No. _____

IN THE

# Supreme Court of the United States

RODNEY LAVALAIS,
*Petitioner*,
*v.*

UNITED STATES OF AMERICA,
*Respondent*.

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. When it is undisputed that a defendant's plea was not knowingly and intelligently made in violation of the Due Process Clause, is automatic reversal required?

2. Relatedly, what prejudice inquiry (if any) applies to appellate review of an unknowing and involuntary guilty plea?

3. What is the definition of "stolen" for purposes of U.S.S.G. § 2K2.1(b)(4)(A), which enhances a defendant's base offense level if a possessed firearm "was stolen"?

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Petitioner Rodney Lavalais respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINION BELOW

The Fifth Circuit's published decision affirming Mr. Lavalais's conviction and sentence under 18 U.S.C. § 922(g), *United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020), is included as an appendix.

## JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on May 22, 2020. No petition for rehearing was filed. Mr. Lavalais's petition is timely filed pursuant to Supreme Court Rule 13 because this petition is filed within 90 days after the entry of the Fifth Circuit's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . .

18 U.S.C. § 922(g) states 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 . . . .

18 U.S.C. § 924(a)(2) states in relevant part:

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

U.S.S.G. § 2K2.2(b)(4) states in relevant part:

> If any firearm (A) was stolen, increase by 2 levels . . . .

## STATEMENT OF THE CASE

This petition arises from this Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which clarified the required elements of 18 U.S.C § 922(g). That commonly prosecuted statute criminalizes certain classes of prohibited individuals from possessing firearms, including felons. Contrary to the prior uniform understanding, *Rehaif* held that individuals convicted under § 922(g) must not only knowingly possess the firearm but also must have knowledge of the status that prohibits them from possessing it. Thus, *Rehaif* created a large class of litigants who previously pleaded guilty to § 922(g) offenses, but were never notified of—and did not admit to—this critical *mens rea* element. Because they were not on notice of the nature of the charge against them, their pleas were not knowing and voluntary, as the Constitution requires.

A circuit split quickly emerged over how to treat *Rehaif*-based challenges to the validity of § 922(g) pleas and resulting convictions. *Compare United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), *with United States v. Coleman*, 961 F.3d 1024 (8th Cir. 2020), *United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020), *United States v. Williams*, 946 F.3d 968 (7th Cir. 2020), *and United States v. Trujillo*, 960 F.3d 1196 (10th Cir. 2020). The dispute boils down to whether the unknowing and involuntary pleas resulting from *Rehaif* error constitute structural constitutional defects subject to automatic reversal or whether they should instead be characterized as mere plea colloquy defects subject to the review framework described by this Court in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). At the heart of that issue is the

question of prejudice—namely, whether defendants raising unpreserved challenges to the missing *mens rea* element must show prejudice to be entitled to relief and, if so, precisely what that prejudice inquiry demands.

**District Court Proceedings**

In November 2016, Petitioner Rodney Lavalais was arrested by the Kenner, Louisiana Police Department following a sting operation targeting local escorts. Through their investigation, detectives determined that a car seen driving a suspected escort from the site of an arranged undercover meeting was rented under Mr. Lavalais's name. Detectives later conducted a takedown of the vehicle and arrested Mr. Lavalais, who was driving at the time. A search of the vehicle uncovered a .40 caliber Glock pistol, and a search of Mr. Lavalais's phone uncovered a video of him shooting the gun at a shooting range. Video footage from the range confirmed that Mr. Lavalais openly possessed and used the weapon, even signing documents at the range when he went.

Federal authorities eventually adopted the portion of the case related to the recovered weapon, charging Mr. Lavalais with possessing a firearm after having been previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). It is undisputed that Mr. Lavalais is, in fact, a felon. Ten years before his 2016 arrest, he was convicted of violating 18 U.S.C. § 922(a)(6)—a felony punishable by more than one year imprisonment. But, while his § 922(g)(1) indictment alleged that he knowingly possessed a gun, the grand jury did not charge that he knew of the relevant status that prohibited him from possessing that firearm. In other words, the indictment

failed to allege that Mr. Lavalais knew he was among that class of individuals that cannot possess a weapon under federal law.

