 2019, this Court granted Mr. Reed's certiorari petition, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *See Reed v. United States*, 139 S. Ct. 2776 (2019).

On remand, the Eleventh Circuit affirmed in a published decision, 941 F.3d 1018 (11th Cir. 2019), which is provided in the petitioner's appendix (Pet. App.) at 1a-4a. Both parties filed rehearing petitions, which the Eleventh Circuit denied on January 8, 2020. *See* Pet. App. 5a.

The Eleventh Circuit's original decision affirming Mr. Reed's conviction and sentence was unpublished, 752 F. App'x 851 (11th Cir. 2018), and is provided at Pet. App. 6a-11a.

The district court's decision to exclude the defense's expert, a neuropsychologist, from testifying at trial and denial of the defense's motion to reconsider are provided at Pet. App. 12a-15a.

JURISDICTION

The Eleventh Circuit issued its decision on October 28, 2019. Pet. App. 1a. The government timely filed a petition for panel rehearing on November 12, 2019, and Mr. Reed timely filed a petition for rehearing and rehearing en banc on November 18, 2019. *See* 11th Cir. R. 35-2, 40-3. The Eleventh Circuit denied the petitions on January 8, 2020. Pet. App. 5a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Mr. Reed has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rules 29.2 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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

> It shall be unlawful for any person–
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition.

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

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

STATEMENT OF THE CASE

1. In *Rehaif v. United States*, this Court held that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove that "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. 2191, 2194 (2019). *Rehaif* overturned the contrary decisions of the courts of appeals, including that of the Eleventh Circuit.

See United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997); *Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing decisions, including *Jackson*).

2. Mr. Reed's petition for a writ of certiorari in his direct appeal was pending when this Court decided *Rehaif*. On June 28, 2019, this Court granted certiorari, vacated the judgment, and remanded this case for further proceedings in light of *Rehaif*. *See Reed v. United States*, 139 S. Ct. 2776 (2019).

3. On remand, the Eleventh Circuit directed the parties to file simultaneous supplemental letter briefs. The government requested that the court of appeals review the "entire" record, including facts about Mr. Reed's prior convictions contained in the presentence report (PSR), to conclude that Mr. Reed knew his felon status at the time of the firearm possession. The government thus asked the Eleventh Circuit to affirm Mr. Reed's conviction based on information that had not been admitted at trial. *See* Supplemental Letter Brief of the United States, No. 17-12699, 2019 WL 4933226, at *5-*7 (11th Cir. Oct. 3, 2019).

Mr. Reed, by contrast, argued that a new trial was warranted. Any effort by the government to rely on the PSR, Mr. Reed contended, only confirmed that the evidence admitted at trial was insufficient to sustain his conviction. If the court chose to consider the "entire" record, however, Mr. Reed asked the Eleventh Circuit to consider the evidence he had sought to admit at trial showing that he is intellectually disabled (he has a full-scale IQ of 61, a score lower than 99.5% of the population) and suffers from mental health conditions (including schizophrenia paranoid type). Mr. Reed contended that such evidence established a reasonable probability the jury could find that he did not have the requisite knowledge at the time of the offense. Finally, Mr. Reed urged the Eleventh Circuit to conclude that it undermines the integrity, fairness, and public reputation of the judicial proceedings for Mr. Reed, an intellectually-impaired and mentally

ill individual, to be convicted and imprisoned without proof that he had the knowledge required by this Court's precedent. *See* Supplemental Letter Brief of Dan Reed, No. 17-12699, 2019 WL 4933227, at *9-*10 (11th Cir. Oct. 3, 2019) (quoting *Rehaif*, 139 S. Ct. at 2197 ("Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful.")).

