No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RASHAWN D. WATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Sixth Circuit

PETITION OF
DEFENDANT-PETITIONER RASHAWN D. WATSON

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RASHAWN D. WATSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Rashawn D. Watson, respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Mr. Watson encloses his affidavit of indigence in support of this motion.

Dated: October 14, 2020

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether the decision in Rehaif v. United States, 139 S. Ct. 2191 (2019) requires that Petitioner's guilty plea and conviction be vacated when (1) the indictment failed to allege an essential element of the offense–that Petitioner knew he belonged to the relevant category of persons barred from possessing a firearm, (2) the government failed to present evidence at the change of plea hearing demonstrating that Petitioner knew he belonged to the relevant category of persons barred from possessing a firearm, and (3) no admission was made by Petitioner at the change of plea hearing that he knew he belonged to the relevant category of persons barred from possessing a firearm.

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IV. OPINIONS BELOW

The district court entered final judgment of conviction on June 28, 2019. See Judgment, United States v. Watson, 19-cr-0085 (N.D. Ohio). The United States Court of Appeals for the Sixth Circuit affirmed the judgment in a published decision entered on July 17, 2020. United States v. Watson, No. 19-3658 (6th Cir. 2020). Both decisions are attached.

V. STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction, as Petitioner was charged with crimes under the United States Code. The Sixth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as the district court entered a final judgment order, and Petitioner timely filed a notice of appeal from the final judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Sixth Circuit rendered a final decision on July 17, 2020, and Petitioner is filing this petition within 90 days of that ruling.

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall * * * be deprived of life, liberty, or property without due process of law * * *.

U.S. Const. Amend. V.

> In all criminal prosecutions, the accused shall enjoy to 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 accusations; 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.

U.S. Const. Amend. VI.

> 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 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.

18 U.S.C. § 922(g)(1).

> (A) No person, *in attempting or committing* a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> > (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
> >
> > (2) Have a dangerous ordinance on or about the offender's person or under the offender's control;
> >
> > (3) Inflict, or attempt to inflict, serious physical harm on another.

VII. STATEMENT OF THE CASE

On February 12, 2019, an indictment was returned against the Petitioner by the grand jury for the Northern District of Ohio. RE 21, Indictment; PageID#66. Petitioner was charged with: possession with intent to distribute approximately 22.4 grams of acetyl fentanyl and fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (Count One); possession with intent to distribute approximately 1.967 grams of methamphetamine hydrochloride in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C)) (Count Two); possession with intent to distribute approximately 57.236 grams of N-ethylpentylone hydrochloride in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C)) (Count Three); felon in possession of firearms and ammunition in violation of 18 U.S.C. §922(g)(1) (Count Four); and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C.

§924(c)(1)(A) (Count Five). Id; PageID#66-68.

Prior to trial, the government filed an information to establish a prior conviction RE 22, Information; PageID#73. It was alleged that the Petitioner had prior convictions as follows: conviction for trafficking offenses (F3), in the Cuyahoga County Court of Common Pleas Case, on or about October 29, 2009; and trafficking offenses (F4), in the Cuyahoga County Court of Common Pleas Case, on or about February 26, 2009. Id.

Petitioner entered into a written plea agreement. RE 30, Plea Agreement (Sealed); PageID#132. Petitioner pleaded guilty to Counts One through Five. Id; PageID#133. The plea contained stipulated Guideline computations. Id; PageID# 137. Petitioner was labeled a career offender pursuant to U.S.S.G. §4B1.1, resulting in an offense level of 34. Id. The plea called for three level reduction to the offense level pursuant to U.S.S.G. §3E1.1 for acceptance of responsibility. Id; PageID#138. The plea contained a waiver of appeal, except when the punishment was in excess of the statutory maximum or "any sentence to the extent it exceeds the maximum of the sentencing imprisonment range determined under the advisory Sentencing Guidelines in accordance with the sentencing stipulations and computations in this agreement, using the Criminal History Category found applicable by the Court. Nothing in this paragraph shall act as a bar to Defendant perfecting any legal remedies Defendant may otherwise have on appeal or collateral attack with respect to claims of ineffective assistance of counsel or prosecutorial misconduct." Id; PageID#139. The court accepted the guilty plea on May 16, 2019. RE 53 Plea Hearing; PageID#319.

Following the entry of the plea, a pre-sentence investigation report (PSR) was prepared. The report issued the stipulated Guideline calculations. RE 31, Presentence Investigation Report (SEALED); PageID#157. With the issuance of the career offender enhancement, along with a

reduction to the offense level for acceptance of responsibility, the total offense level was determined to be 31. Id; PageID#157-158.