Mr. Lavalais ultimately pleaded guilty to the single § 922(g)(1) count against him, without the benefit of a plea agreement. Like the indictment, the factual basis drafted and submitted by the government—and admitted to by Mr. Lavalais—did not stipulate that Mr. Lavalais knew that he had the relevant prohibited status at the time he possessed the gun. At rearraignment, the court asked the prosecutor to describe its evidence in support of the charge in the indictment. The prosecutor explained to Mr. Lavalais and the court that "the government would have proven at trial, through the introduction of competent testimony and admissible tangible exhibits . . . beyond a reasonable doubt" that Mr. Lavalais "is a convicted felon" because he "was convicted of a crime punishable by imprisonment for a term exceeding one year." The prosecutor did not state that the government could prove that Mr. Lavalais knew of his prohibited status at the time of possession. Mr. Lavalais stipulated to the facts described by the prosecution and agreed with the court that he knew about the gun found in his car, used it at the shooting range, and possessed it. However, at no time did Mr. Lavalais or his counsel stipulate, admit, or even suggest that Mr. Lavalais was aware that he had a felony conviction at the time he possessed that prohibited firearm. Finally, prior to accepting Mr. Lavalais's plea, the district court explained the elements of the offense, as required by Federal Rule of Criminal Procedure 11. The court did not mention *mens rea* with respect to prohibited status.

In other words, at no point during the criminal proceedings against Mr.Lavalais did the government state that it could prove, did the district court state that the government *had* to prove, or did Mr. Lavalais admit to any facts proving that he knew of his prohibitive status at the time he possessed the recovered firearm.

At sentencing, the district court applied a two-level Sentencing Guidelines enhancement pursuant to U.S.S.G. § 2K2, which elevates a defendant's base offense level if the firearm involved in the offense was "stolen." Mr. Lavalais objected, explaining that his friend owned the gun and left it in a rental car that Mr. Lavalais borrowed with her permission. When the rental car company contacted the friend about the car not being returned on time, the friend stated that "[s]omeone borrowed the car and never came back." She did not state that either the car or the firearm was stolen. She later inquired about the firearm after the rental car company took possession of the vehicle, noting that it was missing.

The district court maintained application of the enhancement and sentenced Mr. Lavalais to an above-Guidelines sentence of 105 months.

***Rehaif v. United States***

After judgement was entered and Mr. Lavalais had filed a notice of appeal, this Court decided *Rehaif*, which overturned decades of unanimous circuit precedent, which previously had held that the government was *not* required to prove that a defendant accused of a § 922(g) violation *actually knew* that he belonged to one of the listed categories of individuals the statute prohibited from possessing a firearm, but instead only had to prove knowledge of the possession itself. 139 S. Ct. at 2194.

Contrary to this former understanding of the statute, *Rehaif* held that the circuits' erroneous application missed a critical, required element—mandated *mens rea* with respect to prohibited status. The Court explained that the government "must show that the defendant knew he possessed a firearm *and also* that he knew he had the relevant status when he possessed it." *Id*. Therefore, where—as here—a defendant's prohibited status arises from having been previously "convicted of a crime punishable by imprisonment for a term exceeding one year" under § 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 belonged to that class of individuals.

In coming to this conclusion, the Court emphasized the critical importance of scienter, noting the "basic principle of criminal law" that "an injury is criminal only if inflicted knowingly[,]" which "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id*. at 2196.

**Fifth Circuit Affirmance**

Because *Rehaif* was not decided until after entry of the judgment against him, Mr. Lavalais's trial counsel did not object to the now plainly defective indictment, factual basis, or court explanations—all of which omitted a required element of the offense. Indeed, at the time, the issue was soundly foreclosed, including in the Fifth Circuit. Normally, an issue not raised in the district court would be reviewed on appeal for plain error, which requires a showing that the unpreserved error was clear

or obvious and affected the defendant's substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). On appeal, however, Mr. Lavalais argued that the constitutional error in his case—namely, lack of notice of a mandated element of the offense and a resulting involuntary and unintelligent plea—was structural, and therefore reversal was automatic, without regard to prejudice or harm. Or, put another way, the "substantial rights" requirement of plain error review was satisfied by the nature of the constitutional defect itself.

