NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

GARRY GRACE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Mr. Grace was illegally charged with, and unknowingly convicted of, a crime that was not an offense against the United States, in light of the Supreme Court's holding in *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019), clarifying that the term "knowingly" in 18 U.S.C. § 924(a)(2) applies not only to the "possession" element, but also to each of the "status" elements, in § 922(g)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

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

United States v. Garry Grace, No. 16-20387-Cr-Gayles (March 15, 2018)

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

United States v. Garry Grace, No. 18-13710 (March 2, 2020)

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PETITION FOR WRIT OF CERTIORARI

Garry Grace respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-13710 in that court on March 2, 2020, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on March 2, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court did not have jurisdiction over this case pursuant to 18 U.S.C. § 3231, because the petitioner was not charged with an offense against the laws of the United States. Although 28 U.S.C. § 1291 and 18 U.S.C. § 3742 give the court of appeals jurisdiction over all final decisions and sentences of the district courts of the United States, the court of appeals had jurisdiction to consider a challenge to its jurisdiction, but it did not have jurisdiction over any other issue since the crime charged was not an offense against the United States.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

U.S. CONST. amend. V

> 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 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. . . .

U.S. CONST. amend. VI

> 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 defense.

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 ... to ... possess in or affecting commerce, any firearm or ammunition ....

STATEMENT OF THE CASE

Mr. Grace was charged in a one-count indictment which alleged in pertinent part, that:

> On or about September 14, 2013, in Miami-Dade County, in the Southern District of Florida, the defendant, Garry Grace, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

A jury trial began on November 14, 2017. At the conclusion of trial, the jury returned a verdict of guilty. Sentencing began on March 15, 2018. At that time, the district court sentenced Mr. Grace to 180 months imprisonment, followed by two years of supervised release. Mr. Grace timely filed a notice of appeal.

On appeal the Eleventh Circuit Court of Appeals affirmed Mr. Grace's sentence, acknowledging that there was a defect in the indictment but finding that "the defect in Grace's indictment did not affect the jurisdiction of the district court or Grace's substantial rights."

REASON FOR GRANTING THE WRIT

I. Mr. Grace was illegally charged with and convicted of engaging in conduct that is not a violation of the laws of the United States.

In *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019), this Court held that the term "knowingly" in 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of a 18 U.S.C. § 922(g) crime. 139 S. Ct. 2191 at 2200. The Court explained that "the term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." *Id.* at 2196. And "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.

Those "material elements" include not only the prohibited *conduct* (the firearm possession itself), this Court explained, but also the prohibited *status* that make the possession illegal. *Id.* Therefore, where, as here, the prohibited status is having been previously "convicted of a crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. § 922(g)(1), the indictment must charge, and the government must prove beyond a reasonable doubt, that at the time the defendant knowingly possessed a firearm, he *also knew* that he had previously been "convicted of a crime punishable by imprisonment for a term exceeding one year."

Rehaif has clarified that there is no prosecutable, stand-alone violation of § 922(g). Rather, a valid "prosecution" under United States law, has to be "under

[both] 18 U.S.C. § 922(g) and § 924(a)(2)." *Id.* at 2200. In such a prosecution, "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.*

There was no such allegation in the offense charged in Mr. Grace's grand jury's indictment. While admittedly, at the time of Mr. Grace's indictment the law in the Eleventh Circuit – and every other circuit – was clear that the government need *not* prove the defendant's knowledge of his prohibited status in a § 922(g) prosecution, *see, e.g.*, *United States v. Jackson*, 120 F.3d 1226 (11th Cir. 1997), *Rehaif* has definitively abrogated the reasoning in *Jackson* and the other circuit cases that reasoned similarly.[1]

In light of *Rehaif*, and the abrogation of *Jackson*, Mr. Grace's § 922(g) conviction must be reversed, and his indictment dismissed.

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1 Notably, after this Court issued its decision in *Rehaif*, it GVR'd for further consideration of *Rehaif*, in *Reed v. United States*, 139 S. Ct. 2776 (2019), a § 922(g)(1) case from the Eleventh Circuit in which *Rehaif* was raised for the first time on certiorari. The Court has also GVR'd cases from the Fourth and Fifth Circuits. *Allen v. United States*, 139 S. Ct. 2774 (2019); *Hall v. United States*, 139 S. Ct. 2771 (2019); *Moody v. United States*, 139 S. Ct. 2778 (2019).

II. The Indictment Fails to Charge a Federal Crime and Should be Dismissed.

Mr. Grace's indictment charged gun possession by a person previously convicted of a crime punishable by for a term exceeding one year. And that conduct, as per *Rehaif*, is simply *not* a violation of any "law" of the United States. Rather, the conduct charged by the grand jury under § 922(g)(1) alone was an incomplete offense, and therefore, a "non-offense" under federal law.

The correct "prosecution" is under both § 924(a)(2) and § 922(g)(1) and, indeed, § 924(c)(2) is actually the operative provision, with the "knowingly violates" language modifying §922(g) – the indictment in this case did *not* cite § 924(a)(2). Nor did the indictment track the "knowingly violates" language in § 924(a)(2). Nor did the grand jury allege any additional facts from which the now-necessary-to-be-proved knowledge-of-status element may be inferred. As such, there is no assurance from the face of Mr. Grace's indictment that the grand jury found the crucial knowledge-of-status element. The grand jury only expressly charged that Mr. Grace knew of his conduct (possession of a firearm and ammunition), not his status at the time of that possession. The indictment thus directly contravened what *Rehaif* has clarified Congress intended and the law requires.

