No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ANTHONY SMITH,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Title 18, United States Code, Section 922(g)(1), "[i]t shall be unlawful" for certain individuals to possess firearms that have traveled in interstate commerce. The provision lists nine categories of persons subject to the prohibition, including those previously convicted of a crime punishable by a term exceeding one year. A separate provision in 18 U.S.C. § 924(a)(2) adds that anyone who "knowingly violates" the first provision shall be fined or imprisoned for up to 10 years. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court held that in a prosecution under § 922(g) and § 924(a)(2), 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. The issues relating to Sections 922 and 924 are:

1. Whether the district court committed plain error in failing to instruct the jury that the evidence must establish both that appellant Anthony Smith knew he possessed a firearm and ammunition and that he knew he belonged to the relevant category of persons barred from possessing a firearm and ammunition.

2. Whether the convictions must be reversed and the indictment dismissed because the indictment failed to charge a critical element of an offense under Section 922(g)(1), *i.e.*, that Smith subjectively knew he was prohibited from possessing a firearm.

3. Whether the combination of the above errors affected petitioner's substantial rights and the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

In conflict with the decision below, the Fourth Circuit in *United States v. Medley*, No. 18-4789 (4th Cir. August 21, 2020), held that the combination of the above errors required a reversal for plain error.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases pending in any court.

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OPINION BELOW

The summary order of the United States Court of Appeals for the Second Circuit, entered May 26, 2020, 2020 WL 2703680, is not reported and is found at Appendix A.

JURISDICTION

The court of appeals issued its opinion and judgment on May 26, 2020. This petition is filed within 90 days of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18, United States Code, Section 922 provides in relevant part:

(g) 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;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18, United States Code, Section 924(a) provides in relevant part:

(2) 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.

STATEMENT

1. Petitioner Anthony Smith was charged by way of criminal complaint on April 20, 2016. Dkt. No. 1.[1] On May 19, 2016, a grand jury sitting in the District of Vermont returned an indictment charging appellant Anthony Smith with possessing a firearm in commerce after having been convicted of a crime punishable by more than one year in prison, in violation of 18 U.S.C. § 922(g)(1). Dkt. No. 10. A superseding indictment was returned on January 12, 2017, adding an additional count charging possession of ammunition by a previously convicted felon,

[1] "Dkt. No. __" refers to the docket entry numbers in the United States District Court for the District of Vermont in *United States v. Anthony Smith*, 2:16-cr-00071-cr-1.

also in violation of 18 U.S.C. § 922(g)(1). Dkt. No. 42. According to the allegations in the charging documents, Smith possessed a firearm and ammunition located in a vehicle in which he was traveling as a passenger. The firearm and ammunition were discovered during a search by the Vermont State Police. Smith had previously been convicted of a crime punishable by a term of imprisonment exceeding one year. Dkt. No. 1-1 at 2-3.

Following a jury trial in United States District Court for the District of Vermont, Smith was convicted on both counts of the superseding indictment. Dkt. No. 150. He was sentenced to a total of 63 months' imprisonment. Dkt, No. 195. The United States Court of Appeals for the Second Circuit affirmed his conviction. App. A1-A7.

2. At trial, Smith stipulated that "[i]n July 2006, in the United States District Court for the Northern District of New York, the defendant, Anthony Smith, was convicted of a crime punishable by a term of imprisonment exceeding one year." Dkt. No. 166 at 108-09. There was no stipulation, nor was there any proof at trial, the Smith was subjectively aware that he fell within a class of persons prohibited from possessing firearms in commerce. App. 2.

> The district court charged the jury as follows as to the elements of both counts:
>
> The government must prove each of the following elements beyond a reasonable doubt to sustain its burden as to Count 1:
>
> First, that the defendant was convicted, in any court, of a crime punishable by imprisonment for a term exceeding one year, as charged;
>
> Second, that the defendant knowingly possessed ammunition; and
>
> Third, that the possession charged was in or affecting interstate or foreign commerce.

Dkt. No. 166 at 231. The court gave essentially the same charge as to the firearm charge in Count Two. *Id*. at 236. In neither case did the court instruct the jury that the government was

required to prove beyond a reasonable doubt that Smith was aware of his prohibited status. The defense did not object to the charge, and the jury returned verdicts of guilty on both counts.