Without the benefit of oral argument, the Fifth Circuit dismissed Mr. Lavalais's argument out of hand. But rather than engage in constitutional analysis, the Fifth Circuit simply labeled Mr. Lavalais's claim an "[u]npreserved error[] concerning the plea colloquy under Federal Rule of Criminal Procedure 11(b)," subjecting the defect to the prejudice framework applicable to the technical, procedural error that occurs when a district court simply fails to state an element of the offense during a plea colloquy. App. A at 6. The court rejected Mr. Lavalais's structural error argument—which already had been adopted by the Fourth Circuit—concluding that unknowing and involuntary pleas arising from *Rehaif* error should not be considered structural defects requiring automatic reversal since "convicted felons typically know they're convicted felons." *Id.* at 8.

Scanning the record for confirmation of this assumption, the Fifth Circuit noted that Mr. Lavalais "admitted that he was a felon" when he pleaded guilty to the § 922(g) offense and highlighted jail calls in which he asked someone else to take ownership of the gun *after* his arrest. The court concluded: "[H]e knew full well that

he was a convicted felon prohibited from possessing a firearm." Appx A at 7. Thus, the Fifth Circuit deemed the defect in Mr. Lavalais's conviction unworthy of correction.

## REASONS FOR GRANTING THE WRIT

### I. This issue is the subject of a firmly rooted circuit split—implicating unanswered questions at the intersection of plain error review and the structural error doctrine.

The premise of Mr. Lavalais's claim is beyond dispute: his guilty plea was not knowing and voluntary, as the Constitution requires. He received no notice of, and therefore did not understand, the essential elements of the offense to which he pleaded guilty—nor did the prosecutor, the defense attorney, or the presiding judge. "A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)). Indeed, the "first and most universally recognized requirement of due process" is that a guilty plea cannot be knowing and voluntary unless the defendant receives "real notice of the true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (internal quotation marks omitted). Thus, when a defendant never receives notice of the true nature of the offense to which he pleads—and therefore cannot enter a voluntary and intelligent plea—his conviction has been entered without due process of law. The only question is remedy—specifically, whether this category of constitutional defect mandates automatic reversal or whether a defendant must make a specific showing of prejudice before being entitled to relief.

As the Fourth Circuit recently found, this Court's precedent counsels for an automatic reversal rule. *Gary*, 954 F.3d at 201. In fact, it appears that straight-forward application of this Court's decision in *Henderson v. Morgan* would dictate that result. There, as here, it was undisputed the defendant was not informed of one

of the elements of the offense—incidentally, the required *mens rea* element. Indeed, no charging instrument contained the element, and nothing in the record demonstrated a voluntary admission of that element. "Defense counsel did not purport to stipulate to that fact; they did not explain to [the defendant] 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." *Henderson*, 426 U.S. at 646. Thus, the guilty plea "was involuntary and the judgment of conviction was entered without due process of law" because "respondent did not receive adequate notice of the offense to which he pleaded guilty[.]" *Id.* at 647.

Importantly, in *Henderson*, the relief was automatic based on the nature of the error—reversal was required regardless of whether information in the record might point toward the defendant's actual guilt. Indeed, 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 (emphasis added). The Court explained: "In these circumstances, it is impossible to conclude that [the defendant's] plea to the unexplained charge . . . was voluntary." *Id.* And it makes sense that evidence of guilt would be irrelevant to the question of reversal under those circumstances. The bedrock due process requirement of a knowing and intelligent plea does not just guard against erroneous conviction, but safeguards "the fundamental legal principle that a defendant must be allowed to

make his own choices about the proper way to protect his own liberty." *Gary*, 954 F.3d at 204. In other words, the deprivation itself is the harm—not just the resulting conviction.

Although *Henderson* did not call upon the structural error doctrine by name, the error there—and in this case too—would seem to fall squarely within that category of constitutional defects. Structural errors are those 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, 577–78 (1986). As this Court has explained:

> 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.

*Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (citations and internal quotation marks omitted). Structural 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.

Moreover, the nature of these errors—inherently harmful and prejudicial—suggests that the automatic reversal rule should apply even when a structural defect is raised for the first time on appeal. Although this Court has stated that forfeited structural errors are at least subject to plain error review, *see Johnson v. United*

*States*, 520 U.S. 461, 466 (1997), it has repeatedly reserved the question of whether "'structural' errors . . . automatically satisfy the third prong of the plain-error test." *Puckett*, 556 U.S. at 140; *accord United States v. Olano*, 507 U.S. 725, 735 (1993); *United States v. Cotton*, 535 U.S. 625, 632–34 (2002). The Courts of Appeals, though, appear to be in agreement that "[t]he third requisite of plain error review is necessarily met where the error at issue is structural." *United States v. Becerra*, 939 F.3d 995, 1005 (9th Cir. 2019); *accord United States v. Ramirez-Castillo*, 748 F.3d 205, 215 (4th Cir. 2014) ("[I]f the error in the instant case is structural, the third prong of *Olano* is satisfied."); *United States v. McAllister*, 693 F.3d 572, 582 n.5 (6th Cir. 2012) ("When the error in question is structural, the defendant is not required to show that the putative error affected his substantial rights."); *see also United States v. Syme*, 276 F.3d 131, 155 n.10 (3d Cir. 2002) (assuming that structural error "would constitute per se reversible error even under plain error review").

Rather than apply *Henderson*'s automatic reversal rule—and the accompanying structural error doctrine—the Fifth Circuit in this case instead drew upon a different line of caselaw aimed at addressing technical, procedural defects arising from violations of Federal Rule of Criminal Procedure 11. That rule is "meant to ensure that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea." *United States v. Vonn*, 535 U.S. 55, 58 (2002). Those steps include, for example, informing the defendant of various rights waived by a plea, as well as determining that the defendant understands the nature

of the charges and ensuring that there is a factual basis for the plea. *See* Fed. R. Crim. P. 11(b).

In *United States v. Dominguez Benitez*, this Court established the review framework applicable to a district court's failure to comply with Rule 11, holding that a defendant who seeks reversal on that basis "is obliged to show a reasonable probability that, but for the error, he would not have entered the plea.." 542 U.S. at 76. That is the prejudice framework the Fifth Circuit determined should apply to the unknowing and involuntary guilty plea in this case—presumably because the district court failed to notify Mr. Lavalais of *Rehaif*'s *mens rea* element prior to accepting his plea.

But any violation of Rule 11 was merely incidental to the *constitutional* error in this case. Mr. Lavalais sought relief based on the fact that his plea was inherently unknowing and involuntary in violation of due process, not the court's mere failure to scrupulously follow the Federal Rules of Criminal Procedure. Indeed, although the *purpose* of Rule 11 is to verify that a plea is knowing and voluntary as the Constitution requires, the rule's many technical requirements are themselves procedural—not inherently constitutional. *See United States v. Davila*, 569 U.S. 597, 609 (2013) (agreeing that "[e]rrors or omissions in following Rule 11's plea-colloquy instructions . . . are properly typed procedural . . . ."). Of course, a plea may be voluntarily and intelligently made even if Rule 11 technically has been violated, and, conversely, a plea may be unknowing and involuntary even if the rule is carefully followed. Put another way, the rule seeks to "ensure" that constitutional standards

are met, but its requirements are not themselves constitutional mandates. *Vonn*, 535 U.S. at 58. Thus, "[a] variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights." Fed. R. Crim. P. 11(h).

The Court recognized this very distinction in *Dominguez Benitez*. The Court noted that, with respect to Rule 11 violations, "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 the question of reversal. *Dominguez Benitez*, 542 U.S. at 84. But the Court also made clear 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). The implication being that, in *those* circumstances, record evidence of guilt is *not* relevant to reversal, because evidence of prejudice and harm is itself irrelevant. Indeed, the Court reaffirmed the well-known principle that "structural errors undermining the fairness of a criminal proceeding as a whole" will lead to reversal "without regard to the mistake's effect on the proceeding." *Id*. at 81. And the Court explained: "[W]hen 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*." *Id*. at 84 n.10 (emphasis added) (citing *Boykin v. Alabama*, 349 U.S. 238, 243 (1969)).

