No. _____

IN THE

Supreme Court of the United States

MATTHEW JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Amendment requires that no person be held to answer for a felony unless on indictment of a grand jury or without due process of law. The Sixth Amendment requires that no person be convicted of a felony except on a finding by a jury that the government has proved its case beyond a reasonable doubt for every element of a crime. Appellate courts agree that conviction in violation of these provisions is error. They disagree, however, on whether to remedy such errors when applying the fourth prong of the *United States v. Olano*, 507 U.S. 725 (1993) plain error test. They further disagree on which materials appellate courts can rely on when deciding this question.

The fourth prong of *Olano* asks whether an error seriously affects the fairness, integrity or public reputation of judicial proceedings.

The questions presented are:

1. Does a conviction after (a) an incomplete indictment, (b) incorrect jury instructions, (c) failure of the petit jury to make a finding on an essential element of a crime, and (d) an appellate court's reliance of facts not shown to the grand or petit jury, seriously affect the fairness, integrity or public reputation of judicial proceedings?

2. In applying the fourth prong of the plain error test from *Olano v. United States* to an incomplete indictment or jury verdict with a missing element, can appellate judges rely on information that was not presented to the grand or petit juries in the first instance?

DIRECTLY RELATED CASES

Court	Case Name	Case Number
United States Court of Appeals for the Seventh Circuit	*United States v. Jones*	19-1768
United States District Court for the Central District of Illinois	*United States v. Jones*	18-20036

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No. _____

IN THE

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MATTHEW JONES,

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

PETITION FOR CERTIORARI

Petitioner Matthew Jones respectfully petitions for a writ of certiorari to review the published decision of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 960 F.3d 949 and appears in Appendix A to this Petition. Pet. App. 1a. The December 18, 2018 oral decision of the United States District Court for the

Central District of Illinois, denying Mr. Jones' motion for acquittal, was unreported, but an excerpt of the transcript is reproduced in Appendix B. Pet. App. 35a. The December 18, 2018 spoken and written jury instructions from the United States District Court for the Central District of Illinois were not reported, but are reproduced in relevant part in Appendix C. Pet. App. 37a.

JURISDICTION

The Seventh Circuit entered its judgment on June 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days. This petition is filed within 150 days of June 1, 2020.

LEGAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI

Federal Rule of Criminal Procedure 29(a) provides, in relevant part:

> After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction.

Federal Rule of Criminal Procedure 52(b) provides:

> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Title 18 U.S.C. § 922(g)(1) provides, in relevant part:

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

Title 18 U.S.C. § 924(a)(2)

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

INTRODUCTION

The Constitution guarantees a person's right for a grand jury and petit jury to stand between him and the state's judgment.

As the Fourth Circuit held in *United States v. Medly*, 972 F.3d 399 (4th Cir. 2020), we derive confidence in our system because of these constitutional

guarantees, even though having a judge decide cases is more convenient. *Id*. at 415-418. When some courts consider those guarantees inviolate, but other courts treat them as mere procedural inefficiencies, confidence in the entire system suffers. With different rules, the Constitution and laws seem subjective, to be applied or ignored at judges' varying pleasures.

This case arises in the context of 18 U.S.C. § 922(g)(1), and *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Prior to *Rehaif*, and at the time of Mr. Jones' trial, prevailing Seventh Circuit precedent only required proof of three elements for a § 922(g)(1) conviction: A prior felony conviction, possession of a firearm, and an interstate nexus for the gun. *Rehaif* held that § 922(g) convictions also require a defendant to know that he is a prohibited person. *Id*. at 2194.

Mr. Jones was indicted for violating § 922(g)(1), went to trial before *Rehaif*, and his direct appeal was pending when it came out. On appeal, he challenged the insufficiency of his indictment, and the incorrect jury instructions. Many defendants across the country had near-identical situations, and raised the same claims in federal circuit courts.

The results are inconsistent. In the Seventh Circuit, Mr. Jones lost his appeal because the circuit court held that his case does not seriously affect the fairness, integrity, or reputation of judicial proceedings. This finding was made under the fourth prong of the plain error standard this Court set forth in *United States v. Olano*. *Olano* dictates that unpreserved errors should be remedied when they meet four tests: (1) error; (2) the error must be "plain" or obvious; (3) the error

must affect the defendant's substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 732.

Most circuits align with the Seventh Circuit. The Seventh Circuit held that *Olano*'s fairness, integrity, and judicial reputation prong ("*Olano* prong four") is not met when a person is convicted using an incomplete indictment and instructions that omit an essential element, as long as judges can confidently reach a decision after relying on facts that juries did not consider. *See* Pet. App. 32a.

If Jones' case had arisen in the Fourth Circuit, however, his conviction would have been overturned. There, essentially identical errors are held to seriously affect the fairness, integrity, and reputation of judicial proceedings. *See Medly*, 972 F.3d at 403; *United States v. Green*, 973 F.3d 208, 211 (4th Cir. 2020). The Fourth Circuit does not rely on facts outside the trial record when applying the fourth prong of *Olano*. *Medly* at 418.

Though the split arises under *Rehaif* and § 922(g), it has implications for every circuit's application of *Olano* on plain error review, whenever courts are confronted with indictments and jury instructions that omit essential elements. Resolving this split will bring consistency to the application of *Olano* prong four on plain error review.

For these reasons, and for those explained below, this Court should grant certiorari, then vacate Mr. Jones' conviction using the approach taken by the Fourth Circuit in *United States v. Medly*.

STATEMENT OF THE CASE

A. Indictment and Trial

On August 7, 2018, a federal grand jury in the Central District of Illinois charged Mr. Jones by indictment with a violation of 18 U.S.C. § 922(g)(1). Pet. App. 48a. The District Court had jurisdiction over his case pursuant to 18 U.S.C. § 3231. The indictment read:

> On or about July 15, 2018, in Kankakee County, in the Central District of Illinois, Matthew R. Jones, defendant herein, having been previously convicted in a court in the State of Illinois of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, firearms . . . . In violation of Title 18, United States Code, Section 922(g)(l).

Mr. Jones pled not guilty, and went to trial in December 2018. He had not objected to the sufficiency of the indictment under Fed. R. Crim. P. 12(b)(3)(B). At the close of the government's case, he moved the Court for acquittal under Fed. R. Crim. P. 29(a), because "the Government ha[d] not presented sufficient evidence to prove their case beyond a reasonable doubt." Pet. App. 36a.

The district court denied his motion for acquittal, only citing "the three [elements] of conviction of a felony[,] possession and affecting interstate commerce." Pet. App. 36a.

Mr. Jones has a documented history of mental illness, demonstrating "bizarre thought processes," and a poor academic record. *See United States v. Matthew Jones*, No. 18-20036, Presentence Investigation Report, Dkt. No. 64 ¶¶ 56, 69 (C.D. Ill. Filed Apr. 8, 2019) (the "PSR"). But since the indictment had not raised his mental state, and the government had not mentioned it during their case in chief,

he did not affirmatively raise it. With no burden as defendant, and no allegations or evidence concerning his mental state, he had no incentive to introduce the volatile topic of mental illness for the jury. Moreover, his Rule 29 motion had already argued that the government had not met its burden.

The jury instructions did not charge the jury with finding Mr. Jones' knowledge of his prohibited status. Pet. App. 38a-41a. Mr. Jones did not object to the jury instructions.

Mr. Jones filed a timely notice of appeal.

B. The Seventh Circuit's Decision Below

The Seventh Circuit had jurisdiction over Mr. Jones' appeal pursuant to 28 U.S.C. § 1291. On appeal, he relied on *Rehaif* to challenge the indictment and jury instructions.[1] He argued that omitting § 922(g)(1)'s knowledge element violated several Fifth and Sixth Amendment rights. He argued that conviction from an indictment that gave no notice of an essential element, and with a jury verdict that did not answer an essential element, was structural error.

Since he had not objected in the district court, these claims were reviewed for plain error. Pet. App. 8a-10a. The circuit court applied the plain error test from *United States v. Olano*. *Olano* requires that four tests be satisfied before the court will correct an error: (1) there must be error; (2) the error must be "plain" or obvious; (3) the error must affect the defendant's substantial rights; and (4) the

[1] Mr. Jones also appealed the denial of his Rule 29(a) motion, and his sentence.

error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. 507 U.S. at 732.

The Seventh Circuit held that the indictment error and jury instructions were obvious enough errors to satisfy the first two *Olano* prongs. Pet. App. 10a, 27a, 32a. That is, omitting the element from the indictment and jury instructions were errors (prong one), and they were plain, or obvious (prong two). It held that omission of the element was not structural, (Pet. App. 13a), but reserved judgment on whether either error satisfied the third *Olano* prong for effects on substantial rights. Pet. App. 32a-33a. Instead, it decided Jones' appeal by holding that no matter his substantial rights, the errors did not satisfy *Olano* prong four, because the violations did not seriously affect the fairness, integrity, and reputation of judicial proceedings. Pet. App. 32a-33a.

The Seventh Circuit made critical underlying decisions that led to its ruling. Most importantly, the circuit court held that for the fourth *Olano* prong, the panel could rely on the trial records *and* "a narrow category of highly reliable information outside the trial records," from the PSR. Pet. App. 23a. This meant that the appellate panel's factual analysis on the missing element relied on facts that the juries did not see; it was not reviewing a lower decision as much as just making a factual finding in the first instance. The court also limited its consideration to inculpatory evidence from the PSR. Pet. App. 33a.[2]

[2] In a footnote, the court noted that it was not considering the PSR's mention of Jones' limited mental ability. Pet. App. 32a, n. 9. The footnote appeared to reference the Rule 29 denial, but the opinion did not mention the PSR's exculpatory evidence on Jones' mental state when applying it to the *Olano* prong four analysis.

After weighing the evidence before the jury and the inculpatory evidence from the PSR, the circuit court held that Mr. Jones could not satisfy *Olano* prong four on either the indictment or the jury instructions. Pet. App. 32a-33a. For the indictment, the appellate judges were confident that trial testimony of evasiveness, a stipulation to the fact of Jones' prior conviction, and Mr. Jones' criminal history from the PSR proved that he knew he was a felon, and that a second grand jury would indict him on all elements. Pet. App. 33a. It made a similar finding on what the petit jury would have found if it had been shown evidence in the PSR, then properly instructed. Pet. App. 32a.

The specific PSR information that the jury did not see, but which was instrumental in the circuit panel's factual determination, was evidence of Mr. Jones' prior conviction. The panel noted that one of his prior Illinois state convictions was for unlawful possession of a weapon by a felon, which carried a four-year sentence. Pet. App. 32a. Adding the PSR to information the jury did see, the panel was "confident" that Mr. Jones was guilty. *Id*.

The circuit court did not consider exculpatory information in the PSR, though. Specifically, the court ignored evidence of Mr. Jones' limited intellect and "bizarre thought processes," even though the district court had found that evidence to be true at sentencing when it adopted the PSR. Though mental function undoubtedly affects a person's knowledge, the opinion includes no discussion of how the jury might have weighed his limited intellect and bizarre thoughts.

REASONS FOR GRANTING THE PETITION

There are two circuit splits in this case. First, the Fourth Circuit and Seventh Circuit are split on how *Olano* prong four applies in nearly-identical situations involving incomplete indictments and incorrect jury instructions. The split concerns vital questions of the constitutional rights to grand and petit juries. The scope of those guarantees must be consistent across the country.

Second, there is a split on what an appellate court may rely upon, when reviewing a grand or petit jury's decision for *Olano* prong four. Specifically, can circuit courts' factual analyses rely on material that the juries did not see?

On both questions, the Fourth Circuit's decision in *United States v. Medly* is clearly incompatible with the Seventh Circuit's decision in *Jones*.

A. The Fourth Circuit's Decision in *United States v. Medly*

The Fourth Circuit decided *Medly* about eight weeks after the Seventh Circuit decided *Jones*, but adopted almost none of the Seventh Circuit's approach. In *Medly*, the Fourth Circuit reviewed a trial conviction for a violation of 18 U.S.C. § 922(g)(1). 972 F.3d at 402. Like Mr. Jones, Mr. Medly's trial took place before *Rehaif*, and his direct appeal was pending when *Rehaif* came out. *Medly* at 402.

Mr. Medly's case was very similar to Mr. Jones' case. His indictment did not mention knowledge of his prohibited status. *Medly* at 404. The jury instructions did not require a finding on knowledge of his prohibited status. *Id.* at 404. *Medly* even shared factual similarities with *Jones*, like testimony of the defendant's evasiveness, stipulation to a prior conviction, and prior charges and sentences on his PSR. *See* Pet. App. 32a-33a, and *Medly* at 414, 422.

Medly's claimed errors also mirrored those in *Jones*. Mr. Medly sought relief for violation of his Fifth Amendment right to grand jury indictment, claiming that the flawed indictment did not give him notice of the government's allegations. *Medly*, at 406-407. He also claimed that failure to instruct the petit jury on an essential element warranted relief, because it violated his Sixth Amendment right to have a jury determine facts beyond a reasonable doubt. *Medly* at 411.

Last, just like Mr. Jones, Mr. Medly did not object to the indictment or jury instructions in district court, so the Fourth Circuit reviewed his appeal for plain error. That required application of *Olano*'s four-prong test. *Id*. at 405.

The Fourth Circuit found that both errors satisfied the first three *Olano* prongs, then asked the same question as the Seventh Circuit in *Jones*: Would affirmance with such errors seriously affect the fairness, integrity, or public reputation of judicial proceedings? *Medly* at 416.

The Fourth Circuit reached an opposite conclusion from the Seventh Circuit. It showed little doubt on the indictment error:

> There can be no question that the rights involved in this case are central to upholding the fairness, integrity, and public reputation of our judicial proceedings. "By including the Grand Jury Clause in the Bill of Rights, the Framers—mindful of the intimidating force and presence of a strong national government and the potential for abuse of that force—recognized the need to interpose a group of common local citizens between the accused and the sovereign" . . . And we have previously stated that "the wisdom of the Framers in this regard has stood the test of time; thus, depriving an accused of the protection of the grand jury would be, no less today than yesterday, *intolerably unfair*." . . . Thus, even for certain standalone Fifth Amendment grand jury violations, we have proclaimed that "[w]e do not

> hesitate to say that convicting a defendant of an unindicted crime affects the fairness, integrity, and public reputation of federal judicial proceedings in a manner most serious."

Medly, 972 F.3d at 416 (Emphasis in original) (Citing *United States v. Floresca*, 38 F.3d 706, 714 (4th Cir. 1994).

On the jury instructions, the Fourth Circuit held that the Fifth and Sixth Amendment concerns raised by the petit jury's non-consideration of an essential element were "just as important to protecting the fairness, integrity, and public reputation of our judicial proceedings." *Medly* at 416. After citing the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requirement that all facts be given to a jury and proven beyond a reasonable doubt, the Fourth Circuit held that the "most important element" of the right to a jury trial is having "the jury, rather than the judge, reach the requisite finding of guilty." *Medly* at 417 (internal citations omitted).

Crucial to these determinations were two analytical decisions in *Medly*. First, for purposes of *Olano* prong four, the Fourth Circuit did not rely on information that the juries did not see, even though it acknowledged that there was "substantial post-trial evidence supporting Medly's knowledge of his prohibited status," including a 16-year prison term for second-degree murder. *Medly* at 417. For the Fourth Circuit, reliance on post-trial evidence would "usurp the role of both the grand and petit juries and engage in *inappropriate* judicial factfinding." *Id.* at 418 (emphasis added).

The circuit court acknowledged that affirmance would be "convenient" and even that "it may appear . . . that the Government could have proven the additional

element . . . ." *Id*. at 418. But the circuit court would not proceed with a "judges know best" approach. *Id*. It held that such a "level of judicial factfinding" would "cast a defendant's constitutional rights aside and trample over the grand jury and petit jury's function." *Id*.

The second analytical step that *Medly* employed on the fourth *Olano* prong, was evaluating the errors in the aggregate, as opposed to taking them one-by-one. *Id*. at 417. As the Fourth Circuit saw it, without notice of a state of mind allegation, or notice that the (judge) factfinder would consider whether he contested his state of mind, the defense had no incentive "to contest that element during pretrial, trial, or sentencing proceedings." *Id*. at 417. In other words, Medly had no burden to carry on the knowledge element, and the government should not be awarded that element by default.

In its "substantial rights" inquiry under *Olano* prong three, it held that

> Here, the errors occurred at the inception of the Government's case against Medley and continued throughout. Put another way, the error was not just a single, simple procedural error—but a combination of errors that tainted many of the basic protections that permit us to regard criminal punishment as fundamentally fair.

Medly at 415. Though that comment applied *Olano* prong three, it likely colored the court's view of prong four.

In summarizing its *Olano* prong four holding, the Fourth Circuit held that "too much went wrong here," to permit affirmance:

> 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.

Medly, 972 F.3d at 403.

B. There is a Clear Circuit Split on *Olano* Prong Four, Generally

The Fourth Circuit is in stark opposition to the other circuits, including the Seventh Circuit below, on how to apply *Olano* prong four to these admitted constitutional violations. It is an intolerable conflict with such significant constitutional rights at issue.

Like *Jones* and *Medly*, at least the First, Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit Courts have applied *Olano* prong four to a § 922(g)(1)trial conviction where the indictment or jury instructions, or both, lacked an essential element. *See United States v. Lara*, 970 F.3d 68, 87-90 (1st Cir. 2020) (jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at *Olano* fourth prong); *United States v. Ward*, 957 F.3d 691, 694-695 (6th Cir. 2020) (indictment lacked essential element, jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at *Olano* fourth prong); *United States v. Huntsberry*, 956 F.3d 270, 283–286 (5th Cir. 2020) (jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at *Olano* fourth prong); *United States v. Miller*, 954 F.3d 551, 558-560 (2d Cir. 2020) (jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at *Olano*

fourth prong); *United States v. Reed*, 941 F.3d 1018, 1021-1022 (11th Cir. 2019) (indictment lacked essential element, jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at *Olano* third and fourth prong); *United States v. Hollingshed*, 940 F.3d 410, 415–417 (8th Cir. 2019) (jury instructions lacked essential element, judges made findings of fact from materials jury did not see; plain error review fails at *Olano* third and fourth prong); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019) (judges made findings of fact from materials jury did not see; plain error review fails at *Olano* third and fourth prong).

The foregoing appeals all came up in the context of § 922(g) jury convictions that were affected by *Rehaif*, after their trials had ended, but while appeals were pending. Each circuit court reviewed the *Rehaif* claims for plain error. Each court found "error" that was "plain," and had to decide whether the Fifth and or Sixth Amendment violations seriously affected the fairness, integrity, or respect for judicial proceedings under *Olano* prong four. *Medly* and *Green*, the two reported Fourth Circuit cases, are opposite to all of the other decisions.

Dissenting from the Fourth Circuit's decision in *Medly*, Judge Quattlebaum highlighted exactly this split, and the opposing results for identical circumstances. *Medly*. 972 F.3d at 426 (Quattlebaum, J., dissenting). Judge Quattlebaum specifically cited *Jones*[3] and noted that "every other circuit—literally, every one"

[3] Judge Quattlebaum referred to *Jones* as "*Maez*," since the Seventh Circuit published a single opinion for three separate cases. Mr. Maez's name was listed first on the opinion. The cases were not formally consolidated, though there is only one written opinion.

conflicts with the *Medly* ruling on *Olano*'s third and fourth prongs. *Medly* at 426. Identically situated defendants, like Mr. Jones and Mr. Medly, are getting opposite results in different circuits.

While different results are sometimes acceptable, important constitutional issues like jury rights must have consistency. *See Martin v. Hunter's Lessee,* 14 U.S. 304, 347–48, 4 L. Ed. 97 (1816) (noting "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution . . . The public mischiefs that would attend [a disjointed interpretation of the Constitution] would be truly deplorable . . . ."). Mr. Jones and Mr. Medly suffered identical violations of their grand and petit jury rights. This Court should clarify whether these are serious constitutional violations, or just procedural hiccups.

C. There Is a Split on Which Records Appellate Courts Can Consider in Applying *Olano* Prong Four

1. There Is No Precedent from this Court Concerning the Record of Review for *Olano* Prong Four

There is also a split on whether, on *Olano* prong four analysis *for jury verdicts*, appellate courts can rely on materials that were never shown to the juries. This Court has never issued an opinion answering that specific question, and it arose in each circuit that has grappled with *Rehaif* challenges. It has permitted unfettered consultation of the record for plain error review of *guilty pleas*. *United States v. Vonn*, 535 U.S. 55, 74–75 (2002) ("in assessing the effect of Rule 11 error, a reviewing court must look to the entire record, not to the plea proceedings, alone.").

But when applying *Olano* prong four[4] to trial errors, this Court has not given the circuits instruction.

The Seventh Circuit acknowledged the split, and lack of clarity, below:

> The circuits have taken different approaches to the record for plain-error review of *jury verdicts* in light of *Rehaif*. [The Sixth, Eleventh, Eighth, and Ninth Circuits] have freely consulted materials not before the jury—in particular, criminal histories from defendants' presentence investigation reports (PSRs)—without discussing the propriety of thus expanding the record . . . The Second Circuit took a more cautious approach . . . [and the] Fifth Circuit acknowledged this issue but declined to take a side . . . .

Pet. App. 17a (Emphasis in original). The Seventh Circuit elected to restrict itself

> to the trial record and a narrow category of highly reliable information outside the trial records: the defendants' prior offenses and sentences served in prison, as reflected in undisputed portions of their PSRs.

Pet. App. 23a.

Other circuit courts have also noted that this Court has never ruled on this issue. After *Jones*, but before *Medly*, the First Circuit grappled with this question in *Lara*:

> [The] evidence [of past convictions and thus, knowledge], it is true, is not in the trial record. We note, however, that we regularly take judicial notice of such state court records given their presumed reliability . . . Moreover, the Supreme Court has never suggested that we are categorically barred from taking into account evidence not introduced at trial in considering whether an instructional error satisfies the fourth prong of plain error review.

[4] It is also unclear whether *Vonn* applies to *Olano* prong three's "substantial rights" analysis for trials.

Lara, 970 F.3d at 88-89 (1st Cir. 2020). The Fifth Circuit decided similarly to *Lara*, by highlighting the split and lack of controlling precedent, but ultimately just taking judicial notice of the defendant's state court records. *Huntsberry*, 956 F.3d at 286 (5th Cir. 2020).

The Sixth and Eleventh Circuits relied on *Vonn*, notwithstanding its applicability to pleas, as opposed to trials. Both cited *Vonn*, then implicitly extended it to trial errors, without extensive discussion. *Ward*, 957 F.3d at 695 & n.1 (6th Cir. 2020); *Reed,* 941 F.3d at 1021 (11th Cir. 2019).

And the Eighth and Ninth Circuits essentially extended *Vonn* to trials, without citation to *Vonn* or discussion of the extension. *Hollingshed,* 940 F.3d at 415–16 (8th Cir. 2019); *Benamor*, 937 F.3d 1189 (9th Cir. 2019)(same).

As noted above, the Fourth Circuit did not rely on post-trial information in *Medly*, since it would "usurp the role of both the grand and petit juries and engage in *inappropriate* judicial factfinding." *Id*. at 418 (Emphasis added).

Every circuit is choosing its unique path on this issue.

2. Fourth Circuit and Seventh Circuit Treatment of Post-Trial Information

In *Medly*, the Fourth Circuit only relied on evidence that the jury saw. *See Medly* at 417-418 (acknowledging the weight of "post-trial" evidence, but declining to act on it). An important part of *Medly*'s approach is its treatment of *United States v. Cotton*, 535 U.S. 625 (2002), and *Johnson v. United States*, 520 U.S. 461 (1997). In both *Cotton* and *Johnson*, this Court resolved *Olano* prong four by reference to "one-sided and overwhelming" evidence *that the jury saw*. *See Cotton*, at

633 (2002) (testimony on missing element was "overwhelming."); *Johnson* at 470 (evidence on missing element was "overwhelming.").

The Fourth Circuit noted:

> As revealed by those decisions, a defect in an indictment or a jury instruction will generally not be corrected at the *Olano's* fourth prong when the record evidence related to the defective part of the indictment or instruction is "overwhelming" *and* "essentially uncontroverted."

Medly at 417 (Emphasis in original). The Fourth Circuit thus read *Cotton* and *Johnson* to require evidence that is both overwhelming and uncontroverted.

In *Medly*, the Fourth Circuit held that evidence of defendant's knowledge was only uncontroverted because the defendant did not know he had to contest the evidence on knowledge of status. *Medly* at 417-418. Reliance on post-trial information to get over the "overwhelming" bar would have further muddled the issue. Specifically, by failing to raise the missing element in the indictment, and by failing to submit overwhelming evidence to the jury, the government took away the defendant's incentive to controvert it. *Id*. The circuit court did not want to shift the burden and punish defendant for not fighting an allegation that was never made, or to answer a question for the jury that was never asked.

Conversely, in *Jones*, the Seventh Circuit assigned no significance to a lack of overwhelming evidence before the jury, or why Jones did not raise his mental limitations. It held that "the evidence at trial permitted a finding of guilt on the missing element, but it was not so overwhelming as to eliminate any possibility of an effect on the verdict." Pet. App. 32a. After turning to the PSR for stronger

evidence on Mr. Jones' knowledge, it then stopped its review of the PSR without considering evidence of Mr. Jones' limited intellect and mental history. If *Medly* is right on its application of *Cotton* and *Johnson* to this situation, the Seventh Circuit should have weighed Jones' exculpatory evidence or at least discussed why it was not shown to the jury.

It is important to recall the chronology between *Jones* and *Medly*. *Jones* came weeks before *Medly*. The Fourth Circuit had every opportunity to follow *Jones* by relying on post-trial information, too. In *Medly*, the Fourth Circuit had significant PSR evidence of Mr. Medly's prior convictions, including a 16-year sentence for second degree murder. *Medly* at 416. As the *Medly* dissent said, "if ever there were a case" to look at things the jury did not see, *Medly* was the case. *Id*. at 420 (also noting that no other circuits took the Fourth Circuit's approach).

By rejecting the *Jones* approach to post-trial evidence, the Fourth Circuit took a hard line on what it would rely on when applying *Olano* prong four. It is the only circuit to do so, and it conflicts with the Seventh Circuit's approach in *Jones*.

D. This Case Raises Important Constitutional Questions

A constitutionally sound jury trial is a bedrock guarantee of our Constitution.

> "The jury-trial guarantee reflects 'a profound judgment about the way in which law should be enforced and justice administered . . . The Sixth Amendment represents a 'deep commitment of the Nation to the right of jury trial in serious criminal cases . . . .'"

Codispoti v. Pennsylvania, 418 U.S. 506, 515–16 (1974)(Citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). More recently, Justice Sotomayor has written that "the right to put the State to its burden, in a jury trial that comports with the Sixth

Amendment, before facing criminal punishment" is "among the most essential" constitutional protections. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1409, (2020)(Sotomayor, J., concurring).

In the Fourth Circuit, *Olano* prong four compels courts to enforce individuals' constitutional protections, even when it is easier for an appellate panel to assume what a jury would do. In an *Apprendi* concurrence, Justice Scalia defended inefficiency attendant to jury guarantees, because the Constitution went out of its way to vest guilt and innocence decisions with juries, not judges. *Apprendi*, 530 U.S. at 498 (2000) (Scalia, J., concurring):

> [T]he guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury," has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.

Apprendi at 499 (citing U.S. Const. amend. VI).

Conversely, the *Jones* opinion illustrates how, in circuits aligned with the Seventh Circuit, *Olano* prong four is a vehicle to ensure the most efficient result, no matter what the juries saw and what constitutional violations have occurred. Violations of individuals' Fifth and Sixth Amendment rights are less troublesome in those circuits, because the government can always fall back on judges' hypotheses about how a trial would have gone, with different allegations, if the juries had only seen different evidence.

When the government must defend constitutional violations of this magnitude, there should be consistent standards across the country. It cannot be

that depriving individuals of notice, the right to a grand jury indictment, and the right to a petit jury's judgment is inconsequential in the Seventh Circuit and elsewhere, but it does "serious harm to the judicial process" in the Fourth Circuit. *See Medly* at 403.

E. This Problem Will Be Repeated

The split on which evidence to review for *Olano* prong four will come up as long as there are jury trials. Though prosecutors, judges, and defense attorneys do their best, there will always be forfeited indictment challenges, misstated or omitted elements, and unintentional constitutional violations. In short, there will always be plain error review and a need to apply *Olano* prong four to jury trials.

It came up in *Cotton*, when this Court's *Apprendi* decision affected pending appeals for drug quantities. It came up in *Johnson*, when this Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995), affected pending appeals on the issue of materiality in perjury prosecutions. It came up here, when *Rehaif* affected a bevy of pending appeals on § 922(g) prosecutions. It will come up again, and courts will face the question of which parts of the record on appeal are to be considered. It is only a matter of time.

The Seventh Circuit and the *Medly* dissent noted that there is a split on what to review. This Court should settle the question.

F. The Circuits Are Not Resolving the Split on their Own

The Seventh Circuit and Fourth Circuit are not moving towards a unified theory. *Medly*, itself, came out in full knowledge of *Jones*, and the *Medly* dissent explicitly cited *Jones*. *See* 972 F.3d at 427 (Quattlebaum, J., dissenting). Later, the

Fourth Circuit recommitted itself to the *Medly* decision, in *United States v. Green*, 973 F.3d 208. For its part, the Seventh Circuit recommitted itself to *Jones* after *Medly*, and *Green*, through *United States v. Pulliam*, 973 F.3d 775 (7th Cir. 2020). In *Pulliam*, the Seventh Circuit again held that an incomplete indictment and incorrect jury instructions did not warrant plain error relief because the judges were "confident" of what the grand jury and jury would have done, in a different trial with different evidence. *Pulliam* at 782.

Absent a decision from this Court, at least the Fourth and Seventh Circuits will continue their divergent paths on how to apply *Olano* prong four.

G. This Case is an Excellent Vehicle

This case represents an ideal vehicle for review, for several reasons. First, it is representative of the many cases that have turned on *Olano* prong four since *Rehaif*. It is clear that the indictment in the case did not include an allegation that he knew of his status, and the jury instructions clearly did not reference all of the § 922(g)(1) elements. Pet. App. 45a, 48a. The Seventh Circuit also made clear that the trial record did not contain "overwhelming" evidence of guilt on the missing element. Pet. App. 32a. Since the Seventh Circuit relied on the PSR, this Court can squarely address what to do with post-trial evidence when applying *Olano* prong four to jury verdicts and indictments.

Second, the Seventh Circuit methodically considered each step it took in making its *Olano* prong four decision. Rather than elide the preliminary decisions on the way to *Olano*, the Seventh Circuit considered each issue that Mr. Jones raised, and weighed how it would apply those rules. It walked through what

evidence to review, the precise nature of the constitutional errors, and application to the specifics of Mr. Jones' case. It also noted specific places where it lacked definitive direction from this Court, highlighting the scope of the appropriate record to review when considering a plain error challenge after a trial. Pet. App. 16a-23a.

Third, and importantly, unlike most defendants in his position, Mr. Jones could get real relief – more than just a retrial for its own sake – if his conviction is vacated. As noted above, there is documented proof of Mr. Jones' mental limitations and "bizarre thought processes." At sentencing, the district court adopted those mental limitations as fact in the PSR. Because of the incomplete indictment, and the fact that the government did not mention his mental state in its case in chief, Mr. Jones had no incentive to present affirmatively that evidence at his original trial.

On retrial, he obviously would present that evidence. Thus, Mr. Jones' challenge is a live case with real consequences. It would not be just an academic exercise over abstract rights.

The Fourth and Seventh Circuits are starkly opposed on how to apply *Olano* prong four, which concerns fairness, integrity, and respect for judicial proceedings. They reach their opposite applications by taking different approaches to the constitutional rights at issue in this case. They are also split on the proper record courts can review in applying *Olano* prong four. Mr. Jones' claims are representative of others in his position. They will be repeated the next time this Court issues a decision that affects elements of a crime.

This Court should grant the petition, and remand for the Seventh Circuit to adopt the Fourth Circuit's approach to resolving *Olano* prong four.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

October 19, 2020

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In the

United States Court of Appeals

For the Seventh Circuit

No. 19-1287

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARLOS MAEZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division.
No. 3:16-cr-00057-JD-MGG-1 — **Jon E. DeGuilio**, *Judge*.

SUBMITTED MARCH 31, 2020* — DECIDED JUNE 1, 2020

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* This court granted the parties' joint motion to waive oral argument. The case is therefore submitted on the briefs.

No. 19-1768

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MATTHEW R. JONES,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois, Urbana Division.
No. 2:18-cr-20036-HAB-EIL-1 — **Harold A. Baker**, *Judge*.

No. 19-2049

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CAMERON BATTISTE,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:17-cr-00220-2 — **Matthew F. Kennelly**, *Judge*.

ARGUED MARCH 31, 2020 — DECIDED JUNE 1, 2020

Before WOOD, *Chief Judge*, and KANNE and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. In separate cases, juries found appellants Carlos Maez, Matthew Jones, and Cameron Battiste guilty of violating 18 U.S.C. § 922(g), which prohibits convicted felons and several other classes of people from possessing firearms or ammunition. In their appeals, the three defendants raise overlapping issues relying on *Rehaif v. United States*, 139 S. Ct. 2191 (2019), to challenge their convictions in trials held before *Rehaif* was decided. Before *Rehaif*, the federal courts of appeals had all held that § 922(g) required the government to prove a defendant knowingly possessed a firearm or ammunition, but not that the defendant knew he or she belonged to one of the prohibited classes. *United States v. Williams*, 946 F.3d 968, 970 (7th Cir. 2020). In *Rehaif*, the Supreme Court reached a different conclusion, holding that the statute requires the government to "show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. at 2194.

Courts across the nation are grappling with how *Rehaif* affects cases pending on direct appeal when it came down. This court has already affirmed several pre-*Rehaif* convictions based on guilty pleas, but this is our first precedential decision concerning convictions upon jury verdicts. See *United States v. Ballard*, 950 F.3d 434, 436 n.1 (7th Cir. 2020); *United States v. Dowthard*, 948 F.3d 814, 818 (7th Cir. 2020); *Williams*, 946 F.3d at 975. The three appellants assert types of error that we have not yet addressed in light of *Rehaif*: a missing element in their indictments and jury instructions and—in Jones's case—a denied motion for a judgment of acquittal. Applying plain-error review, we conclude that the asserted errors do not require reversing any of the convictions. We vacate Jones's sentence, however. As the government acknowledges, the district court made what is known as a *Tapia* error, imposing a longer

prison term for purposes of rehabilitation through prison programs. See *Tapia v. United States*, 564 U.S. 319, 334 (2011).

I. *Factual and Procedural Background*

Carlos Maez robbed a bank at gunpoint in South Bend, Indiana, on October 16, 2015. Police found firearms and ammunition in Matthew Jones's bedroom when executing a search warrant for his home in Kankakee, Illinois, on July 15, 2018. And when federal agents arrested Cameron Battiste and his girlfriend outside their apartment complex in Willowbrook, Illinois, on April 7, 2017, his girlfriend was carrying a laundry bag that contained two firearms. Each defendant stipulated at his trial that prior to the charged possession of a firearm, he had been convicted of a crime punishable by imprisonment for a term exceeding one year. Juries found each defendant guilty on one count of violating 18 U.S.C. § 922(g)(1), and each was sentenced under § 924(a)(2).[1]

On appeal, the defendants argue that *Rehaif v. United States*, 139 S. Ct. 2191, requires reversal of their § 922(g) convictions. All three defendants argue that their indictments were defective because they failed to allege that they knew of their felon status. All three argue that the jury instructions erroneously omitted this same element of knowledge. None of the defendants objected to the indictment or jury instructions in the district courts, on any grounds. Jones did, however, move for a judgment of acquittal at the close of evidence. See Fed. R. Crim. P. 29(a). He gave no specific grounds to support his oral motion, and the district court denied it without asking

[1] Maez was also convicted of one count of armed bank robbery and one count of using or carrying a firearm in relation to a crime of violence. See 18 U.S.C. §§ 2113(d), 924(c). He does not challenge those convictions.

for elaboration. Jones argues that this denial was also a *Rehaif* error because the trial evidence was insufficient to show that he knew he was a felon.[2]

II. *Legal Framework*

We first address the common legal issues raised by these jury verdicts before *Rehaif* was decided. Current law governs our review on direct appeal, including any issues reviewed for plain error. See *Henderson v. United States*, 568 U.S. 266, 276–77 (2013). This principle applies with full force where an intervening decision has effectively added an element to a crime. See *Johnson v. United States*, 520 U.S. 461, 467–68 (1997) (giving retroactive effect to *United States v. Gaudin*, 515 U.S. 506 (1995), which required the jury to find materiality in perjury prosecutions); *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996) (same). Several questions arise concerning our review of jury verdicts rendered before *Rehaif* was issued.

A. *Scope of Knowledge Required by Rehaif*

Jones and Battiste raise a threshold question concerning the scope of the Supreme Court's holding in *Rehaif*. The Court held 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. Does this language require only that defendants know *their status*—in these cases, having a felony conviction? Or, construing the decision more

[2] Battiste moved for a judgment of acquittal in the district court as well, but his written motion specifically targeted the government's case that he possessed the firearms. On appeal, he does not challenge the denial of that motion.

broadly, must defendants know *that it was a crime to possess a firearm* as a result of their prohibited status? Jones and Battiste press the broader interpretation. In effect, they argue that § 922(g), as interpreted in *Rehaif*, prohibits only criminally *willful* possession of firearms and ammunition—possession with knowledge that the law makes the possession a crime. See *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) ("As a general matter, when used in the criminal context, … in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'"), quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994).

We do not read *Rehaif* as imposing a willfulness requirement on § 922(g) prosecutions. First, the difference between requiring knowledge of status and knowledge of the criminal prohibition is so important in the practical workings of federal courts that the Supreme Court would not have adopted the broader reading without saying so with unmistakable clarity. More fundamental, the logic of the Court's opinion supports only the narrower requirement of knowledge of status. The textual analysis centered on Congress's use of the word "knowingly" in § 924(a)(2), which spells out the punishment for violations of § 922(g). 139 S. Ct. at 2195. This fact alone casts serious doubt on Jones and Battiste's reading because, in criminal law, "knowing" connotes a lower level of scienter than does "willful." In *Bryan*, the Court collected cases holding that defendants could be convicted of "knowing" crimes without proof that they knew their deliberate actions violated the law. 524 U.S. at 192–93. *Rehaif* fits easily into that line of cases interpreting "knowing" requirements.

Rehaif changed governing law in holding that "knowingly" in § 924(a)(2) applies not only to the "possession element" of § 922(g) but also to its "status element." 139 S. Ct. at 2195–96. In other words, both elements require the same knowledge, an awareness of the fact. See Model Penal Code § 2.02(2)(b)(i) (Am. Law Inst. 1985). Before *Rehaif*, we consistently held that the government needed to prove that § 922(g) defendants knew only that they possessed firearms or ammunition, not that they knew their status or that their possession was unlawful. See, e.g., *United States v. Stein*, 712 F.3d 1038, 1041 (7th Cir. 2013) ("[T]he word 'knowingly' made applicable to § 922(g) by § 924(a)(2) requires knowledge of the factual elements of the offense and nothing more."); *United States v. Wilson*, 159 F.3d 280, 289 (7th Cir. 1998) ("[T]he fact that [the defendant] did not know about the statute does not mean that he could not have committed a 'knowing' violation of it."). *Rehaif* did not overturn such holdings with respect to the possession element; it applied the same knowledge requirement to the status element.

Next, *Rehaif*'s discussion of "the well-known maxim that 'ignorance of the law' (or a 'mistake of law') is no excuse" makes doubly clear that § 922(g) requires knowledge only of status, not knowledge of the § 922(g) prohibition itself. As the Court explained, the maxim means that a defendant normally cannot argue that he was "unaware of the existence of a statute proscribing his conduct." 139 S. Ct. at 2198, quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.1(a), at 575 (1986). But ignorance as to a "collateral matter," even if that matter happens to be a legal fact, can "negat[e] an element of the offense." *Id.* The Court concluded that a "defendant's status" under one of the provisions of § 922(g) is a "'collateral' question of law," so the "ignorance"

maxim does not apply. *Id.* The fact that § 922(g)(1) exists and prohibits certain conduct is not collateral, though. It is the prohibition itself. Because § 924(a)(2) does not require willfulness, ignorance of the statutory prohibition itself is not a defense.[3]

B. *Standards of Review*

We next identify the standard of review for each type of error argued in these three appeals: a defective indictment, an element omitted from jury instructions, and a denied Rule 29 motion. Although it is tempting to lump these *Rehaif* errors together, each has distinctive features we must consider.

1. *Incomplete Jury Instructions*

None of these defendants asked to have the jury instructed that the government was required to prove that, at the time he possessed the firearm, he knew that he had previously been convicted of a felony. Failing to raise an objection to the jury instructions before deliberations start "precludes appellate review, except as permitted under Rule 52(b)." Fed. R. Crim. P. 30(d). Rule 52(b) in turn allows for "plain-error" review: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." We review for plain error even if the objection would

[3] The dissenting Justices in *Rehaif* also read the majority opinion this way. According to the dissent, no one, including Rehaif, argued for willfulness because "the pointed use of the term 'knowingly,' as opposed to 'willfully,' in § 922(g), provides a ground to infer that Congress did not mean to require knowledge of illegality." 139 S. Ct. at 2205 (Alito, J., dissenting). Instead, the majority "require[d] knowledge of both the conduct and status elements of the offense." *Id.* The majority did not object to this description of its holding.

have lacked merit at the time of trial, before an intervening change in the law. See *Johnson*, 520 U.S. at 464–66 (applying plain-error review to jury instructions rendered incomplete by a decision issued after conviction).

Plain-error review under Rule 52(b) has four elements: "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 466–67, quoting *Olano v. United States*, 507 U.S. 725, 732 (1993); see also *United States v. Caira*, 737 F.3d 455, 462–63 (7th Cir. 2013) (applying *Olano* test to forfeited objections to jury instructions).

2. *Defective Indictments*

None of these defendants objected to any defect in his indictment before trial, as required by Rule 12(b)(3)(B)(v). In Jones and Battiste's cases, the government argues that these failures waived any challenge to their indictments on appeal. As we recently made clear in *United States v. Muresanu*, indictment defects are never jurisdictional so they may be waived if not properly presented. 951 F.3d 833, 837–39 (7th Cir. 2020), citing *United States v. Cotton*, 535 U.S. 625, 631 (2002). The defendants here invoke Rule 12(c)(3), which allows a district court to consider untimely challenges to an indictment "if the party shows good cause." We have interpreted this provision to permit new arguments on appeal as well, provided that "the district court would have abused its discretion if it had concluded that [the defendant] lacked good cause." *United States v. Thomas*, 897 F.3d 807, 815 (7th Cir. 2018); see also

United States v. Lockett, 859 F.3d 425, 428 (7th Cir. 2017) (same).[4]

An intervening legal decision that overturns settled law amounts to good cause for this purpose. The government has conceded as much in Maez's appeal. In *Thomas*, we explained that the Supreme Court's intervening decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), was *not* good cause for failing to move to suppress evidence because it resolved a circuit split on a "high-profile issue," so the defendant should have presented his argument to the district court. 897 F.3d at 815. In contrast, *Rehaif* went counter to the settled views of every federal court of appeals on an issue affecting thousands of felon-in-possession prosecutions every year. See 139 S. Ct. at 2210 (Alito, J., dissenting). If *Rehaif* had come down while these cases remained in the district courts, it would have been an abuse of discretion for a judge to refuse to consider an untimely challenge to the indictment based on *Rehaif*.

Although the intervening decision in *Rehaif* establishes good cause to avoid waiver, the issue was still not preserved in these cases, so we again review the indictments for plain error. See *United States v. Grayson Enterprises, Inc.*, 950 F.3d 386, 403 (7th Cir. 2020) (showing of good cause under Rule 12(c)(3) gives rise to plain-error review). An alleged indictment error is "plain," satisfying the first two prongs of the *Olano* test, only if the indictment "is so obviously defective as not to charge the offense by any reasonable construction."

[4] The situation is different for a defendant who pleads guilty and waives "any argument that could have been raised in a pretrial motion." *United States v. Wheeler*, 857 F.3d 742, 744 (7th Cir. 2017). The good-cause proviso thus will usually help only defendants who went to trial.

United States v. Frank Smith, 223 F.3d 554, 571 (7th Cir. 2000); see also *Grayson Enterprises*, 950 F.3d at 402 (same).[5]

One of the defendants' principal arguments on appeal is that the omission of an element from the indictment is a "structural error" that, they argue, always requires reversal. As an initial matter, a finding of structural error would definitively resolve only the third prong of the *Olano* plain-error test, the effect on substantial rights. The Supreme Court has "noted the possibility that certain errors, termed 'structural errors,' might 'affec[t] substantial rights' regardless of their actual impact on an appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263 (2010); see also *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) ("structural defects in the constitution of the trial mechanism … defy analysis by 'harmless-error' standards"). The Court has repeatedly assumed without deciding that such structural errors "automatically satisfy the *third prong* of the plain-error test." *Puckett v. United States*, 556 U.S. 129, 140 (2009) (emphasis added); see also *Cotton*, 535 U.S. at 632; *Johnson*, 520 U.S. at 468–69; *Olano*, 507 U.S. at 735. We have done the same. See *United States v. Anderson*, 881 F.3d 568, 573 (7th Cir. 2018) ("[T]here is a question as to whether the third prong of the plain error test is met automatically in cases of structural error."); see also *United States v. Gary*, 954 F.3d 194, 205 (4th Cir. 2020) ("[I]f an error is determined to be structural, the third prong of *Olano* is satisfied."). Even structural errors remain subject to the fourth and discretionary prong of the plain-error test.

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[5] We cite two different cases where the defendant's last name was Smith, so we have included first names in the relevant citations.

Still, a structural error would go a long way toward reversal of these convictions, so we address the argument. "'[S]tructural errors' are 'a very limited class' of errors that affect the 'framework within which the trial proceeds.'" *Marcus*, 560 U.S. at 263, quoting *Johnson*, 520 U.S. at 468. The Supreme Court has identified, in total, about a dozen forms of structural error, depending on how one counts. See 7 Wayne R. LaFave et al., Criminal Procedure § 27.6(d) (4th ed. 2019). Signal examples include the total deprivation of counsel, the lack of an impartial trial judge, a violation of the right to a public trial, and an erroneous reasonable-doubt instruction. *Marcus*, 560 U.S. at 263. That is not to say that previously unrecognized forms of structural error cannot be newly identified. In *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), the Court listed three different qualities that can render an error structural: (1) "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest;" (2) "the effects of the error are simply too hard to measure;" or (3) "the error always results in fundamental unfairness." *Id.* at 1908. The defendants here argue that "an indictment that omits an essential element" satisfies the second and third criteria.

In *Cotton*, the Supreme Court expressly reserved the question whether indictment errors are structural. See 535 U.S. at 632–33. Binding precedent in this circuit holds that they are not. In *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000), we reviewed a drug conviction after the Supreme Court decided *Apprendi v. New Jersey*, which required "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" to be charged in an indictment and proved to a jury. 530 U.S. 466, 490 (2000). Reviewing for plain error in *Nance*,

we agreed with the defendant that his indictment was defective in light of *Apprendi*. 236 F.3d at 825. We then asked whether this was "a structural error so fundamental that it cannot be left unremedied," the same argument defendants make here. We concluded the error was not structural because an incomplete indictment was analogous to an error in the jury instructions. *Id*. We have also held in numerous cases that prejudice is required to reverse based on a *preserved* challenge to the indictment. See, e.g., *United States v. Vaughn*, 722 F.3d 918, 925 (7th Cir. 2013); *United States v. Dooley*, 578 F.3d 582, 590 (7th Cir. 2009); *United States v. Webster*, 125 F.3d 1024, 1029 (7th Cir. 1997). By definition, though, a structural error does not require a showing of prejudice. See *Fulminante*, 499 U.S. at 309. The defendants do not attempt to distinguish these cases.

In effect, the defendants tacitly ask us to overrule multiple prior decisions based on the criteria identified in *Weaver*, 137 S. Ct. at 1908. We decline to do so. First, the defendants mount no argument that the grand jury right "is not designed to protect the defendant," and we can imagine none. Second, the effect of an indictment error is not "too hard to measure." The potential effect depends on context, of course, but often turns on whether there is doubt that the defendant was put on notice of the nature of the charges. See, e.g., *Dooley*, 578 F.3d at 590 ("It is clear from the record that Mr. Dooley and his counsel understood the Government's allegations and were able to mount a vigorous, albeit unsuccessful, defense at trial."). Third, not every indictment error "results in fundamental unfairness." Some may, but others raise no serious questions about the integrity of the criminal process. See *Russell v. United States*, 369 U.S. 749, 763 (1962) (praising the "salutary development in the criminal law" that "[c]onvictions are no longer reversed because of minor and technical deficiencies

[in the indictment] which did not prejudice the accused"). Defendants who have suffered an effect on their substantial rights because of indictment error can still obtain relief under existing law.

3. *Denied Rule 29 Motion*

Jones moved for judgment of acquittal under Rule 29 in the district court. His motion was general. He asserted only that "the Government has not presented sufficient evidence to prove their case beyond a reasonable doubt." Without asking Jones to elaborate, the district court denied the motion, which was clearly the correct decision under then-governing circuit precedent.

This short exchange preserved all possible challenges to the sufficiency of the evidence, including the post-*Rehaif* argument that the government failed to prove that Jones knew his felony status. A motion under Rule 29 that makes specific arguments waives issues not presented, but a general motion preserves every objection. "Although a motion for judgment of acquittal need not spell out the particular basis for the challenge to the sufficiency of the evidence, when such a motion raises specific arguments, any claims not presented in the motion are waived." *United States v. Jones*, 763 F.3d 777, 811–12 (7th Cir. 2014), vacated on other grounds in *United States v. Drake*, 774 F.3d 1104 (7th Cir. 2014), quoting *United States v. Moore*, 363 F.3d 631, 637 (7th Cir. 2004); see also *United States v. Hammoude*, 51 F.3d 288, 291 (D.C. Cir. 1995) ("Hammoude's second motion for acquittal was broadly stated, without specific grounds, and was therefore sufficient to preserve the full range of challenges, whether stated or unstated, to the sufficiency of the evidence."). Cf. *United States v. Huntsberry*, 956 F.3d 270, 282–83 (5th Cir. 2020) (reviewing for plain error a

denied Rule 29 motion after *Rehaif* where original motion argued for acquittal on a different basis).[6]

We therefore apply de novo review to Jones's preserved challenge to the sufficiency of the evidence in light of *Rehaif*. We ask "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hernandez*, 952 F.3d 856, 859 (7th Cir. 2020).

C. *Record for Plain-Error Review*

A final question raised by these appeals from jury verdicts is the scope of the record we review for plain error. Must errors in the jury instructions and indictments be evaluated solely against the trial record of evidence heard by the jury, or may we also consider information revealed at sentencing? The answer has important consequences for pending appeals after *Rehaif*. Nearly all felon-in-possession defendants who go to trial, including all three defendants here, stipulate to the fact of a prior conviction. Pursuant to *Old Chief v. United States*, 519 U.S. 172 (1997), that stipulation has barred the government from offering more detailed evidence of their criminal

[6] This rule follows from the fact that parties to a criminal case—unlike civil parties—have no general obligation to support these motions with specific reasons. See Fed. R. Crim. P. 47 advisory committee's note to 1944 adoption ("This rule is substantially the same as the corresponding civil rule, except that it authorizes the court to permit motions to be made orally and does not require that the grounds upon which a motion is made shall be stated 'with particularity,' as is the case with the civil rule." (citation omitted)); see also Peter J. Henning & Sarah N. Welling, 2A Federal Practice and Procedure: Criminal § 466 (4th ed. 2019) ("Specificity is not required by Rule 29 or by Rule 47.").

histories. (In the wake of *Rehaif*, defendants and the government have begun agreeing to modified *Old Chief* stipulations that also include knowledge of felon status. See, e.g., *United States v. Price*, No. 1:18-cr-00348-JMS-MPB-1, 2020 WL 2113410, at *3 (S.D. Ind. May 4, 2020); *United States v. Garcia*, No. 16-cr-00109-1, 2020 WL 1663127, at *8 (N.D. Ill. Apr. 3, 2020).) But trial records in cases tried before *Rehaif* was issued are likely to disclose little regarding defendants' knowledge of felon status, due in part to the *Old Chief* bar. The appropriate record on plain-error review is important, and the courts of appeals have taken different approaches to this issue after *Rehaif*.

As an initial matter, it is well established that, to review alleged errors in *guilty plea proceedings*, appellate courts consider the entire record, not just the transcript of the plea hearing: "in assessing the effect of Rule 11 error, a reviewing court must look to the entire record, not to the plea proceedings alone." *United States v. Dominguez Benitez*, 542 U.S. 74, 80 (2004), citing *United States v. Vonn*, 535 U.S. 55, 74–75 (2002). We have applied this approach to *Rehaif* claims. E.g., *United States v. Williams*, 946 F.3d 968, 974 (7th Cir. 2020) (consulting entire district court record to assess effect of *Rehaif* error in plea colloquy). But *Vonn* relied on an advisory committee note to Rule 11 for this holding. See 535 U.S. at 74. The same logic does not apply to trial errors. To win reversal of a guilty plea on plain-error review, a defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83. This "cost-benefit analysis" of the defendant's options, *United States v. Coleman*, 806 F.3d 941, 945 (7th Cir. 2015), would be impossible based on a plea-hearing transcript alone.

The circuits have taken different approaches to the record for plain-error review of *jury verdicts* in light of *Rehaif*. Four circuits have freely consulted materials not before the jury—in particular, criminal histories from defendants' presentence investigation reports (PSRs)—without discussing the propriety of thus expanding the record. See *United States v. Ward*, 957 F.3d 691, 695 & n.1 (6th Cir. 2020) (citing *Vonn* for authority to consult non-jury evidence without addressing *Vonn*'s limitation to plea context); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019) (same); see also *United States v. Hollingshed*, 940 F.3d 410, 415–16 (8th Cir. 2019) (assuming without analysis that consulting non-jury evidence is permissible); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019) (same).

The Second Circuit took a more cautious approach in *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020). Like the defendants here, the defendant in *Miller* was convicted by a jury of violating § 922(g)(1) after stipulating under *Old Chief* to the fact of a prior felony conviction. See *id.* at 556, 559 & n.23. At the third prong of the plain-error test—the effect on substantial rights—*Miller* expressly limited itself "to the evidence actually presented to the jury." *Id.* at 558 & n.17, citing *Neder v. United States*, 527 U.S. 1, 19 (1999). It concluded that, on such a limited record, "the substantial-rights analysis" was "a difficult one," and declined to resolve it. *Id.* at 559. The court proceeded to the fourth prong. Citing the constraints that *Old Chief* had imposed on the government at trial, the Second Circuit concluded that "in the limited context of [its] fourth-prong analysis," it would "consider reliable evidence in the record on appeal that was not a part of the trial record," namely the PSR. *Id.* at 560.

The Fifth Circuit acknowledged this issue but declined to take a side in *Huntsberry*, 956 F.3d 270. The defendant in *Huntsberry* also had stipulated to a prior conviction under *Old Chief*. *Id.* at 285 n.8. The Fifth Circuit noted that any use of sentencing evidence "may be in tension with our precedent that 'we review for plain error based on *the record before the district court*.'" *Id.* at 284, quoting *United States v. Ceron*, 775 F.3d 222, 226 (5th Cir. 2014). It concluded, however, that it could avoid the question through judicial notice of "the facts of Huntsberry's prior felony conviction," based not on the PSR but rather on the original "state court record of conviction," as submitted on appeal. *Id.* at 284–85. In the appeals before us, the government provided state court records for potential judicial notice only in Jones's case, so we cannot avoid the record issue.

We think the Second Circuit's distinction between the third and fourth prongs of the *Olano* plain-error test hews most closely to the governing precedents and best fits the problem posed by *Rehaif* claims. The third prong "calls for the same inquiry as 'harmless error' analysis, except that here the defendant bears the burden of persuasion with respect to prejudice." *Ross*, 77 F.3d at 1540, citing *Olano*, 507 U.S. at 734–35; see also *United States v. Turner*, 651 F.3d 743, 748 (7th Cir. 2011) ("The third prong of the plain error test—whether the error affected the defendant's substantial rights—calls for essentially the same inquiry as harmless error analysis."). The Supreme Court has made clear that harmless-error analysis looks only to the trial record to measure the effect of trial error. See *Neder*, 527 U.S. at 19 (in assessing "whether the jury verdict would have been the same absent the error … a court, in typical appellate-court fashion, asks whether the record

contains evidence that could rationally lead to a contrary finding with respect to the omitted element"); *Fulminante*, 499 U.S. at 307–08 ("error which occurred during the presentation of the case to the jury … may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt").

This restriction to the jury record flows logically from the nature of a substantial-rights inquiry on direct review. The more abstract question of the defendant's actual guilt or innocence is not the issue. Rather, the appellate court asks what effect the error could have had on the verdict in the trial actually conducted. The Supreme Court explained in *Sullivan v. Louisiana* that the Sixth Amendment mandates this approach:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

508 U.S. 275, 279 (1993); see also *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."). A defendant "need not establish that in a trial without the error, a reasonable jury *would have acquitted* him; he must demonstrate that the jury verdict

in this case *was actually affected* by the district court's [error]." *Ross*, 77 F.3d at 1540 (emphasis added). An effect on the verdict can of course be measured only against what the jury saw, hence the restricted record for the substantial-rights analysis.

Putting these pieces together, because the substantial-rights assessment is the same under either Rule 52(a) or Rule 52(b), both harmless-error analysis and the third prong of the plain-error test look to the trial record when a defendant has exercised his right to a trial. Our prior cases concerning both instructional and indictment errors have respected this limit. See, e.g., *United States v. Groce*, 891 F.3d 260, 269–70 (7th Cir. 2018) (on plain-error review, upholding verdict despite error in jury instructions based on "overwhelming evidence" presented to the jury); *United States v. Daniels*, 803 F.3d 335, 340–41 (7th Cir. 2015) ("[A]n error involving [indictment] misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'"), quoting *United States v. Lane*, 474 U.S. 438, 449 (1986); *United States v. Peters*, 435 F.3d 746, 754 (7th Cir. 2006) (reviewing jury instructions for plain error "in light of the facts of the case and the evidence presented").

But the Supreme Court drew a clear line in *Olano* between the first three prongs of the plain-error test and the fourth, even devoting a separate section of the opinion to the fourth prong. 507 U.S. at 732–37. The Court described the first three prongs as "limitation[s] on appellate authority." *Id.* at 732–34. They determine whether, under Rule 52(b), a "plain error" that an appellate court may correct occurred at all. Even if the

first three prongs are satisfied, though, the appellate court retains discretion to leave an error uncorrected: "Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the court of appeals has authority to order correction, but is not required to do so." *Id.* at 735. In later rulings, the Court has continued to emphasize the discretionary nature of prong four. See *Puckett*, 556 U.S. at 135 ("if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error"); *Johnson*, 520 U.S. at 467 (same); see also *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007) ("Having determined that the elements of plain error are satisfied, we turn to our final inquiry, whether, in the exercise of discretion, we should correct the error.").

A court should exercise its discretion at the fourth prong only if "the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 736 (alteration in original), quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936). We explained the difference between "substantial rights," on the one hand, and "fairness, integrity or public reputation," on the other, in *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005). Crucially, only the latter has been compared to a "miscarriage of justice," or in other words, "a substantial risk of convicting an innocent person." *Id.* at 481, citing among others *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982). To be sure, an error need not "shock the conscience" to satisfy prong four, and defendants can sometimes show an effect on fairness or integrity without a claim of innocence. See *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018). Still, though a defendant's likelihood of actual guilt or innocence does not necessarily control the third prong of plain-error review, it may play a role at prong four: "the first element merely requires prejudice, in the sense that the

verdict might have been different, whereas the second requires confidence that if the error is not corrected the result will be intolerable, such as the conviction of an innocent person or subjecting a guilty person to an illegally long sentence." *Paladino*, 401 F.3d at 481.[7]

In sum, we have broad discretion under prong four to leave even plain errors uncorrected where we have no doubt as to the ultimate result of further proceedings. We agree with the Second Circuit that this discretion necessarily implies some power to look beyond the trial record to assess an error's effect, at least for the errors argued here, where the governing law at the time of their trials (*Old Chief*) prevented the government from offering a great deal of circumstantial evidence showing that these defendants knew they had been convicted of several felonies. See *Miller*, 954 F.3d at 559–60. Our decisions in the wake of *Apprendi*, 530 U.S. 466, adopted this approach. After *Apprendi*, we reviewed for plain error many sentences that had been enhanced based on drug quantities found by a judge, which was no longer permissible. We often affirmed in reliance on overwhelming drug quantity evidence *presented at sentencing*, and we cited the discretionary fourth prong as the basis for affirmance. See, e.g., *United States v. Martinez*, 258 F.3d 582, 586–87 (7th Cir. 2001); *United States v.*

[7] The likelihood of a defendant's actual guilt is also often relevant on collateral review, which proceeds under distinct legal standards we have no need to address here. See *Olano*, 507 U.S. at 736 ("In our collateral-review jurisprudence, the term 'miscarriage of justice' means that the defendant is actually innocent."); Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970) (arguing that "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence").

Patterson, 241 F.3d 912, 913–14 (7th Cir. 2001); *Nance*, 236 F.3d at 826.

In these appeals, we confine our inquiry to the trial records and a narrow category of highly reliable information outside the trial records: the defendants' prior offenses and sentences served in prison, as reflected in undisputed portions of their PSRs. Considering these at prong four does not adversely affect the fairness, integrity, or public reputation of judicial proceedings. First, the defendants had every incentive to challenge at sentencing any incorrect PSR information about prior felonies given its impact on Sentencing Guidelines calculations and factors under 18 U.S.C. § 3553(a). Second, the trial records were left bare of such information largely because *Old Chief* stipulations barred the government from offering it. Finally, the Supreme Court has long recognized that "the fact of a prior conviction" does not raise the same Sixth Amendment concerns as other facts. See *Apprendi*, 530 U.S. at 490, interpreting *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Few accused defendants wish to put their full felony records on display before a jury. We therefore conclude that we may consider prior criminal convictions as reflected in PSRs in exercising our discretion under prong four of the plain-error test.

III. *Application to These Appeals*

We now apply the principles explained above to each of these three appeals. We conclude that the argued *Rehaif* errors do not require reversal of any of the § 922(g) convictions.

A. *Carlos Maez*

Maez argues that his jury instructions and indictment both omitted the element of knowledge of felon status, constituting plain error under *Rehaif*. We start with the jury instructions.

1. *Jury Instructions*

The jury instructions at Maez's trial said in relevant part that the government had to prove the following facts beyond a reasonable doubt: "1. The defendant knowingly possessed a firearm; and 2. At the time of the charged act, the defendant had previously been convicted of a felony, meaning a crime punishable by more than a year of imprisonment." This instruction tracked circuit precedent and the pattern jury instructions in use at the time, but the government concedes that the instruction was incomplete and that the error was plain in light of *Rehaif*. We agree with the parties that prongs one and two of the *Olano* plain-error test are met here because the instruction's second element did not include defendant's knowledge of his status as a felon.

The evidence from Maez's trial, however, prevents him from satisfying *Olano*'s third prong, an effect on his substantial rights. To decide whether "an instruction that omitted an element of the crime" affected substantial rights, the reviewing court asks whether "it appeared 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *United States v. Caira*, 737 F.3d 455, 464 (7th Cir. 2013), quoting *Neder v. United States*, 527 U.S. 1, 15 (1999). If "overwhelming evidence" before the jury proved the omitted element, we can usually conclude that the error did not contribute to the verdict. See, e.g., *United States v. Groce*, 891 F.3d 260, 269 (7th Cir. 2018); *United States v. Matthews*, 505 F.3d 698, 706 (7th Cir. 2007).

Here, the jury heard several pieces of undisputed evidence that strongly support an inference that Maez knew he was a felon. First, Maez stipulated under *Old Chief* that at the time of the offense, he had "previously been convicted of a felony

crime punishable by more than a year of imprisonment." A jury could reasonably think that a felony conviction is a life experience unlikely to be forgotten. Second, Maez's daughter testified at trial that she had no relationship with Maez until she was eighteen because he had been "incarcerated [her] whole life." Finally, Maez's parole officer testified that he supervised Maez after his release from prison and that Maez was on parole at the time of the bank robbery. In the absence of any contradictory evidence, these facts provided powerful circumstantial evidence that Maez knew he had been convicted of at least one prior felony.

Even if Maez could show prejudice at prong three, we would decline to exercise our discretion to correct any error under prong four of the *Olano* test. Undisputed portions of the PSR provide even more circumstantial evidence of Maez's knowledge. Maez, now in his early forties, has spent most of his adult life in prison. He was convicted of his first two felonies when he was seventeen and sentenced to three years in prison. After being released in 1999, he was convicted of another felony five months later and sentenced to twelve years in prison. He was paroled for about a month in 2010 before he committed two more felonies and was sentenced to eight years in prison. We are thus confident that Maez knew he was a felon. Remand would not produce a different result. Affirmance in this instance protects rather than harms "the fairness, integrity or public reputation of judicial proceedings." As in *Johnson v. United States*, 520 U.S. 461, 470 (1997), "it would be the reversal of a conviction such as this which would have that effect."

2. *Indictment*

An alleged flaw in the indictment is a plain error only when the indictment fails as a result "to charge the offense by any reasonable construction." *United States v. Frank Smith*, 223 F.3d 554, 571 (7th Cir. 2000); see also *Grayson Enterprises*, 950 F.3d at 402. Maez's indictment read: "CARLOS MAEZ, defendant herein, did knowingly possess a firearm, after having been convicted of a crime punishable by more than a year of imprisonment, that had travelled through interstate or foreign commerce." This language closely tracked the statutes and has a reasonable construction that charges every element of a § 922(g) offense, even after *Rehaif*. The mens rea term "knowingly" came at the start of a series. A grammatically correct and natural reading of the text applies "knowingly" to each of the subsequent clauses. In fact, the *Rehaif* Court read § 922(g) and § 924(a)(2) in precisely this manner to require knowledge of prohibited status in the first place. See 139 S. Ct. at 2196 ("As a matter of ordinary English grammar, we normally read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime." (citation omitted)). That is not the only possible construction of the indictment, but it is at least a reasonable one.

Indictments that track the statutory language so closely are usually sufficient. See *United States v. Craig Smith*, 230 F.3d 300, 305 (7th Cir. 2000) ("[I]t is generally acceptable for the indictment to 'track' the words of the statute itself, so long as those words expressly set forth all the elements necessary to constitute the offense intended to be punished."); see also *United States v. White*, 610 F.3d 956, 958–59 (7th Cir. 2010) (same). In fact, in *Frank Smith*, we held that an indictment that omitted the mens rea term—"knowingly and intentionally"—

still had a reasonable construction that charged the offense because it tracked the rest of the statutory language. 223 F.3d at 571–72, discussing 21 U.S.C. § 861(a). Maez's indictment did not contain a plain error.

B. *Cameron Battiste*

Battiste, too, challenges his jury instructions and indictment. We affirm Battiste's conviction with a few variations on our reasoning in Maez's case.

1. *Jury Instructions*

As in Maez's case, the government concedes that the jury instructions omitted knowledge of status, constituting an "error" that is "plain." The third prong of the plain-error test then asks whether Battiste's substantial rights were affected based on the trial record. His trial focused on the knowing-possession element, which was sharply disputed. The jury also heard some evidence relating to his status as a felon. Like Maez, he stipulated under *Old Chief* to a prior conviction. The jury also heard that Battiste attempted to flee from arresting agents. He then started gesturing toward men back in his apartment complex, apparently seeking to draw their attention to a bag of firearms lying on the lawn that the agents had not yet noticed. This testimony was at least probative of the fact that Battiste knew he had a prohibited status when he possessed the firearms. Still, the trial evidence was not overwhelming on the new *Rehaif* element of knowledge of status as a felon. Cf. *United States v. Miller*, 954 F.3d 551, 559 (2d Cir. 2020) (declining to resolve "difficult" substantial-rights analysis on plain-error review after *Rehaif*).

Even if we assume Battiste could satisfy the third prong of plain-error review, we decline to exercise our discretion to

correct this error under the fourth prong because there is no risk of a "miscarriage of justice" in Battiste's case. See *United States v. Paladino*, 401 F.3d 471, 481 (7th Cir. 2005). Battiste's PSR, to which he lodged no objection, shows that he had at least four prior felony convictions. He served a year or more in prison on three of those convictions. In fact, Battiste had once been charged under Illinois law on two counts of the crime at issue here, felon in possession of a firearm. There is no doubt that a jury permitted to hear such evidence would find Battiste knew his felon status. The plain error in the jury instructions did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 736.

2. *Indictment*

Battiste's indictment was phrased differently than Maez's, with the word "knowingly" placed later in the sentence. Battiste's indictment read: "CAMERON BATTISTE … having previously been convicted of a crime punishable by a term of imprisonment exceeding one year, did knowingly possess in and affecting interstate commerce a firearm … ." Here, "knowingly" came after the fact of the prior felony conviction, and a typical reader would not apply it to the earlier clause set off by commas. We are not sure it would be a "reasonable construction" to do so. *Frank Smith*, 223 F.3d at 571. We assume there was a plain error here.[8]

[8] The Second Circuit has held that similar indictment wording did not fail to *confer jurisdiction* on the district court since the language resembled what the Supreme Court was interpreting in *Rehaif*. See *United States v. Balde*, 943 F.3d 73, 89–90 (2d Cir. 2019). Unlike the Second Circuit, however, we do not recognize any indictment errors as jurisdictional, so *Balde* offers limited guidance. See *United States v. Muresanu*, 951 F.3d 833, 839

But even assuming a plain error in the indictment and even assuming an effect on Battiste's substantial rights, we still decline to exercise our discretion to correct the error. As with the missing element in the jury instructions, it is clear that the wording of the indictment did not undermine the fairness or integrity of judicial proceedings. Considering the evidence heard by the trial jury and Battiste's extensive prior criminal history laid out in detail in his PSR, "we can be confident in retrospect that the grand jury (which acts under a lower burden of persuasion) would have reached the same conclusion." *United States v. Patterson*, 241 F.3d 912, 914 (7th Cir. 2001). If we remanded, there is no chance the result would change.

C. *Matthew Jones*

Jones's appeal raises challenges to his jury instructions and indictment parallel to those of Maez and Battiste. Jones also appeals the denial of his motion for a judgment of acquittal at the close of evidence. He also challenges his sentence because the district court lengthened his prison term to allow more rehabilitation through prison programs.

1. *Rule 29 Motion*

We start with the denied Rule 29 motion for judgment of acquittal. As explained above, Jones preserved his challenge to the sufficiency of the evidence under *Rehaif* with a general motion. We thus review the district court's denial de novo: "we do not defer to the district judge's decision." *United States v. Garcia*, 919 F.3d 489, 496 (7th Cir. 2019). Nevertheless, the

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(7th Cir. 2020) ("[D]efects in an indictment do not deprive the court of subject-matter jurisdiction, and this is so even when the defect is a failure to state a federal offense.").

standard remains demanding for criminal defendants: "We 'consider the evidence in the light most favorable to the Government,' and will reverse 'only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.'" *United States v. Dewitt*, 943 F.3d 1092, 1096 (7th Cir. 2019), quoting *United States v. Blassingame*, 197 F.3d 271, 284 (7th Cir. 1999). This appeal turns on whether the evidence presented to the jury permits an inference beyond a reasonable doubt that Jones knew he had committed a felony. The government tried the case without knowing it needed to prove Jones had that knowledge, but we find that the evidence at trial did permit, but not require, such an inference.

The first piece of evidence was the *Old Chief* stipulation, which said: "Prior to July 15, 2018, the defendant, Matthew R. Jones, had been convicted of a felony crime that was punishable by a term of imprisonment of more than one year." A juror could apply her common sense and conclude that it was highly likely that Jones remembered having been convicted of a felony, a major life event. The other important evidence was Jones's behavior at the time of the search and arrest. An officer testified at trial that when Jones was first presented with the search warrant for his house, he denied having a key. He insisted it was his mother's house. But the officers found that the keys in Jones's hands opened not only the front door but also locked interior doors and a padlocked room that contained the firearms. Without any contradicting or impeaching evidence on these points, the combination of the *Old Chief* stipulation and the false denials about the house where Jones possessed firearms was sufficient to permit the required inference of knowledge of his status as a felon.

To be clear, we are not saying that an *Old Chief* stipulation, standing alone, would show *conclusively* that a *Rehaif* error in jury instructions did not affect substantial rights. See *United States v. Hollingshed*, 940 F.3d 410, 415 (8th Cir. 2019) (in plain-error review of *Rehaif* error in jury instructions, "we will assume that Hollingshed's stipulation does not resolve the issue of whether he knew he was a felon"); *United States v. Benamor*, 937 F.3d 1182, 1188–89 (9th Cir. 2019) (assuming "that the stipulation does not end the discussion as to Defendant's *knowledge* of his status as a felon," but finding plain-error test was not satisfied where PSR showed defendant had seven prior felony convictions).

We also do not have to go quite so far as to hold that an *Old Chief* stipulation standing alone is sufficient to infer, beyond a reasonable doubt, a defendant's knowledge of his status as a felon at the time of the charged possession of the firearm. Cf. *United States v. Ward*, 957 F.3d 691, 696 (6th Cir. 2020) (holding that stipulation alone is sufficient). We decide here that Jones's *Old Chief* stipulation, combined with the evidence of his evasive behavior at the time of the search, was sufficient to permit that inference of his knowledge. See generally *McFadden v. United States*, 135 S. Ct. 2298, 2304 n.1 (2015) (noting that for "most *mens rea* requirements, the Government can prove the requisite mental state through either direct evidence or circumstantial evidence," including "evasive behavior with respect to law enforcement"). Although § 922(g) requires that the government prove only knowledge of prohibited status, not knowledge of the prohibition itself, see above at 5–8, facts suggesting the defendant knew that he could not lawfully possess firearms point toward knowledge of his status.

We have said that a "judge facing a Rule 29 motion in a criminal case might benefit from first asking whether, if the evidence had been presented in a civil case, it would be sufficient to send the case to the jury," in other words, sufficient to defeat a motion for summary judgment. *Garcia*, 919 F.3d at 497–98. Jones's evasive behavior, combined with his stipulation to a prior felony conviction, would put the issue of his knowledge in the province of the jury even under *Rehaif*-compliant instructions. Denial of the Rule 29 motion was appropriate.[9]

2. *Jury Instructions and Indictment*

Jones's challenges to the jury instructions and indictment are indistinguishable from Battiste's. As to the jury instructions, we do not resolve whether the missing knowledge element affected Jones's substantial rights. The evidence at trial permitted a finding of guilt on the missing element, but it was not so overwhelming as to eliminate any possibility of an effect on the verdict. Instead, we decline to exercise our discretion under prong four of the plain-error test in light of our limited review of Jones's PSR. His criminal history includes multiple felony convictions, at least one of which led to his spending over one year in prison. He had even been convicted before of unlawful possession of a weapon by a felon under Illinois law and sentenced to four years in prison on that charge. We are confident that when he possessed the charged

[9] Because sufficient evidence supported the jury's verdict, we do not address the government's argument that Jones invited any error in the denial of his Rule 29 motion. We also do not address Jones's contention on appeal that his limited intellect rendered him unaware of his status because the jury heard no such evidence.

firearms in this case, he knew he had been convicted of a prior felony.

Like Battiste's indictment, Jones's indictment charged that he, "having been previously convicted in a court in the State of Illinois of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, firearms … ." As in Battiste's appeal, it might not be a "reasonable construction" of the indictment to apply the "knowingly" term to the preceding clause concerning the fact of a prior conviction. *Frank Smith*, 223 F.3d at 571. But as summarized above, Jones's PSR shows an extensive criminal history that leaves no doubt as to his knowledge of his status as a felon or as to the result of impaneling a second grand jury. We decline to exercise our discretion to correct any error in the indictment.

3. *Sentence*

Finally, Jones challenges his sentence, arguing that the district court committed a *Tapia* error. Sentencing courts are prohibited from imposing a term of incarceration for rehabilitative ends because "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). The Supreme Court held in *Tapia v. United States*, 564 U.S. 319, 334 (2011), that this statute "prevents a sentencing court from imposing or lengthening a prison term because the court thinks an offender will benefit from a prison treatment program."

Jones argues, and the government and we agree, that the judge's explanation for his sentence showed a *Tapia* error. See Sent. Tr. at 21, 29. When a term of imprisonment is improperly imposed for rehabilitative purposes, remand for resentencing

is the appropriate remedy. See *United States v. Kopp*, 922 F.3d 337, 343 (7th Cir. 2019).

Conclusion

The judgment of the district court in *United States v. Maez*, No. 19-1287, is AFFIRMED. The conviction in *United States v. Jones*, No. 19-1768, is AFFIRMED, but the sentence is VACATED and the case is remanded to the district court for resentencing. The judgment of the district court in *United States v. Battiste*, No. 19-2049, is AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MATTHEW R. JONES,

Defendant.

Docket No. 18-20036

Urbana, Illinois
December 18, 2018
9:01 a.m.

JURY TRIAL -- DAY 2 OF 2

BEFORE THE HONORABLE HAROLD A. BAKER
SENIOR UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

For the Plaintiff:

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Proceedings recorded by mechanical stenography; transcript produced by computer.

confirming with -- I believe all of our exhibits have been admitted. We have no more witnesses to present; so, at this time, the United States rests.

THE COURT: The government rests.

All right, jury may have a recess. Take the jury out, please.

(Brief pause in proceedings.)

(Jury absent, 9:55 a.m.)

THE COURT: Out of the presence and hearing of the jury, motions at the close of the government's case. Any?

MR. MALIZA: Yes, Your Honor. We move for a directed verdict of not guilty on grounds that the government's -- under Rule 29, as the Government has not presented sufficient evidence to prove their case beyond a reasonable doubt.

THE COURT: Well, aside from that conclusion, what are they missing? They've got at least a prima facie case, whether the jury believes it beyond a reasonable doubt, on the three issues of conviction of a felony possession and affecting interstate commerce. So the motion's denied. It's going to be up to the jury. It has to decide whether the proof is beyond a reasonable doubt.

Are you going to present any evidence for the

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

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Those are all choices that Matthew Jones made.

And our request to you, ladies and gentlemen, is simply to hold him accountable for those choices. We have proven beyond a reasonable doubt -- we have proven beyond all doubt, really -- that he possessed all three of those firearms, only one of which you must find he possessed. But he possessed all three. He admitted to all three.

Hold him accountable for those choices. Hold him accountable. Find him guilty as charged.

Thank you.

Thank you, Your Honor.

THE COURT: All right. Sam, pass out the instructions.

Ladies and gentlemen, I introduce you to Samuel Branham. He's one of the Court's staff attorneys. We call them law clerks. That's the ancient reference, "out of the judge's court."

He's going to read my instructions to you because my eyesight is failing, and I will miss words and he won't. And you each will have a set of instructions to follow along and read with him.

All right.

(Brief pause in proceedings.)

THE COURT: All right, ladies and gentlemen,

these are my instructions on the law applicable to this case.

You may proceed.

LAW CLERK BRANHAM: Members of the jury, I will now instruct you on the law that you must follow in deciding this case. I will also give you a copy of these instructions to use in the jury room.

You must follow all of my instructions about the law, even if you disagree with them. This includes the instructions I gave you before the trial, any instructions I gave you during the trial, and the instructions I am giving you now.

As jurors, you have two duties. Your first duty is to decide the facts from the evidence that you saw and heard here in court. This is your job, not my job or anyone else's job.

Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt.

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you. In addition, do not let any person's race, color, religion, national ancestry, or gender influence you.

You must not take anything I said or did during the trial as indicating that I have an opinion about the evidence or about what I think your verdict should be.

The charge against the defendant is in a document called an indictment. You will have a copy of the indictment during your deliberations. The indictment in this case charges that the defendant committed the crime of possession of a firearm by a felon. The defendant has pled not guilty to the charge.

The indictment is simply the formal way of telling the defendant what crime he is accused of committing. It is not evidence that the defendant is guilty. It does not even raise a suspicion of guilt.

That you can read.

The defendant is presumed innocent of the charge. This presumption continues throughout the case, including during your deliberations. It is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence. He is not required to produce any evidence at all.

You must make your decision based only on the evidence that you saw and heard here in court. Do not consider anything you may have seen or heard outside of court, including anything from the newspaper, television, radio, the Internet, or any other source.

The evidence includes only what the witnesses said when they were testifying under oath, the exhibits that I allowed into evidence, and the stipulations that the lawyers agreed to. A stipulation is an agreement that certain facts are true or that a witness would have given certain testimony.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts. The lawyers' questions and objections, likewise, are not evidence.

A lawyer has a duty to object if he thinks a question is improper. If I sustained objections to questions the lawyers asked, you must not speculate on what the answers might have been. If, during the trial, I struck testimony or exhibits from the record, or told you to disregard something, you must not consider it.

Give the evidence whatever weight you decide it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own

actions, facial expressions, and lip movements that you are able to observe on a video recording to help you determine what was said and who said it.

If, during your deliberations, you wish to have another opportunity to view the transcripts and view or listen to the recordings, send a written message to the court security officer, and I will provide you with an opportunity to do so.

If you have taken notes during the trial, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

Count 1 charges the defendant with possession of a firearm by a felon. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt: (1) the defendant knowingly possessed the firearms; and (2) at the time of the charged act, the defendant had been previously convicted in a court in the State of Illinois of a crime punishable by imprisonment

for a term exceeding one year; and (3) the firearms had been shipped or transported in interstate or foreign commerce.

If you find from your consideration of all of the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

"In or affecting commerce" and "interstate or foreign commerce" include commerce between anyplace in a state and anyplace outside of that state. The terms do not include commerce between places within the same state, but through any place outside of that state. This requirement is satisfied if the firearm traveled in interstate or foreign commerce prior to the defendant's possession of it.

A firearm has traveled in interstate or foreign commerce if it has traveled between one state and any other state or country, or across a state or national boundary line. The government need not prove how the firearm traveled in interstate commerce; that the

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
MATTHEW R. JONES,	)	18-20036
	)	
Defendant.	)	

JURY INSTRUCTIONS

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1. The defendant knowingly possessed the firearms; and

2. At the time of the charged act, the defendant had been previously convicted in a court in the State of Illinois of a crime punishable by imprisonment for a term exceeding one year; and

3. The firearms had been shipped or transported in interstate or foreign commerce.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C.
United States Code, 2018 Edition
Title 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 44 - FIREARMS
Sec. 922 - Unlawful acts
From the U.S. Government Publishing Office, www.gpo.gov

§922. Unlawful acts

(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.

18 U.S.C.
United States Code, 2018 Edition
Title 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 44 - FIREARMS
Sec. 924 - Penalties
From the U.S. Government Publishing Office, www.gpo.gov

§924. Penalties

(a)

(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.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. 18-CR-200<u>36</u>
	)	
vs.	)	Title 18, United States Code,
	)	Section 922(g)(1)
MATTHEW R. JONES,	)	
	)	
Defendant.	)	

INDICTMENT

COUNT 1
(Possession of a Firearm by a Felon)

THE GRAND JURY CHARGES:

On or about July 15, 2018, in Kankakee County, in the Central District of Illinois,

MATTHEW R. JONES,

defendant herein, having been previously convicted in a court in the State of Illinois of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess, in and affecting commerce, firearms, that is: (1) a Lorcin .380 caliber semi-automatic pistol, model L380, with a defaced serial number, (2) a Smith & Wesson .40 caliber semi-automatic pistol bearing serial number PBU1917, and (3) a Smith & Wesson .38 caliber special revolver bearing serial number CRM5009.

In violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE ALLEGATION ONE

THE GRAND JURY CHARGES:

1. The Grand Jury re-alleges and incorporates by reference the allegations of Count One of this Indictment as though fully set forth herein, for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

2. On or about July 15, 2018, in the Central District of Illinois,

MATTHEW R. JONES,

defendant herein, did engage in a knowing violation of Title 18, United States Code, Section 922(g), thereby subjecting to forfeiture to the United States, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), any firearms and ammunition involved in the commission of the offenses, including, but not limited to: (1) a Lorcin .380 caliber semi-automatic pistol, model L380, with a defaced serial number, (2) a Smith & Wesson .40 caliber semi-automatic pistol bearing serial number PBU1917, and (3) any ammunition found therein.

All pursuant to Title 28, United States Code, Section 2461(c) and Title 18, United States Code, Section 924(d).

A TRUE BILL.
s/Foreperson

FOREPERSON

s/Gregory Harris

JOHN CHILDRESS
Acting United States Attorney
RER