3. The court of appeals affirmed. The court of appeals acknowledged this Court's holding in *Rehaif* that, "in a prosecution under 18 U.S.C. § 922(g) . . . , the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." App. 2, quoting 139 S. Ct. at 2200. The court of appeals also agreed with Smith that "[n]either the indictment charging Smith nor the jury instructions at his trial articulated the knowledge requirement identified by the Court in *Rehaif*." App. 2. Because Smith did not object at trial, the court of appeals reviewed his claim "for plain error, considering whether (1) there is an error; (2) the error is clear or obvious . . . ; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." App. 2-3, quoting *United States v. Miller*, 954 F.3d 551, 557–58 (2d Cir. 2020) (quotation marks omitted).

The court of appeals held that Smith's claim of instructional error was foreclosed by the court's decision in *Miller*, where the court "rejected the argument that the district court plainly erred by failing to instruct that § 922(g) requires the government to prove knowledge of felon status." App. 3, citing 954 F.3d at 557–60. *Miller* held that the defendant's challenge failed at the fourth prong of plain-error analysis, examining whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 559-60. The court in *Miller* "look[ed] beyond the trial record at the defendant's presentence investigation report ("PSR")." Relying on the PSR, the court reasoned that, because Miller had been sentenced to and served more than one year in prison for a prior felony conviction, he necessarily knew of his felon status and "would have stipulated to knowledge of his felon status to prevent the jury from

hearing evidence of his actual sentence." 954 F.3d at 560. The court of appeals continued: "The same is true here: Smith has multiple prior felony convictions, was sentenced to over one year in prison for two of those crimes, and served nearly seven years in prison for one prior conviction. Smith, like Miller, stipulated to the existence of a prior felony in order to prevent its details from being placed before the jury." App. 3. While the stipulation did not "specifically address[] the defendant's knowledge of his felon status," the court of appeals had "no doubt" that, had the *Rehaif* issue been foreseen by the district court, Smith would have stipulated to knowledge of his felon status. The court of appeals therefore held that the erroneous instruction did not warrant vacatur of Smith's conviction. App. 4.

The court of appeals also rejected Smith's claim that the indictment was jurisdictionally defective because it did not allege an element of the offense, *i.e.*, Smith's knowledge of his prohibited status. The court of appeals noted that it had previously rejected a similar claim in *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019). *Balde* held that an indictment that tracks the language of the statute is sufficient to confer jurisdiction. *Id*. at 89–90. The indictment here "mirrors the words of the relevant statute" and therefore, according to the court of appeals, the indictment's failure to allege that Smith knew that he was a felon was not a jurisdictional defect. App. 3.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision below is in conflict with the Fourth Circuit's decision in *United States v. Medley*, No. 18-4789 (4th Cir. August 21, 2020). In *Medley*, the Fourth Circuit vacated the conviction of a defendant who—like petitioner Smith—went to trial and was convicted of a Section 922(g)(1) charge before the Court's decision in *Rehaif*. The Fourth Circuit held the defendant's trial was marred by two separate plain errors: (1) the indictment did

not allege he was aware of his felon status, and (2) the district court did not instruct the jury on, and the government did not present sufficient evidence of, the knowledge-of-status element. The opinion stated: "Applying plain-error review, we conclude that the asserted *Rehaif* errors violated Medley's substantial rights. Sustaining Medley's conviction under the present circumstances would deprive Medley of several constitutional protections, prohibit him from ever mounting a defense to the knowledge-of-status element, require inappropriate appellate factfinding, and do serious harm to the judicial process." *Id*., slip op. 3. The court below, in contrast, relied on *Miller* and found that precisely the same errors did not affect petitioner Smith's substantial rights, nor seriously affected the fairness, integrity or public reputation of judicial proceedings. This Court should grant certiorari to resolve this conflict.

As noted above, this Court held in *Rehaif* that to convict a defendant of violating § 922(g) and § 924(a)(2), the government must show not only that the defendant knew he possessed a firearm, but "also that he knew he had the relevant status when he possessed it." 139 S.Ct. at 2194. The Court stated: "We conclude that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), 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." 139 S.Ct. at 2200. Justice Alito's dissent acknowledged that "[t]hose [defendants] for whom direct review has not ended will likely be entitled" to reversal of their convictions. *Id*. at *17.