*United States v. Davila*—another Rule 11 case—recognized this important distinction as well. There, this Court determined that a violation of Rule 11(c)(1)—which bans judicial involvement in plea discussions—does not automatically

mandate reversal, but instead requires an appellate court to consider whether, but for the improper comments, "it was reasonably probable" that defendant "would have exercised his right to go to trial." *Davila*, 569 U.S. at 612. In doing so, the Court placed Rule 11(c)(1) violations in the same category as simple Rule 11(b) omissions, observing: "Rule 11(c)(1) was adopted as a prophylactic measure, *not one impelled by the Due Process Clause or any other constitutional requirement*." *Id.* at 610 (emphasis added) (internal citation omitted). In other words, Rule 11's procedural mandates are preventative. Though the rule seeks to ensure the voluntariness of a plea, a violation of its terms does not automatically result in a plea being involuntary. Additional inquiry is necessary to determine the actual effect of any rule violation.

But no further inquiry is needed here. It is indisputable that Mr. Lavalais's plea was not knowing and voluntary, as the Constitution requires. Indeed, no one involved in the proceedings—the court, defense counsel, the prosecutor, or Mr. Lavalais—understood the true nature of the offense to which he was pleading guilty. Thus, the error was not a procedural defect that *could* have resulted in a due process violation. The error itself was a due process violation—a grave and pervasive denial from the start to the finish of the proceedings. It is of no consequence that this error also incidentally violated the Federal Rules in the process.

At least four circuits now have expressly rejected this important distinction, shoehorning the constitutional error of an unknowing and involuntary plea into an ill-fitting Rule 11 prejudice framework. *See United States v. Coleman*, 961 F.3d 1024 (8th Cir. 2020); *United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020); *United States*

*v. Williams*, 946 F.3d 968, 972 (7th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196 (10th Cir. 2020).

Mr. Lavalais's case presents the ideal vehicle to address this critical issue, which affects not only defendants with *Rehaif*-based claims, but all future defendants whose criminal convictions rest on unknowing and involuntary admissions of guilt.

## II. Even if *Rehaif* error does not mandate automatic reversal, this Court should clarify the prejudice framework applicable to unknowing and involuntary guilty pleas.

Even if this Court ultimately disagrees that an unknowing and involuntary plea is reversible per se, it should clarify the prejudice inquiry applicable to that special brand of constitutional error. In Mr. Lavalais's case, the Fifth Circuit—like the Eighth, Seventh, and Tenth Circuits—simply squeezed the defect into an ill-fitting Rule 11 mold. But "the concept of prejudice is defined in different ways depending on the context in which it appears." *Weaver*, 137 S. Ct. at 1911. And *Dominguez Benitez*—at the very least—made clear that its prejudice analysis was limited to the Rule 11 context and should not be stretched to encompass constitutional errors like the one in this case.

At the very least, if this Court does intend to permit continued use of the *Dominguez Benitez* prejudice framework in this context, the contours of that standard must be carefully defined. The Fifth Circuit took liberties with its application—imposing an actual innocence standard that imagined the outcome of a theoretical trial, rather than focusing on the soundness of Mr. Lavalais's decision-making at the time of his plea. In essence, the Fifth Circuit concluded that the constitutional validity of a guilty plea and resulting unlawful conviction is of no consequence so long

as the defendant is unable to scrap together conclusive proof from an underdeveloped record that he would have prevailed at trial. Importantly, "[t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 83 n.9.

Moreover, the Fifth Circuit's approach is particularly dangerous in this context, in which defendants are unaware of the government's additional burden and therefore have no reason to develop record evidence relevant to the missing element or dispute incorrect record evidence that may appear to support it. *See Descamps v. United States*, 570 U.S. 254, 270 (2013) ("A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense."). And, most fundamentally, the constitutional ill in this context is not the wrongful conviction, but instead the invalid adjudication itself. The Fifth Circuit's approach to constitutional error transforms reviewing courts into mere deciders of guilt or innocence, rather than custodians of fair process.