The career offender enhancement was based upon the above mentioned trafficking convictions, as well as a 2002 conviction for aggravated robbery in the Cuyahoga County Court of Common Pleas. Id; PageID#160-163. Because Petitioner was determined to be a career offender who is also convicted of § 924(c), the applicable guideline range was increased to between 262 and 327 months. Id; PageID#168.

Petitioner filed a sentencing memorandum rasing objections to the PSR and arguing that he did not qualify for the career offender enhancement under § 4B1.1. RE 38 Sentencing Memorandum; PageID#248-250.

Petitioner proceeded to sentencing on June 27, 2019. RE 54-1 Sentencing Hearing (SEALED); PageID#425. The Court determined that Petitioners guideline range was 235 to 293 months' imprisonment, Id; PageID#440, total offense level was determined to be 31, and the criminal history category was determined to be VI. RE 54-1, Sentencing Transcript (Sealed); PageID#429. The court noted the Petitioner's age, difficult childhood, the length of time since the prior convictions, and the Petitioner's substance abuse history in determining the appropriate sentence. Id; PageID#447-448. Petitioner was sentenced to 130 months incarceration on each of Counts One through Four to be served concurrently, and a consecutive term of 60 months incarceration on Count Five resulting in a total term of 190 months' imprisonment. RE 42, Judgment; PageID#275. A timely notice of appeal was filed on July 10, 2019. (RE 45, Notice of Appeal; PageID#289).

VIII. STATEMENT OF FACTS

On January 23, 2018, the Petitioner met "Person 1" at the Petitioner's place of business, the Savvy Smoke Shop, on St. Clair Avenue in Cleveland. RE 30, Plea Agreement; PageID#140. Petitioner sold purported heroin to Person 1, which contained 17.43 grams of fentanyl. On February 8, 2018, a transaction occurred at the same location with the same participants, involving 16.02 grams of fentanyl. Id; PageID#141. On February 22, 2018, a transaction occurred at the same location with the same participants, involving 15.95 grams of fentanyl. Id; PageID#141.

On March 7, 2018, investigators with the Drug Enforcement Administration and the Cleveland Division of Police executed search warrants at the Petitioner's residence in North Olmsted, Ohio, his above referenced business, his Ford F-150, and a stash house on East 101st Street in Cleveland. Id. In the course of the searches, law enforcement officials seized a firearm from each of the three premises. Id. Controlled substances were also seized, including 22.4 grams of a mixture containing acetyl fentanyl and fentanyl, 1.967 grams of methamphetamine hydrochloride, and 57.236 grams of N-ethylpentylone hydrochloride. Id; PageID#142.

IX. REASONS FOR GRANTING THE WRIT

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

In the instant case, the conduct charged in the indictment did not constitute a federal offense because it failed to charge that Petitioner knew he belonged to the class of individuals prohibited from possessing a weapon under § 922(g)(1). Thus, the Indictment failed to include all essential elements and failed state a 922(g)(1) offense. Consequently, during the change of plea hearing the district court failed to notify Petitioner of all § 922(g)(1) elements and Petitioner failed to admit to all elements. Specifically, that Petitioner knew he belonged to the relevant category of persons barred from possessing a firearm at the time of the offense. These failures violated this Court's decision in Rehaif and amounted to a structural error that affected Petitioner's substantial rights. And because the error resulted in a constitutionally invalid plea of guilty, the error affected the fairness and integrity of the justice system. Thus, the Sixth Circuit was required to vacate Petitioner's conviction. However, the Sixth Circuit refused to find reversible error, in contravention of this Court in Rehaif and Fourth Circuit precedent in United States v. Gary, 954 F.3d 194 (4th Cir. 2020) and United States v. Medley, 972 F.3d 399 (4th Cir. Aug. 21, 2020). Because the Sixth Circuit's decision is contrary to Supreme Court and Fourth Circuit precedent, Petitioner asks that this Honorable Court exercise its authority under Supreme Court Rule 10 and grant certiorari with respect to Petitioner's claim.

A. Whether the decision in Rehaif v. United States, 139 S. Ct. 2191 (2019) requires that Petitioner's guilty plea and conviction be vacated when (1) the indictment failed to allege an essential element of the offense–that Petitioner knew he belonged to the relevant category of persons barred from possessing a firearm, (2) the government failed to present evidence at the change of plea hearing demonstrating that Petitioner knew he belonged to the relevant category of persons barred from possessing a firearm, and (3) no admission was made by Petitioner at the change of plea hearing that he knew he belonged to the relevant category of persons barred from possessing a firearm.

In Rehaif v. United States, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), this Court held that in a prosecution under § 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." Id. at 2200 (emphasis added). In order to convict under § 922(g), the following elements must be proved beyond a reasonable doubt: (1) a status element requiring that the defendant knows he is a member of a class subject to § 922(g); (2) a possession element requiring knowing possession of a firearm or ammunition; (3) a jurisdictional element requiring that the possession was "in or affecting commerce"; and (4) a firearm element. 139 S.Ct. at 2195-96. In reaching this decision the Court emphasized that "[t]he term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." Id. The Court saw "no basis to interpret 'knowingly' as applying to the second § 922(g) element [on possession] but not the first [on status]. The Court found "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.

It is undisputed that a criminal defendant is entitled by the Sixth and Fourteenth amendments to a jury determination that he is guilty beyond a reasonable doubt of every element of the crime with which he is charged. United States v. Gaudin, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). An indictment is required to allege the essential elements of an offense. "[A]n indictment is sufficient if it, first, contains the elements of the offense charged; second, fairly informs a defendant of the charge against which he must defend, and, third, enables him to plead an acquittal or a conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); see also United States v. Rankin, 870

F.2d 109, 112 (3d Cir. 1989); United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007).

An indictment must allege the essential elements of an offense. See, United States v. Parisi, 365 F.2d 601, 604 (6th Cir. 1966). The purpose of this requirement is to make sure the defendant is informed of "the nature and cause of the accusation" as required by the Sixth Amendment of the United States Constitution. See United States v. Piccolo, 723 F.3d 1234, 1238 (6th Cir. 1983). "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); see also United States v. Gioiosa, No. 90-3097, 1991 U.S. App. LEXIS 2254, at *8 (6th Cir. 1991) (citing Russell v. United States, 369 U.S. 749, 763-764 (1962). Additionally, the Fifth Amendment requires that a grand jury only return an indictment when it finds probable cause to support all the necessary elements of a crime. See, Williams v. Haviland, 467 F.3d 527, 531-32 (6th Cir. 2006); see also Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972) (discussing the historical powers of the grand jury when determining whether there is probable cause that a crime has been committed).

As noted, Section 922(g) makes possession of a firearm or ammunition unlawful when the following elements are satisfied: (1) a status element requiring that the defendant knows he is a member of a class subject to § 922(g) (in this case, being a felon); (2) a possession element requiring knowing possession of a firearm or ammunition; (3) a jurisdictional element requiring that the possession was "in or affecting commerce"; and (4) a firearm element. Rehaif, 139 S.Ct. at 2195-96. In order to provide Petitioner with notice required by due process, the indictment was required to charge each of these elements. This contention is supported by decisions from the Fourth Circuit

finding that, as a matter of law, the failure to charge an essential element of § 922(g)(1) in the indictment violates a defendant's substantial rights and requires that the conviction be vacated. See, United States v. Gary, 954 F.3d 194 (4th Cir. 2020) and United States v. Medley, 972 F.3d 399 (4th Cir. Aug. 21, 2020).

In Count Four, Petitioner was charged with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). RE 66 Indictment; PageID#66. Specifically, the indictment charged that Petitioner "having been previously been convicted of crimes punishable by imprisonment for a term exceeding one year * * * did knowingly possess in and affecting interstate commerce firearms * * * and ammunition, said firearms and ammunition having been shipped and transported in interstate commerce, in violation of Title 18 United States Code Section 922(g)(1)" Id: PageID#67-68. The plea agreement echoed the language in the indictment and set forth the following elements of the § 922(g) offense: (1) Defendant was convicted of a crime punishable by imprisonment for more than one year; (2) Following Defendant's conviction, Defendant knowingly possessed a firearm and/or ammunition; and (3) The specified firearm and/or ammunition crossed a state line prior to Defendant's possession. RE 30 Plea Agreement (Sealed); PageID#136. The factual basis for the offense is set forth in the plea agreement and provides details of Petitioner's drug dealing and weapon possession. Id; PageID#140-143.

What is evident from the record is that an essential element was not charged in the indictment. The indictment does not include language charging that Petitioner, at the time he is alleged to have possessed a firearm, did so with knowledge that he belonged to the relevant category of persons barred from possessing a firearm. Thus, the indictment fails to state an essential element of the offense required by Rehaif. Because Petitioner's indictment "failed to satisfy the notice

function of an indictment through its charging language and description of overt acts, its defects violated [Petitioner]'s substantial rights." United States v. Medley, 972 F.3d 399 *23 (4th Cir. Aug. 21, 2020), see also, United States v. Gary, 954 F.3d 194 (4th Cir. 2020).

At the change of plea hearing, Petitioner admitted only to the elements of § 922(g)(1) set forth in the indictment and the plea agreement. RE 53 Plea Hearing; PageID#336, 338, 340, 342. The government did not provide any evidence indicating that Petitioner knew that he was prohibited from possessing a firearm at the time of the possession as required by Rehaif. And, Petitioner has not admitted that he knew he was prohibited from possessing a firearm at the time of the possession. Thus, Petitioner has not admitted to the essential elements of § 922(g)(1), yet he stands convicted for that offense.

The Supreme Court has "long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" Bousley v. United States, 523 U.S. 614, 618 (1998) (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)). Where neither the defendant, "nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged," his "plea would be . . . constitutionally invalid." Id at 618-19. It is axiomatic that in order for a defendant to plead guilty to an offense, a defendant must admit to all essential elements of that offense. For a defendant's waiver of the right to trial to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019 (1938).

Federal Rule of Criminal Procedure 11 "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly" knowing and

voluntary. McCarthy v. United States, 394 U.S. 459, 463, 89 S. Ct. 1166 (1969). Rule 11 provides, "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Fed. R. Crim. P. R. 11(b)(3). Under the rule, "the court must determine that there is a factual basis for the plea" to ensure the plea is accurate and there is some evidence that the defendant actually committed the offense. United States v. McCreary-Redd, 475 F.3d 718, 722 (6th Cir. 2007). The requirement for a factual basis to enter a plea is strict and is "subject to no exceptions." United States v. Percival, 50 Fed. Appx. 280, 281 (6th Cir. 2002). "[T]he lack of a sufficient factual basis for a plea can never be harmless error * * *." United States v. Williams, 176 F.3d 301, 313 (6th Cir. 1999).

Here, the district court advised Petitioner only that he was charged with possessing a firearm after having been convicted of a crime punishable by a term of imprisonment exceeding one year. The court did not advise Petitioner that the government was required to prove that he also knew he was a felon. Nor did the government do so, or even proffer any evidence about Petitioner's knowledge of his status. Rehaif, however, makes clear that this was an essential element of the offense. Because nobody at the plea hearing understood the essential elements of the offense, Petitioner's plea was involuntary and unconstitutionally invalid. Bousley, 523 U.S. 618-619, See also, United States v. Dominguez-Benitez, 542 U.S. 74, 84 n.10 (2004)(Where a defendant's guilty plea was neither knowing nor voluntary the conviction cannot "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless").

Despite these errors, the Sixth Circuit Court of Appeals refused to vacate Petitioner's conviction, finding that the failure to charge elements of a federal offense was an error, but was not a jurisdictional error. See United States v. Watson 19-3658, Opinion, p 3-4.The Sixth Circuit then

faulted Petitioner for failing to object to the Rehaif error. The Sixth Circuit then found that the errors in the indictment and during the change of plea hearing did not affect Petitioner's substantial rights and was not reversible plain error. Id at p 5-6.

The Sixth Circuit's decision is flat wrong and contrary to well settled Supreme Court precedent and the Fourth Circuit's decisions United States v. Medley, 972 F.3d 399 *23 (4th Cir. Aug. 21, 2020) and United States v. Gary, 954 F.3d 194 (4th Cir. 2020). Petitioner's case is nearly identical to the decision in Gary. In that case, the defendant pleaded guilty to possession of a firearm by a convicted felon under § 922(g)(1). Id at 199. Like the instant case, the indictment failed to charge and the defendant never admitted that he "knew he had the relevant status when he possessed the firearm." Id (citing Rehaif, 139 S. Ct. at 2194). And like the instant case, the defendant did not object to this error. The Gary court found that this failure constituted error in both the indictment and in the plea hearing and that even though the defendant failed to object in the district court, the error was reversible plain error. Specifically, the court held:

> We find that a standalone Rehaif error satisfies plain error review because such an error is structural, which per se affects a defendant's substantial rights. We further find that the error seriously affected the fairness, integrity and public reputation of the judicial proceedings and therefore must exercise our discretion to correct the error.

Id at 200.

Like Gary, the indictment failed to state an offense because it omitted the element that Petitioner knew of his status at the time of the offense. Like Gary, the failure to include the knowledge-of-status element under § 922 in Petitioner's indictment and the failure to obtain Petitioner's admission to the knowledge-of-status element is an error affecting the defendant's substantial rights. Like Gary, the error affected the fairness, integrity and public reputation of the

judicial proceedings because "fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea. Id at 206. Under these circumstances, the failure to charge the scienter element in the indictment and the failure to obtain an admission to the scienter element affected Petitioner's substantial rights and was plain and reversible error under Federal Rule of Criminal Procedure 52(b).

Because the Sixth Circuit's decision to affirm Petitioner's conviction is inapposite to Rehaif and directly contrary to Fourth Circuit precedent in Gary, certiorari should be granted and Petitioner's conviction must be overturned.

CONCLUSION

Petitioner respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a on October 14, 2020 a true and accurate copy of the foregoing was sent via U.S. Mail with sufficient postage affixed to Assistant U.S. Attorney Elliot D. Morrison, Office of the U.S. Attorney, 801 W. Superior Avenue, Suite 400, Cleveland, OH 44113 and Office of the Solicitor General, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001 and a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

/s/ Matthew M. Robinson
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Attorney for the Petitioner