The jury instructions at Smith's trial were not in accord with *Rehaif*. Dkt. No. 166 at 231-37. Although the defense did not object (*id*. at 242), the failure to instruct the jury on an element of the offense amounts to plain error under *United States v. Olano*, 507 U.S. 725 (1993), and its progeny for the reasons stated in *Medley*. *See also Molina-Martinez v. United States*, 136

S. Ct. 1338, 1343 (2016). The court of appeals in this case arrogated to itself the determination of whether Smith knew that he belonged to the relevant category of persons barred from possessing a firearm. In doing so, it credited information contained in the presentence report prepared after the jury rendered its verdict. Petitioner submits that a plain error analysis may not uphold a jury verdict based on "evidence" that was never presented to the jury. In these circumstances, "[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). *See also Dunn v. United States*, 442 U.S. 100, 107 (1979) ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."). Although a court must "relive the whole trial imaginatively" on plain error review, *United States v. Young*, 470 U.S. 1, 16 (1985) (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)), a court is not free to imagine a different trial altogether, which is what the court of appeals did here.

As stated above, the court of appeals' decision in this case squarely conflicts with the *Medley*, as well as with the Fourth Circuit's prior decision in *United States v. Gary*, 954 F.3d 194, *reh'g en banc denied*, 963 F.3d 420 (4th Cir. 2020). In *Medley*, the Fourth Circuit vacated the conviction of a defendant who went to trial and was convicted of a Section 922(g)(1) charge before the Court's decision in *Rehaif*. The Fourth Circuit held the defendant's trial was marred by the same two plain errors that occurred in Smith's case: (1) the indictment did not allege he was aware of his felon status (slip op. 9-19), and (2) the district court did not instruct the jury on, and the government did not present sufficient evidence of, the knowledge-of-status element (slip

op. 19-29). The Fourth Circuit concluded that the cumulative effect of these errors was prejudicial. Slip op. 27-28.

The decision below conflicts with *Medley* in finding that it was unnecessary to include *Rehaif's* knowledge element in the superseding indictment. App. 3. As noted in *Medley,* this Court has held that an indictment that omits an essential element of an offense is deficient. *See Apprendi v. New Jersey*, 530 U.S. 466, 500-518 (2000) (Thomas, J., concurring) (discussing cases and treatises since the 1840's, which repeatedly emphasize the importance of including every element in an indictment); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (holding that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").[2] And the Court's prior cases suggest that a constitutionally deficient indictment is prejudicial under *Olano*'s third prong. *See Silber v. United States*, 370 U.S. 717, 717 (1962) (reversing judgment for plain error as a result of a defective indictment); *see also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (citing *Silber* approvingly); *Russell v. United States*, 369 U.S. 749, 770 (1962) ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time

[2] In *United States v. Cotton*, 535 U.S. 625 (2002), this Court overruled its prior holding that indictment defects are jurisdictional. *Id.* at 629–31 (overruling *Ex parte Bain*, 121 U.S. 1 (1887)). The Court declined to address whether indictment defects satisfied the third prong of the plain-error inquiry. *Id*. at 632–33 ("[W]e need not resolve whether respondents satisfy this element of the plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings."). Because the trial evidence supporting the element omitted from the indictment was "overwhelming" and "essentially uncontroverted," the Court declined to exercise its discretion to notice the error. *Id*. at 632–34.

they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure.")

The Fourth Circuit held that an indictment's omission of an essential element, the Fourth Circuit wrote, violates a defendant's substantial rights "if the protections provided by an indictment were . . . compromised." Slip op. 16-17 (citation omitted). Specifically, an indictment causes prejudice if it does not protect the right "to be notified of the charges against [a defendant] by a description of each element of the offense." *Id*. at 17 (citation omitted). Because neither the indictment's "charging language" nor its "factual allegations" put Medley on notice of the need to defend against the knowledge-of-status element, the third prong plain error analysis was satisfied. *Id*. at 19.