Accordingly, regardless of this Court's leanings on the structural error question, it is critical—at the very least—to clarify the prejudice standard applicable to appellate review of unknowing and involuntary guilty pleas.

## III. Mr. Lavalais's case presents an independent sentencing question that warrants this Court's consideration.

In addition to—or in lieu of—the important questions raised above, this Court should address the sentencing dispute in Mr. Lavalais's case, which implicates an ambiguous Sentencing Guidelines enhancement that is commonly applied to

firearms-related offenses. Specifically, U.S.S.G. § 2K2.1(b)(4)(A) provides for a two-level enhancement if the firearm involved was "stolen." Unfortunately, the Guidelines do not define that generic term, which has a diverse range of meanings depending on the context and jurisdiction.

Commonly applied definitions of the term "stolen"—and the intent of the enhancement—counsel for a narrow scope. The dictionary definition of steal is "to take or appropriate without right or leave and with intent to keep or make use of wrongfully." *Steal*, Merriam-Webster Dictionary (2019). Similarly, the Model Penal Code provides that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." Model Penal Code § 223.2, Theft by Unlawful Taking or Disposition. The term "deprive" is defined in relevant part as the "withhold[ing] property of another *permanently* or for so extended a period as to appropriate a major portion of its economic value. *Id*. at § 223.0, Definitions (emphasis added). In other words, these standard definitions require that an individual have intent to permanently deprive the owner of the taken property—they do not encompass borrowing property without returning it.

The Fifth Circuit ignored this intent requirement, instead determining that it was sufficient that Mr. Lavalais merely "took the Glock from the car without permission and did not let its true owner know of its whereabouts." App. A at 9. In other words, the Fifth Circuit interprets the term "stolen" broadly to eliminate intent to permanently deprive. That is in accord with other circuits, which have generally

adopted a "broad" interpretation of this ambiguous and undefined term. *See United States v. Colby*, 882 F.3d 267, 272 (1st Cir. 2018) (defining "stolen" broadly); *United States v. Bates*, 584 F.3d 1105, 1109 (8th Cir. 2009) ("Considering the context of § 2K2.1(b)(4), we conclude that it likewise requires a broad interpretation of 'stolen.'"); *United States v. Jackson*, 401 F.3d 747, 748–50 (6th Cir. 2005) (defining "stolen" broadly).

As an initial matter, because the Guidelines do not define the term "stolen," the rule of lenity counsels for a narrow interpretation in line with the Model Penal Code. That definition rationally excludes simply borrowing a gun from a friend and, at worst, failing to return it. Moreover, the Fifth Circuit's "broad" understanding does not accord with the purpose of the enhancement. Promulgation of the provision was part of Congress's broader scheme to control the illegal gun trade and regulate the movement of firearms. *United States v. Mobley*, 956 F.2d 450, 453 (3d Cir. 1992). "When a firearm is stolen, determining this chain is difficult and when serial numbers are obliterated, it is virtually impossible. Therefore, stolen or altered firearms in the hands of people recognized as irresponsible pose great dangers, and the guideline here reflects this heightened danger." *Id.* at 454.

In other words, stolen and altered firearms are dangerous because they fall into the abyss. They no longer can be traced and regulated, because the owners do not know where they are. That is true of a firearm that is taken without consent or bought in a back alley without knowledge of the gun's true owner and source. That is *not* true of a firearm that is borrowed with the lawful owner's knowledge—even if the

borrower is prohibited by law from possessing the gun. Although the act of possession is illegal, the chain of custody is intact and the ills § 2K2.1(b)(4) seeks to prevent are not present. *See id.* ("[I]t is safe to say that stolen or pirated guns move in the back alleys and among clandestine meetings of the criminal world.").

This Court should intervene to resolve the confusion over this commonly applied enhancement.

## CONCLUSION

For the foregoing reasons, Mr. Lavalais respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted August 20, 2020,

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