4. The Eleventh Circuit affirmed Mr. Reed's conviction in a published decision. Pet. App. 1a-4a. The Eleventh Circuit agreed that Mr. Reed had established the first two prongs of plain-error review, stating that the "government concedes that plain error occurred when Reed's indictment failed to allege that he knew he was a felon and when the jury was not instructed to find that Mr. Reed knew he was a felon." Pet. App. 3a.[1] And addressing his insufficiency-of-the evidence argument, the Eleventh Circuit agreed with Mr. Reed that "error occurred when the government was not required to prove that Reed knew he was a felon." Pet. App. 3a.

The Eleventh Circuit, however, accepted the government's suggestion that it could review the "entire" record to evaluate prongs three and four of plain-error review. Pet. App. 3a-4a (citing *United States v. Vonn*, 535 U.S. 55 (2002); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); and *United States v. Young*, 470 U.S. 1 (1985)). The Eleventh Circuit thus did not confine its review to the evidence that had been admitted at trial, implicitly agreeing with Mr. Reed that the evidence at trial was not sufficient to sustain his conviction light of *Rehaif*.[2] Instead, the court

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[1] This Court has outlined four prongs for plain-error review. The first three prongs require "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). Further, "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks and citations omitted).

[2] Mr. Reed addresses the evidence admitted at trial at pp. 13-14, *infra.*

of appeals relied on facts about Mr. Reed's prior convictions that had not been admitted at trial, particularly the number of convictions and the length of his sentences, to surmise that "Mr. Reed knew he was a felon." Pet. App. 4a. The Eleventh Circuit thus determined that Mr. Reed "cannot prove that the errors affected his substantial rights or the fairness, integrity, or public reputation of his trial." *Id.*

5. Both parties filed rehearing petitions. The government asked the Eleventh Circuit to amend its opinion to delete the statement that the government had conceded plain error as to the indictment. The government further requested that the Eleventh Circuit affirm Mr. Reed's conviction without addressing whether the indictment is plainly erroneous. *See* Government's Reh'g Pet. at 2-4 & n.1 (11th Cir. Nov. 12, 2019).

Mr. Reed requested rehearing and rehearing en banc. Among other arguments, Mr. Reed contended that the Eleventh Circuit was incorrect to consider the facts about his prior convictions taken from the PSR, which had been prepared after the trial and subjected to a lesser preponderance-of-the-evidence standard. Mr. Reed additionally objected that while the Eleventh Circuit had agreed with the government's suggestion to review the "entire" record, the Eleventh Circuit had not addressed the parts of the record to which Mr. Reed pointed, including the defense expert's proffered testimony as to Mr. Reed's intellectual disability and mental health conditions. *See* Mr. Reed's Reh'g and Reh'g En Banc Pet. at 3-4, 11-16 (11th Cir. Nov. 18, 2019).

On January 8, 2020, the Eleventh Circuit summarily denied both petitions. The court of appeals thus did not amend its opinion or provide further analysis. Pet. App. 5a.

REASONS FOR GRANTING THE WRIT

In *Rehaif*, this Court narrowed the reach of 18 U.S.C. §§ 922(g) and 924(a)(2), holding that to convict a defendant the government must prove that "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. at 2194. One "relevant status" is that the defendant have a prior conviction for "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

The circuits are expressly split in § 922(g)(1) cases that had been tried to a jury and were pending on direct appeal when this Court decided *Rehaif*. The question that divides the circuits is whether they may review information not admitted at trial—particularly, facts about a defendant's prior convictions—to determine that a defendant's substantial rights have not been affected by the failure of the indictment to charge, and the government to prove to the jury, that he knew his felon status.

In the decision below, the Eleventh Circuit affirmed Mr. Reed's conviction, relying on information about his prior convictions (the number of prior convictions and length of sentences) that had not been presented to the jury. From this information, the Eleventh Circuit concluded that Mr. Reed knew he was a convicted felon and, therefore, his substantial rights had not been affected by the failure of the government to prove his knowledge of status to the jury. Pet. App. at 3a-4a.

Seven circuits have now issued published decisions on the question presented here, including circuits that have disagreed with the approach used by the Eleventh Circuit. The circuits are intractably divided, and Mr. Reed's case is an excellent vehicle to resolve the circuit split.

Indeed, the Eleventh Circuit's reliance on facts about Mr. Reed's prior convictions not admitted at trial squarely presents Sixth Amendment issues. *See United States v. Maez*, __ F.3d __, 2020 WL 2832113, at *8 (7th Cir. June 1, 2020) (limiting review to the evidence admitted at trial to determine if the defendant's substantial rights have been affected, in recognition of the Sixth Amendment problem that would otherwise arise) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). None of Mr. Reed's prior convictions were proven to a jury beyond a reasonable doubt, including the 1987 conviction the district court determined (over the defense objection) belonged to Mr. Reed under a lesser preponderance-of-the-evidence standard. *See* Pet. App. 3a. Further, the Eleventh Circuit's decision rests on the presumption that a typical defendant would know his felon status based on his prior convictions and sentence lengths. *See* Pet. App. 4a. But Mr. Reed is not a typical defendant. He has a full-scale IQ of 61 (a score lower than 99.5% of the population) and suffers from mental health defects. The crucial element of wrongfulness under §§ 922(g) and 924(a)(2) is whether the defendant knew his relevant status at the time of the firearm possession. *Rehaif*, 139 S. Ct. at 2197. Whether *Mr. Reed* knew his felon status has never been subjected to the crucible of trial.

The Eleventh Circuit thus erred by considering the facts about Mr. Reed's prior convictions that were not proven to a jury beyond a reasonable doubt. Moreover, the Eleventh Circuit abused its discretion by considering this non-trial evidence, without also considering other record evidence tending to show that Mr. Reed lacked the requisite knowledge of his status. Because the government has never proven beyond a reasonable doubt that Mr. Reed knew his felon status, a new trial is warranted. Mr. Reed accordingly requests this Court's review.

I. The circuits are expressly divided on an important and recurring question

Before *Rehaif*, the courts of appeals had uniformly held that the government was required to prove the defendant's knowledge only as to his possession, not as to his status. *See, e.g., United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997); *Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing decisions, including *Jackson*). In accordance with this then-binding precedent and this Court's Federal Rule of Evidence 403 ruling in *Old Chief v. United States*, 519 U.S. 172, 174 (1997), many defendants, including Mr. Reed, stipulated that they had been convicted of a felony offense at the time of the alleged firearm possession. *See, e.g.,* Pet. App. 3a-4a.

Following *Rehaif*, the courts of appeals have been "grappling with how *Rehaif* affects cases pending on direct appeal when it came down." *Maez*, 2020 WL 2832113, at *1. Seven circuits have thus far issued published decisions in cases tried to a jury before *Rehaif* was decided.[3] These circuits are expressly divided on whether they may consult information not presented to the jury to determine the effect of the *Rehaif* errors under plain-error review.[4] They have taken three different approaches.

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[3] *See, e.g.,* Pet. App. 1a-4a (Eleventh Circuit decision below); *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020); *United States v. Huntsberry*, 956 F.3d 270 (5th Cir. 2020); *United States v. Ward*, 957 F.3d 691 (6th Cir. 2020); *Maez*, 2020 WL 2832113 (7th Cir.); *United States v. Hollingshed*, 940 F.3d 410 (8th Cir. 2019), *cert. denied*, No. 19-7630, 2020 WL 1326060 (2020); *United States v. Welch*, 951 F.3d 901 (8th Cir. 2020); *United States v. Heard*, 951 F.3d 920 (8th Cir. 2020); *United States v. Warren*, 951 F.3d 946 (8th Cir. 2020); *United States v. Haynes*, 958 F.3d 709 (8th Cir. 2020); *United States v. Benamor*, 937 F.3d 1182 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 818 (2020); *United States v. Moore*, 954 F.3d 1322 (11th Cir. 2020); *United States v. McLellan*, 958 F.3d 1110 (11th Cir. 2020).

[4] *See Maez*, 2020 WL 2832113, at *7 ("The circuits have taken different approaches to the record for plain-error review of *jury verdicts* in light of *Rehaif*."); *Huntsberry*, 956 F.3d at 284 ("We note that our sister courts have taken different paths on this issue" concerning "what sources of evidence we, as an appellate court, may properly consider in determining whether the [*Rehaif*] errors affected [the defendant's] substantial rights"). The Third Circuit has *sua sponte* decided to

1. Four circuits, including the Eleventh Circuit in the decision below, have expanded their review beyond the evidence admitted at trial to address prong three of plain-error review, which asks whether the error affected the defendant's substantial rights. These circuits considered facts about the defendant's prior convictions, which were not admitted at trial, to conclude that the defendant knew his felon status and cannot establish a reasonable probability of a different outcome at trial. Pet. App. 2a-4a; *Ward*, 957 F.3d at 695 & n.1 (6th Cir.); *Hollingshed*, 940 F.3d at 415-16 (8th Cir.); *Benamor*, 937 F.3d at 1189 (9th Cir.).[5] As the Seventh Circuit later observed, these "[f]our circuits have freely consulted materials not before the jury—in particular, criminal histories from defendants' presentence investigation reports (PSRs)—without discussing the propriety of thus expanding the record." *Maez*, 2020 WL 2832113, at *7.

The Eleventh Circuit cited this Court's guilty-plea decisions in *United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), to support its decision to consider the "entire" record to affirm Mr. Reed's conviction after a trial on plain-error review. Pet. App. 3a-4a. In *Vonn*, 535 U.S. at 74-75, this Court decided that a court of appeals may review the "entire" record to assess the effect of plain error under Federal Rule of Criminal Procedure 11. And in *Dominguez Benitez*, 542 U.S. at 83, the Court held that a defendant raising a non-constitutional Rule 11 error in his guilty plea must show a reasonable probability he would not have pleaded guilty but for the error, a claim that is "informed by the entire record."

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hear this issue *en banc*. *See United States v. Nasir*, No. 18-2888 (3d Cir. Mar. 4, 2020) (en banc).

[5] The government's briefs in *Hollingshed* and *Benamor* make clear that these facts about the defendant's prior convictions were not admitted at trial. *See* Supplemental Brief of Appellee, *United States v. Hollingshed*, No. 17-2951, 2019 WL 4196787, at *6-*9 (8th Cir. Aug. 26, 2019); Government's Response to Defendant's Reh'g and Reh'g En Banc Pet. at 9-11, *United States v. Benamor*, No. 17-50308 (9th Cir. Aug. 12, 2019).

2. The Fifth Circuit found that the Eleventh Circuit's reliance on sentencing information that had never been admitted at trial in Mr. Reed's case "may be in tension with" previous Fifth Circuit precedent restricting plain-error review to the record before the court. *Huntsberry*, 956 F.3d at 284 (citation omitted). Rather than resolving whether it could rely on such sentencing-only information, the Fifth Circuit determined it could take judicial notice of the "facts of [the defendant's] prior felony conviction." *Id.* at 284-85 & n.8. Based on this judicially-noticed record of conviction, the Fifth Circuit held that the defendant could not meet either prongs three or four of plain-error review. *Id.* at 286-87.

3. The Second and Seventh Circuits have expressly rejected the approach taken by the Eleventh Circuit in Mr. Reed's case (and by the Sixth, Eighth, and Ninth Circuits). *Miller*, 954 F.3d at 558-60 & n.24; *Maez*, 2020 WL 2832113, at *7-*8. The Second and Seventh Circuits have limited their review to the trial evidence for purposes of prong three, because that inquiry asks what effect the error had on the outcome of the trial that was conducted. *Miller*, 954 F.3d at 558-59 & n.17; *Maez*, 2020 WL 2832113, at *8.

The Seventh Circuit's decision, the most recent on this question, extensively analyzed the approaches by the circuits. *Maez*, 2020 WL 2832113, at *7-*8. In rejecting the Eleventh Circuit's approach in Mr. Reed's case, the Seventh Circuit recognized the Sixth Amendment problem presented by imagining a trial that did not occur. *Id.* at *8 (citing *Sullivan*, 508 U.S. at 279). Further, the Seventh Circuit observed that this Court's decisions in *Vonn* and *Dominguez Benitez*, cited by the Eleventh Circuit, had permitted a review of the entire record for a different purpose—to assess the cost-benefit analysis of whether the defendant would have not entered a guilty plea but for the error—rather than to affirm a conviction based on evidence never admitted at trial. *Id.* at *7.

Both the Second and Seventh Circuits thus declined to rely on evidence that had not been admitted at trial for purposes of considering the third prong of plain-error review. *Miller*, 954 F.3d at 559; *accord Maez*, 2020 WL 2832113, at *8. But both circuits concluded they could appropriately rely on facts about the defendant's prior convictions, including information not admitted at trial, to decide whether to exercise their discretion at the fourth prong of plain-error review. *Miller*, 954 F.3d at 559; *accord Maez*, 2020 WL 2832113, at *9-*10.

The circuits are thus divided on how to apply plain-error review in cases that were tried to a jury before this Court decided *Rehaif*. This question—whether the appellate courts may consider information the government was not required to prove to a jury beyond a reasonable doubt, and for which the defendant did not have an opportunity to defend at trial—presents significant constitutional issues for the many cases being heard in light of *Rehaif*. Furthermore, resolution of the questions presented here will be important to other cases that will arise when this Court "narrow[s] the scope of a criminal statute by interpreting its terms." *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (internal quotation marks omitted). Mr. Reed accordingly requests this Court's review.

II. The decision below is wrong, and Mr. Reed's case presents an excellent opportunity to resolve the disagreement among the circuits

The Eleventh Circuit's decision to affirm Mr. Reed's conviction after trial based on information not admitted at trial is not supported by this Court's precedent and raises significant Sixth Amendment issues. For four reasons, Mr. Reed's case presents an excellent vehicle to resolve the questions that divide the circuits after *Rehaif*.

1. The Eleventh Circuit's decision is not supported by the decisions of this Court on which it relied. *See* Pet. App. 2a-4a. Only one of these decisions, *Young*, involved a trial. In that case, the Court examined the propriety of the prosecutor's closing argument in view of the

entirety of the closing arguments (including defense counsel's closing argument) and the trial evidence. 470 U.S. at 16-20. The Court therefore did not expand the record to consider information that had not been admitted at trial. *See id.*

The Eleventh Circuit also cited *Vonn* and *Dominguez Benitez*. As the Seventh Circuit recognized, however, this Court's decision in *Vonn* and *Dominguez Benitez* permit a review of the entire record for a different purpose—to assess the cost-benefit analysis of whether the defendant would have not entered a guilty plea but for the Rule 11 error. *Maez*, 2020 WL 2832113, at *7 (citing *Vonn*, 535 U.S. at 74-75; *Dominguez Benitez,* 542 U.S. at 80, 83). These guilty-plea decisions therefore do not support the Eleventh Circuit's decision to affirm Mr. Reed's conviction after trial based on information never admitted at trial.

2. Indeed, the Eleventh Circuit did not address the Sixth Amendment implications of its decision to affirm Mr. Reed's conviction based on information not presented to the jury. *See Maez*, 2020 WL 2832113, at *8. The fact of a defendant's prior conviction, and his knowledge of it, are elements of the §§ 922(g)(1)/924(a)(2) offense. *See Rehaif*, 139 S. Ct. at 2194-96; *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998) (noting that, unlike other statutes, § 922(g)(1) makes recidivism "an offense element"). But the facts about Mr. Reed's prior convictions that the Eleventh Circuit relied on to infer his knowledge of status, and to affirm his conviction, were not proven to a jury beyond a reasonable doubt.

Instead, the facts about Mr. Reed's prior convictions that the Eleventh Circuit relied on were sentencing facts only subjected to a lesser preponderance-of-the-evidence standard. Mr. Reed was not afforded the right at the sentencing hearing to require the government to prove any facts about his prior convictions beyond a reasonable doubt. *See Almendarez-Torres*, 523 U.S. at 239-47. That is true for the prior convictions referenced by the Eleventh Circuit, including the

1987 conviction the district court determined (over the defense objection) belonged to Mr. Reed. *See* Pet. App. 2a-3a, 10a.

As the Seventh Circuit observed, the Eleventh Circuit "freely consulted materials not before the jury—in particular, criminal histories from defendants' [PSRs]—without discussing the propriety of thus expanding the record." *Maez*, 2020 WL 2832113, at *7. The Eleventh Circuit thus did not consider the Sixth Amendment implications of relying on sentencing facts, subjected to a lesser preponderance-of-evidence standard, to infer an element the government would have to prove at trial for the §§ 922(g)(1)/924(a)(2) offense in light of *Rehaif*.

3. The Eleventh Circuit's decision squarely presents the issue that divides the circuits. In Mr. Reed's case, the Eleventh Circuit did not confine itself to the trial evidence, implicitly acknowledging that the evidence at trial was not sufficient to sustain Mr. Reed's conviction light of *Rehaif*. *See* Pet. App. 2a-4a.

The trial evidence consisted of the parties' *Old Chief* stipulation, wherein Mr. Reed agreed that he "had been convicted of a felony offense, that is, a crime punishable by imprisonment for a term in excess of one year." Doc. 67. Mr. Reed entered into that stipulation with the benefit of counsel and in light of then-binding Eleventh Circuit precedent requiring the government to prove the defendant's knowledge only as to the possession element, not the status element. *See Jackson*, 120 F.3d at 1229. The stipulation accordingly does not address whether Mr. Reed knew his felon status at the time of the firearm possession. *Cf. Maez*, 2020 WL 2832113, at *6 (noting that "[i]n the wake of *Rehaif*, defendants and the government have begun agreeing to modified *Old Chief* stipulations that also include knowledge of felon status").

The trial evidence also consisted of Mr. Reed's testimony. He testified in support of the only defense then available to him, the affirmative defense of justification. *See* Pet. App. 2a. Mr.

Reed testified at trial that he had possessed the firearm—an unloaded gun belonging to his mother, with whom he lived—because he had been afraid for his life. Doc. 177 at 160-61, 163, 195; Doc. 179 at 15-18, 22-25, 30. On cross-examination, the prosecutor asked Mr. Reed, "you knew you weren't supposed to have that gun, right?," and Mr. Reed replied, "[y]es, sir." Doc. 179 at 30. But the prosecutor never asked Mr. Reed any follow-up questions, such as why he was not supposed to have the gun. *See id.* at 30-32. Mr. Reed's testimony therefore did not address whether he knew his felon status at the time he possessed the firearm. *Cf. United States v. Moss*, No. 19-4161, 2020 WL 2116508, at *3 (4th Cir. Apr. 22, 2020) ("During his direct testimony, Moss stated that he was well aware of his prohibited status because of his prior convictions.").

Other evidence at trial raises the question whether Mr. Reed knew his prohibited status at the time of the firearm possession. For example, unlike other defendants who flee or evade law enforcement because they possess a gun and know they are prohibited by law from having it,[6] Mr. Reed readily admitted to the law enforcement officer that he had the gun on him. Doc. 177 at 149-52, 156; *see also* pp. 15-16, *infra.*

That the Eleventh Circuit relied on information outside the trial evidence to review the *Rehaif* error demonstrates that the trial evidence was not sufficient to establish that Mr. Reed knew his felon status at the time of the firearm possession. Mr. Reed's case thus presents an excellent opportunity to resolve the question that divides the circuits.

4. Finally, the Eleventh Circuit's decision presents the question whether, even if it is appropriate to consider the "entire" record for purposes of prong three or four of plain-error review, the court errs by not considering information on the record tending to show that the defendant did

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[6] *See, e.g., Haynes* 958 F.3d at 716; *Warren*, 951 F.3d at 951-52; *Maez*, 2020 WL 2832113, at *11-*13.

not have the requisite knowledge. The Eleventh Circuit affirmed Mr. Reed's conviction by considering certain non-trial evidence, but without considering other information in the record to which Mr. Reed pointed.

Mr. Reed asked the Eleventh Circuit, if it chose to review the entire record, to consider Mr. Reed's intellectual disability and mental health conditions. Mr. Reed has a full-scale IQ of 61, a score lower than 99.5% of the population. Doc. 177 at 98; PSR ¶ 64. The neuropsychologist who administered this testing found that Mr. Reed's "ability to verbalize and to understand verbal concepts, to read, [and] to write" were in the "extremely low range." Doc. 177 at 98; *see* PSR ¶ 64 ("his verbally mediated tasks and attention are extremely impaired"). Mr. Reed reads at a first-grade level. Doc. 177 at 101; PSR ¶ 64. Mr. Reed has tested as intellectually disabled since the age of 6. PSR ¶ 65. Mr. Reed also suffers from mental health conditions, including schizophrenia paranoid type. Doc. 177 at 94-95; PSR ¶ 67.

The Eleventh Circuit, however, did not consider any of this information in the decision below. *See* Pet. App. 1a-4a. Indeed, although the Eleventh Circuit relied on some of the information in the PSR (which concerned Mr. Reed's prior convictions), it did not consider other information in the PSR showing his extreme intellectual disability and his mental health conditions. *See* PSR ¶¶ 63-68.

Significantly, moreover, Mr. Reed had sought to introduce this evidence of his intellectual disability and mental health conditions when he went to trial. At that time, the district court excluded this testimony from trial on the ground that "a defendant's subjective perception of threats and subjective ability to consider reasonable alternatives is not relevant to a justification defense." Pet App. 12a. The district judge later denied the defense's motion to reconsider, stating he was "troubled by [his] ruling, but that's [his] understanding of the *current state of the*

law." Pet. App. 15a (emphasis added). The Eleventh Circuit affirmed this evidentiary decision, in its opinion issued before *Rehaif*. Pet. App. 9a-10a.

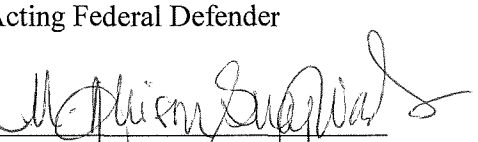
Rehaif now makes clear, however, that the crucial element of wrongfulness under §§ 922(g) and 924(a)(2) is whether *the defendant* knew his relevant status at the time of the firearm possession. 139 S. Ct. at 2197. Because Mr. Reed's subjective belief as to his status is an element of the offense in light of *Rehaif*, a new trial is warranted, not an affirmance. *See, e.g., United States v. Makkar,* 810 F.3d 1139, 1147-48 (10th Cir. 2015) (addressing that erroneous *mens rea* element in jury instructions affected district court's evidentiary decisions and remanding for further proceedings).

The Eleventh Circuit thus erred by affirming Mr. Reed's conviction without considering the "entire" record. Indeed, should this Court conclude that a court of appeals may consider the entire record for purposes of prong three or four of plain-error review, Mr. Reed submits that the Eleventh Circuit abused its discretion by not considering the entire record here.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,
James T. Skuthan
Acting Federal Defender



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