The Fourth Circuit also held Medley's substantial rights were violated "by the district court's failure to instruct the jury that it had to find Medley knew his prohibited status, and the Government's failure to present sufficient evidence on that point at trial." *Id.* at 27. This error was "independently" sufficient to satisfy the third plain-error prong. The Court identified "three scenarios" in which failure to instruct the jury on an element is not prejudicial: "when 1) a jury necessarily made the findings notwithstanding the omission, 2) the omitted element was uncontested and supported by overwhelming evidence, or 3) the element was genuinely contested, but there is no evidence upon which a jury could have reached a contrary finding." *Id*. at. 23.

The only scenario potentially relevant was the second. Based on the law at the time of trial, neither party had any incentive to contest the knowledge-of-status element. Therefore, speculating about how Medley would have defended against that element "would represent [an] untoward leap of logic." Because it is "inappropriate" to hypothesize about such a

"counterfactual scenario," the Fourth Circuit held—without looking to the trial record—that Medley's substantial rights were violated. While it may be appropriate to look at the trial record in certain circumstances, where "we do not have a contested element 'because the element emerged as a consequence of a change in the law after trial,' . . . it is inappropriate to speculate whether a defendant could have challenged the element that was not then at issue." *Id*. at 24.

The court then held, in the alternative, that even if it considered the trial record, the third plain-error prong was satisfied because the government did not present "overwhelming" evidence of Medley's knowledge of status. In particular, Medley's trial stipulation to felon status and his flight upon seeing police did not establish knowledge at the time of the offense. The court did not consider it appropriate to look to evidence outside the trial record, such as the presentence report, which showed Medley had previously served sixteen years in prison for murder. *Id*. at 25-27.

Finally, the court exercised its discretion at the fourth plain-error step because, "in the aggregate," the indictment and instructional/sufficiency errors affected the fairness, integrity, and public reputation of judicial proceedings. Depriving a defendant of the protection of a grand jury is "intolerably unfair," the court wrote, and the petit jury right "ranks among the most essential." Affirming Medley's conviction would require "cast[ing] a defendant's constitutional rights aside and trampl[ing] over the grand jury and petit jury's functions." *Id*. at 32. As the court put it, "[i]f the right to trial by jury does not guarantee relief in the case at bar, it is hard to see what exactly it does guarantee." *Id*. at 33 n.8. For all of the reasons stated by the Fourth Circuit, the Second Circuit reached the wrong result in this case. The issue is critically important to numerous defendants whose convictions were on direct appellate review when *Rehaif* was decided, and this Court should resolve this manifest conflict.

Petitioner notes that the Fourth Circuit recently denied rehearing in *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), a case in which it is likely that the Solicitor General will seek this Court's review. The panel held that where the Section 922(g)(1) plea colloquy did not properly explain the elements per Rehaif, and "[b]ecause the court accepted Gary's plea without giving him notice of an element of the offense, the court's error is structural." 954 F.3d at 198. Although *Gary* was decided in the context of a plea, it highlights the essential nature of informing a criminal defendant of each and every element of an offense prior to his conviction, whether by plea or by jury trial. The panel below gave no weight to the indictment's failure to include, or the district court's failure to charge, a critical element of the offense.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the court of appeals.

Dated: August 24, 2020

Respectfully submitted,

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APPENDIX A

19-621
United States v. Smith

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of May, two thousand twenty.

Present:

RICHARD C. WESLEY,
DEBRA ANN LIVINGSTON,
STEVEN J. MENASHI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 19-621

ANTHONY SMITH,

Defendant-Appellant.

For Appellee: Owen C.J. Foster and Gregory L. Waples, Assistant United States Attorneys, *for* Christina E. Nolan, United States Attorney for the District of Vermont, Burlington, VT

For Defendant-Appellant: Andrew Levchuk, Amherst, MA

Appeal from a judgment of the United States District Court for the District of Vermont (Reiss, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Anthony Smith appeals from a judgment and sentence entered on March 12, 2019. Smith was indicted for being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g). Before trial, Smith moved to suppress the ammunition, which was found in a duffel bag near the rear passenger seat of the car in which he was traveling, and the firearm, which was found under the driver's seat. He also sought to suppress a statement he made indicating that the gun was not loaded. The district court denied these motions. Smith proceeded to trial, where a jury convicted him of both charges. After Smith was sentenced, the Supreme Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which held that the government must prove that a defendant knew he was a felon in order to secure a conviction under § 922(g). Smith argues that the indictment and the jury instructions were defective because they failed to articulate that requirement. He also challenges the district court's ruling on his suppression motions. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. *Rehaif* Claims