In this respect, the instant case is analogous to *United States v. Martinez*, 800 F.3d 1293 (11th Cir. 2015), a case this Court GVR'd for further consideration of the sufficiency of an indictment in light of its definitive construction of 18 U.S.C. § 875(c)

in *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001 (2015). Upon remand in *Martinez*, the Eleventh Circuit Court considered *Elonis*' holding that in a prosecution under § 875(c) for making a threatening communication, the government must offer affirmative proof of *mens rea* as to the threatening nature of the communication, by proving beyond a reasonable doubt that the defendant either had the purpose or the knowledge that her communication would be construed as threatening by the recipient. *Elonis*, 135 S. Ct. at 2012.

The *Martinez* Court recognized that in establishing this heightened *mens rea* requirement, *Elonis* had abrogated the prior precedent of the Eleventh Circuit. *Martinez*, 800 F.3d at 1295. But that now-abrogated precedent could not save the grand jury's indictment. Rather, the Eleventh Circuit held, because that indictment failed to allege that the defendant had any *mens rea* as to the threatening nature of her communications, nor did the grand jury include any specific facts from which the intent or knowledge required by *Elonis* could be inferred, the indictment was "insufficient" on its face, and should be dismissed. *See* 300 F.3d at 1295 (explaining that the indictment could not stand after *Elonis* because it "does not meet the Fifth Amendment requirement that the grand jury find probable cause for each of the elements of a violation of § 875(c)").

Here, as in *Martinez*, an intervening decision of the Supreme Court has made clear that the indictment failed to charge a complete – and therefore, *any* – federal offense. Without the requisite *mens rea* required by *Rehaif*, as in *Martinez*, what the

indictment charged was ***not*** a violation of U.S. law at all. Because the grand jury only charged that Mr. Grace violated § 922(g)(1), which is a non-offense without the addition of § 924(a)(2)'s "knowingly" requirement which applies to both the status and possession elements in § 922(g)(1), here as in *Martinez* the indictment was "insufficient" on its face and must be dismissed.

For over half a century, this Court has held firm to the rule that an insufficient indictment may not be amended, cured, or declared "harmless" by a court. And that is because the deprivation of the "defendant's substantial right [under the Fifth Amendment] to be tried only on charges presented in an indictment returned by a grand jury" is "far too serious to be treated as nothing more than a variance and dismissed as harmless error." *Stirone v. United States*, 361 U.S. 212, 217, 80 S. Ct. 270 (1960); *see also id.* at 219 (conviction on a charge the grand jury never made against a defendant is "fatal error").

The Eleventh Circuit agreed in *United States v. Lang*, 732 F.3d 1246 (11th Cir. 2013), where it found several counts of a currency structuring indictment did not charge a crime stating: "[T]he only way to remedy the defects in the indictment would be to rewrite it, and that we may not do." *Id.* at 1249. *See also*, *United States v. Huff*, 512 F.2d 66, 69 (5th Cir. 1975), ("A grand jury indictment may be amended only by resubmission to a grand jury 'unless the change is merely a matter of form.'") (quoting *Russell v. United States,* 369 U.S. 749, 770-71, 82 S. Ct. 1038, 1050 (1962)). "Where no count in the indictment charges a crime, the defendant is entitled to have

the judgment vacated and the case remanded with instruction that the indictment be dismissed." *Lang*, at 732 F.3d at 1250.

As this Court rightly recognized in *Stirone*, "neither this nor any other court can know that the grand jury would have been willing" to charge the crime as mandated now by law. 361 U.S. at 217. And it would violate the Fifth Amendment for the Court to usurp the role of the grand jury, by speculating in that regard at this time to uphold a conviction on an indictment plagued by "fatal error." *Rehaif, Martinez*, *Lang, Huff, Russell,* and *Stirone* require that Mr. Grace's judgment be vacated and the indictment dismissed.

III. Because the Government neither charged nor proved an essential element of the firearm offense under 18 U.S.C. § 922(g), Mr. Grace's conviction must be vacated.

Both the indictment and the jury instructions failed to include the element of knowledge required under Section 922. Here, the Government charged Mr. Grace as follows:

> On or about September 14, 2013, in Miami-Dade County, in the Southern District of Florida, the defendant, Garry Grace, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

The jury instructions likewise tracked the language of the indictment:

> It's a Federal crime for anyone who has been convicted of a felony offense to possess a firearm or ammunition in or affecting interstate or foreign commerce.
>
> The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:
>
> (1) the Defendant knowingly possessed a firearm or ammunition in or affecting interstate or foreign commerce; and
>
> (2) before possessing the firearm or ammunition, the Defendant had been convicted of a felony - a crime punishable by imprisonment for more than one year.

Neither the indictment nor the jury instructions mentioned Mr. Grace's knowledge about his status as a prohibited person. And *Rehaif* applies to Mr. Grace's Section 922(g)(1) conviction currently on direct appeal. "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that an

error be 'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544 (1997).

This error affected the fairness and integrity of the judicial proceedings. In 1970, this Court held in *In re Winship* that the Due Process Clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). *See Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691 (1976); *Henderson v. Kibbe*, 431 U.S. 145, 153, 97 S. Ct. 1730 (1977); *Ulster County Court v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 2213 (1979); *Sandstrom v. Montana*, 442 U.S. 510, 520–24, 99 S. Ct. 2450 (1979). *See also Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt).

By convicting and sentencing Mr. Grace without proof of all required elements of a federal offense, the judicial proceedings below violated due process, endangering the fairness and integrity of the criminal proceedings. For that reason, the Government's proof is constitutionally inadequate to support the judgment of conviction on the firearm count.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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