The Supreme Court held in *Rehaif* that, "in a prosecution under 18 U.S.C. § 922(g) . . . , the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200. Neither the indictment charging Smith nor the jury instructions at his trial articulated the knowledge requirement identified by the Court in *Rehaif*. Because Smith did not challenge this failure below, we review his claim "for plain error, considering whether (1) there is an error; (2) the error is clear or obvious . . . ; (3) the error affected the appellant's substantial rights; and (4)

the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *See United States v. Miller*, 954 F.3d 551, 557–58 (2d Cir. 2020) (quotation marks omitted).

As to Smith's claim that the indictment was jurisdictionally defective because it did not allege an element of the offense, we rejected this claim in *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019). Indeed, Smith appears to have abandoned this claim in his reply brief. We held in *Balde* that an indictment that tracks the language of the statute is sufficient to confer jurisdiction. *See id.* at 89–90. The indictment here mirrors the words of the relevant statute. Thus, "the indictment's failure to allege that [Smith] knew that he was [a felon] was not a jurisdictional defect." *Id.* at 92.

Smith's claim of instructional error is similarly foreclosed by our recent decision in *Miller*, 954 F.3d 551. In *Miller*, we rejected the argument that the district court plainly erred by failing to instruct that § 922(g) requires the government to prove knowledge of felon status. *Id.* at 557–60. We concluded that the defendant's challenge failed at the fourth prong of our plain-error analysis, which allowed us to look beyond the trial record at the defendant's presentence investigation report ("PSR"). *Id.* at 559–60. Relying on the PSR, we reasoned that, because the defendant had been sentenced to and served more than one year in prison for a prior felony conviction, he necessarily knew of his felon status and "would have stipulated to knowledge of his felon status to prevent the jury from hearing evidence of his actual sentence." *Id.* at 560. The same is true here: Smith has multiple prior felony convictions, was sentenced to over one year in prison for two of those crimes, and served nearly seven years in prison for one prior conviction. Smith, like Miller, stipulated to the existence of a prior felony in order to prevent its details from being placed before the jury. *See Miller*, 954 F.3d at 558–59 & n.18. While neither stipulation specifically addressed the defendant's knowledge of his felon status, "we have no doubt that, had

the *Rehaif* issue been foreseen by the district court, [Smith] would have stipulated to knowledge of his felon status." *Id.* at 560. Thus, the erroneous instruction does not warrant vacatur of Smith's conviction.

II. Motions to Suppress

"We review a district court's decision on a suppression motion *de novo* on questions of law and for clear error in factual determinations." *United States v. Gonzalez*, 764 F.3d 159, 165 (2d Cir. 2014).

A. Fourth Amendment

Smith argues that the district court erred in denying his motion to suppress the firearm and ammunition found in the Chevrolet Trailblazer in which he was traveling. We disagree. The district court found that, when Vermont State Police Corporal George Rodriguez first approached the vehicle, "he observed the driver, a child in the backseat, and [Smith] in the reclined passenger seat." App'x 125. Rodriguez

> asked [the driver] if Smith had any bags in the car and she responded he had one in the trunk. He requested her consent to search the vehicle . . . [and she] signed a written consent form allowing Corporal Rodriguez to search her vehicle. It stated: "I freely give my permission to CPL Rodriguez . . . to conduct a complete search of [the Trailblazer] and its contents here under my control."

App'x 125. Rodriguez proceeded to search the car. "In the backseat, next to where the child had been seated, he saw an open and unzipped red and black canvas bag with no tags or identification with a Ziploc bag full of .22 bullets on top. . . . The bag contained large male clothing." App'x 125–26.

Smith primarily argues that, while the driver of the vehicle consented to the search, Smith did not, so the search of his bag was unlawful. This argument is unavailing. The Fourth Amendment's touchstone is reasonableness and the Supreme Court has "long approved consensual

searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *See Florida v. Jimeno*, 500 U.S. 248, 250–51 (1991); *Illinois v. Rodriguez*, 497 U.S. 177, 183–84 (1990). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno*, 500 U.S. at 251. Officers may reasonably conduct a search even if the consenting party lacks actual authority to consent so long as "the facts available to the officer . . . warrant a man of reasonable caution in the belief that the consenting party had authority." *Rodriguez*, 497 U.S. at 188 (quotation marks and alterations omitted).

Here, Rodriguez reasonably believed that the driver had authorized him to search the entire car, including the duffel bag, because the written consent stated that Rodriguez could search the car and its contents. *See Jimeno*, 500 U.S. at 251("[I]t [is] objectively reasonable for the police to conclude that [a] general consent to search [a] car include[s] consent to search containers within that car."); *see also United States v. Sparks*, 287 F. App'x 918, 920–21 (2d Cir. 2008) ("[T]he officer requested—and [the suspect] provided—consent to search 'the vehicle and the contents therein.' Given the broad scope of that consent, it was objectively reasonable for the officer to believe that it covered the bags inside the car."); *United States v. Snow*, 44 F.3d 133, 135 (2d Cir. 1995) ("[A]n individual who consents to a search of his car should reasonably expect that readily-opened, closed containers discovered inside the car will be opened and examined."). Smith insists that, because the bag contained men's clothing, it clearly belonged to a man and not to the female driver. Thus, it was unreasonable for Rodriguez to believe that the bag fell within the scope of the driver's consent and he should have asked Smith before rummaging through the bag. Not so. Police officers need not canvass potential objectors before conducting a lawful search

based on the voluntary consent of an individual with apparent authority, like the driver here. *See United States v. Lopez*, 547 F.3d 397, 399–400 (2d Cir. 2008). Moreover, the driver stated that Smith had a single bag *in the trunk*. Based on that information, Rodriguez reasonably believed that the bag *on the back seat* did not belong to Smith. Indeed, Smith's argument presumes that Rodriguez found the bullets after seeing that the duffel bag contained men's clothing. But the district court found that the bullets were in a Ziploc bag on top of the clothing. Thus, Rodriguez found the bullets before he had any reason to believe that the bag did not belong to the driver. Finally, the gun was found beneath the driver's seat, not in the bag, and the driver's consent plainly extended to that area.

Rodriguez reasonably searched Smith's bag pursuant to the driver's consent. Accordingly, the district court properly denied Smith's motion to suppress the firearm and ammunition found in the Trailblazer.

B. Fifth Amendment

Smith next argues that his statement to Rodriguez that "the gun wasn't loaded," App'x 82, should have been suppressed. We disagree. Before transporting Smith to a detention facility upon his arrest, Rodriguez read Smith his *Miranda* rights and Smith chose to remain silent. *See generally Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, during the drive, Smith asked Rodriguez "what was going on" and Rodriguez informed him "that the ATF [the federal Bureau of Alcohol, Tobacco, and Firearms] was adopting the case" and that "they're always willing to work out a plea deal." App'x 82. Smith responded, "[A]t least it's not a violent felony . . . because the gun wasn't loaded." App'x 82. Rodriguez had not informed Smith that the gun he recovered from the vehicle was unloaded.

"[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980). Thus, *Miranda* rights attach when a police officer uses "words or actions . . . that they should have known were reasonably likely to elicit an incriminating response." *Id.* at 302 (emphasis omitted). Where, as here, a person invokes the right to remain silent, *Miranda* guarantees that a person's "right to cut off questioning" will be "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (quoting *Miranda*, 384 U.S. at 474, 479); *see also, e.g.*, *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010) ("Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.").

"This is not a case . . . where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Mosley*, 423 U.S. at 105–06. Rather, Rodriguez refrained from engaging with Smith after Smith invoked his right to silence until Smith asked "what was going on." App'x 82. Rodriguez's response, offering an explanation and prediction of what would happen next, did not represent an impermissible failure to honor Smith's invocation of his right to silence. *See Gonzalez*, 764 F.3d at 167. Accordingly, the district court correctly denied Smith's motion to suppress his statement that the gun was not loaded.

* * *

We have considered Smith's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk