No. 20-_____

IN THE
SUPREME COURT OF THE UNITED STATES

CORDARRIUS BONDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When a defendant pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and the plea was neither knowing nor voluntary because no one was aware that knowledge of his prohibited status is a crucial element of the offense, is the defendant entitled to automatic plain-error reversal, or must the defendant prove he would not have pled guilty had he been advised of the knowledge-of-status element?

II. Does the mere fact that a defendant served a sentence of more than a year for a prior conviction necessarily prove the knowledge-of-status element for conviction under 18 U.S.C. § 922(g)(1)?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Bonds*, No. 1:17-cr-00108, District Court for the Eastern District of Tennessee. Judgment entered October 1, 2018.

(2) *United States v. Bonds*, No. 18-6085, U.S. Court of Appeals for the Sixth Circuit. Order affirming judgment entered June 17, 2020.

(3) *United States v. Bonds*, No. 18-6085, U.S. Court of Appeals for the Sixth Circuit. Order denying petition for rehearing *en banc* entered August 5, 2020.

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Petitioner Cordarrius Bonds respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished orders of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment and denying rehearing *en banc* appear at pages 1a to 4a and at page 5a, respectively, of the appendix to this petition. The judgment of the district court appears at pages 7a to 13a of the appendix, along with indictment, the transcript of the change of plea hearing in which the district

court informed Mr. Bonds of the nature of the charge against him, and the factual basis underlying his plea, at pages 6a, 14a to 30a, and 31a to 33a, respectively.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' order affirming the conviction and sentence was entered on June 17, 2020. Pet. App. 1a. The court denied rehearing *en banc* on August 5, 2020. Pet. App. 5a. This petition is timely filed under Supreme Court Rule 13.1, as extended by Order of March 19, 2020.

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULE INVOLVED

The Fifth Amendment provides:

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

The Sixth Amendment provides:

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

18 U.S.C. § 922(g) states in relevant part:

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

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

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

18 U.S.C. § 921(a)(20) states in relevant part:

> What constitutes a conviction of such a crime [punishable by imprisonment for a term exceeding one year] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Fed. R. Crim. P. 52(b) provides:

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

STATEMENT OF THE CASE

Overview. This case arises in the wake of the Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). There, it held that the phrase "knowingly violates" in 18 U.S.C. § 924(a)(2) applies to prosecutions under 18 U.S.C. § 922(g), and requires proof beyond a reasonable doubt that the defendant not only "knew he possessed a firearm," but that at the time of the firearm possession he also knew of his prohibited "status"—that is, he "knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 2199-2200. *Rehaif* created a class of litigants who had previously pleaded guilty to § 922(g) offenses, but were never notified of this critical *mens rea* element. Because they were not on notice of the

nature of the charge against them, their pleas were not knowing and voluntary, as the Constitution requires.

Cordarrius Bonds is one such litigant. In 2018, he pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). As later revealed by *Rehaif*, the indictment, plea agreement, and plea colloquy omitted a crucial *mens rea* element that no one realized was missing, depriving Mr. Bonds of real notice of the charge against him—"the first and most universally recognized requirement of due process." *Bousley v. United States*, 523 U.S. 614, 618 (1998). On appeal, the government did not dispute that in light of *Rehaif*, Mr. Bonds's plea was constitutionally invalid because it was entered unknowingly and involuntarily, but the question remained whether the error was a "true nature" structural error, requiring reversal of his conviction regardless whether he shows prejudice.

Without addressing this question (though it was briefed), the court below affirmed in an unpublished order. It relied on the court's published decision in *United States v. Hobbs*, 953 F.3d 853 (6th Cir. 2020), ruling that Mr. Bonds failed to meet *Olano*'s third prong for plain error because he did not show a reasonable probability that he would not have entered the guilty plea had he known the true nature of the crime. Pet. App. 3a. Instead, applying *Hobbs* and observing that Mr. Bonds had previously served more than one year in prison (information absent from the record of his plea proceedings), the panel concluded that "it would have been exceedingly easy" for the government to prove that he knew he had been previously convicted of a felony for purposes of § 922(g)(1). Pet. App. 3a.

The Sixth Circuit is wrong for two reasons. First, by foreclosing a finding of structural error, *Hobbs* is contrary to this Court's precedent. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905 (2017) (recognizing that structural error warrants automatic reversal without inquiry into prejudice). Circuits are now split on the question. *Compare United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), *with United States v. Coleman*, 961 F.3d 1024 (8th Cir. 2020); *United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020); and *United States v. Trujillo*, 960 F.3d 1196 (10th Cir. 2020). The Fourth Circuit in *Gary* has correctly interpreted this Court's precedent, holding that this *Rehaif* error is structural and requires reversal without need for a showing of prejudice. This Court should resolve the conflict by holding that a guilty plea that was unknowing and involuntary in light of *Rehaif* constitutes structural error.

Second, and independent of whether the *Rehaif* error here is structural, the Sixth Circuit's approach to the knowledge-of-status element for purposes of § 922(g)(1) conflicts with this Court's analysis in *Rehaif*. The Sixth Circuit and other courts have taken the view that a defendant's knowledge-of-status may be assumed from the mere fact that he served more than a year in prison, but this ignores the collateral legal matter at issue. Instead, the government must prove that the defendant knew that he had been "convicted" of a crime punishable by more than one year, with the term "convicted" defined specially to mean that his firearms rights had not been restored. 18 U.S.C. § 921(a)(20). Until this court steps in, the lower courts will continue upholding § 922(g)(1) convictions using an incorrect approach to

the government's burden—not just for those convicted before *Rehaif*, but for all time going forward.

Background. In 2017, Cordarrius Bonds was charged with being a felon in possession of a firearm. Specifically, the indictment alleged that Mr. Bonds, "having previously been convicted in court of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce, a firearm, in violation of Title 18, United States Code, Section 922(g)(1)." Pet. App. 6a. This indictment was consistent with then-binding circuit precedent about the statute's *mens rea*, which required the government to prove only that the person knowingly possessed a firearm. *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003). The government was not required to prove Mr. Bonds knew he had previously been convicted of a felony. *Id.*

Consistent with the indictment and the law, the district court advised Mr. Bonds at the plea colloquy as follows:

> For you to be convicted of this offense if you were to take your case to trial, the government would have to prove beyond a reasonable doubt the following three elements: First, that you knowingly possessed a firearm; and, second, that prior to that possession you had been convicted of a crime punishable by a term of imprisonment exceeding one year——that would be a felony——and the third element is that the firearm traveled in and affected interstate commerce.

Pet. App. 6a, 20a-21a. The court did not tell Mr. Bonds that the government would have to prove he knew that he belonged to the category of persons prohibited from possessing a firearm under § 922(g)(1). The factual basis signed by Mr. Bonds likewise omits any *mens rea* element related to his status as a convicted felon, stating as the

second element only that "[p]rior to that possession, the defendant had been convicted of a crime punishable by a term of imprisonment exceeding one year." Pet. App. 32a. Mr. Bonds pled guilty to the then-understood elements of a violation of § 922(g)(1) as set forth in the indictment and in the factual basis. Pet. App. 6a, 32a.

In short, Mr. Bonds had no idea the government had to prove he knew of his status for purposes of § 922(g)(1). Deemed an Armed Career Criminal under the Armed Career Criminal Act ["ACCA"], 18 U.S.C. § 924(e), he was subject to a 15-year mandatory minimum and sentenced to 186 months in prison, to be followed by five years of supervised release. Pet. App. 8a.

While Mr. Bonds's appeal was pending and before briefing had begun, this Court held that in order to prove a violation of 18 U.S.C. § 922(g), the government "must show 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." *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). In light of *Rehaif*, Mr. Bonds contended on appeal in the lower court (among other things) that his conviction must be vacated because his plea was unknowing, unintelligent, and involuntary. (Sixth Cir. Opening Br. 21-23; Reply 2-15.)

Because *Rehaif* was decided after Mr. Bonds's sentence was imposed, the court reviewed for plain error. Plain error review required Mr. Bonds to show (1) an error, (2) that the error was plain, (3) that the error affected his substantial rights, and (4) that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993). The government did

not dispute that Mr. Bonds satisfied the first two requirements, but argued he did not meet *Olano*'s third prong because the evidence related to Mr. Bonds' prior convictions—namely, that he had served a prison sentence of over a year—was enough to establish that he knew of his prohibited status. (Sixth Cir. Gov't Br. 6, 20-25.)

Mr. Bonds's position, in contrast, was that no amount of evidence could save his conviction based on an involuntary plea, so it *per se* affected his substantial rights as structural error, requiring vacatur of his conviction without need for a showing of prejudice under *Olano*'s third prong. (Opening Br. 21-23; Reply 2-15.) He emphasized that his uninformed plea precluded him from making his own choices about the proper way to protect his own liberty, like the structural error identified in *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). (Sixth Cir. Reply 13-15.)

He further pointed out that the *mens rea* requirement includes knowledge of the "legal effect" of collateral matters. *Rehaif*, 139 S. Ct. at 2198. Specifically, for conviction under § 922(g)(1), a defendant's status depends on a collateral legal matter: namely, whether his conviction is a "conviction" as specially defined under § 920(a)(20) for this purpose. Section § 920(a)(20) provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

Mr. Bonds noted the notoriously complex Tennessee law at issue in his case had changed several times in the last decade with respect to restoration of civil rights, a system with some provisions at certain points in time allowing for automatic restoration of firearm rights. (Sixth Cir. Reply 20-21.) Mr. Bonds also pointed out that although the state court told Mr. Bonds that he was losing his right to possess firearms at the state plea hearing for two of his prior offenses, the court prefaced these comments by saying that "you lose certain rights, *most of which you can regain*." (R. 58-1, Plea Hr'g Tr. at 9, *State v. Bonds*, Tenn. Crim. Ct. Nos. 268807, 273620 (Jan. 26, 2010).) The confusing message, he argued, prevented any fair presumption that the government would necessarily be able to prove beyond a reasonable doubt that he knew of the "legal effect" of his Tennessee convictions for purposes of § 922(g)(1). *Rehaif*, 139 S. Ct. at 2198. (Sixth Cir. Reply 20-21.) Rather, to prove that a defendant knew he belonged to the class of persons prohibited from possessing a firearm due to a prior "conviction," the government must prove more than the mere fact that he knew he had served a year in prison. In Mr. Bonds's case, the absence of any evidence related to his knowledge-of-status in the record of the plea proceedings supported a finding of plain error, even if the *Rehaif* error is not structural.

In an unpublished order, the Sixth Circuit affirmed. Relying on *United States v. Hobbs*, 953 F.3d 853 (6th Cir. 2020), the panel ruled that Mr. Bonds could not show that the *Rehaif* error affected his substantial rights under *Olano*'s third prong. Though the record of the plea proceedings includes no reference to the length of the sentences he had served, Pet. App. 14a-32a, the court gleaned from elsewhere in the

record that Mr. Bonds had as a factual matter served more than a year in prison for previous convictions, so "'[i]t would have been exceedingly easy for the government to prove at trial that [Bonds] knew he was a felon when he committed the firearms offense.'" Pet. App. 3a (quoting *Hobbs*, 953 F.3d at 858). As a result, it reasoned, Mr. Bonds could not show he would not have pled guilty had he known the government's true burden. *Id.*

The court did not directly address Mr. Bonds's argument that the relevant category for § 922(g)(1) purposes is that he was "convicted" of a felony, a legal term defined to mean that his firearms rights had not been restored and a collateral legal matter of which his knowledge must also be proved. 18 U.S.C. § 921(a)(20). The court later denied his petition for rehearing *en banc*. Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's holding that an unknowing and involuntary plea is not automatically reversible directly conflicts with this Court's precedent, as well as the Fourth Circuit's correct interpretation of that precedent in *Gary*.

Mr. Bonds's guilty plea was unknowing and involuntary. Neither he, "nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged." *Bousley v. United States*, 523 U.S. 614, 618-19 (1998); *see Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); *Henderson v. Morgan*, 426 U.S. 637, 644-45 & n.13 (1976). The circuits are now intractably divided on the important question whether the error requires automatic reversal as structural error, warranting this Court's review.

A. In this guilty plea context, the *Rehaif* error is structural.

This Court has recognized repeatedly that when, as here, a defendant pled guilty without the notice fundamental to due process, his conviction cannot stand. In *Boykin v. Alabama*, this Court held that it is *per se* reversible error when the record does not disclose that a defendant voluntary and understandingly entered a guilty plea. 395 U.S. at 244. The Court later confirmed in *Bousley* that "[a] plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" *Bousley*, 523 U.S. at 618 (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)).

Over forty years ago, this Court addressed a situation nearly identical to the one presented here. In *Henderson v. Morgan*, this Court reaffirmed that the "first and most universally recognized requirement of due process" is that a guilty plea is not voluntary unless the defendant receives "real notice of the true nature of the charge against him." *Henderson*, 426 U.S. at 647. Thus, this Court held that even when the prosecutor had "overwhelming evidence of guilt," the defendant's involuntary plea—involuntary "in the constitutional sense" because the defendant was not informed of an essential *mens rea* element—"cannot support a judgment of guilt" and the conviction must be set aside. *Id.* at 644-45. The Court vacated the defendant's conviction even while it expressly "assume[d] that he probably would have pleaded guilty anyway" had he known about the intent element—and despite his later assertion that he would *not* have pled guilty had he known of the intent element, an assertion the Court dismissed as "hypothetical." *Id.* at 643-44 & n.12. Even if "the prosecutor had overwhelming evidence of guilt available," that could not cure or

obviate this fundamental constitutional error. *Id.* at 644. And indeed, the Court found, even the defendant's admission that he killed the victim could not "serve as a substitute for either a finding after trial, or a voluntary admission, that [he] had the requisite intent." *Id.* at 646.

It is clear from *Henderson* that the only harmless error inquiry in a guilty plea case asks whether the defendant was informed of the missing element of the offense through some other means. *Id.* at 646. Though its holding was not couched in terms of structural error, the outcome is consistent with its conceptual underpinnings. The bedrock due process requirement of a knowing and intelligent plea not only guards against erroneous conviction, but safeguards "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *United States v. Gary*, 954 F.3d 194, 204 (4th Cir. 2020). In other words, the deprivation of autonomy itself, rather than the resulting conviction, constitutes the harm.

No doubt for these reasons, this Court has expressly distinguished a conviction obtained by an unknowing and involuntary plea, where the record contains no evidence the defendant knew of the rights he was waiving, with a garden-variety Rule 11 error. Unlike an ordinary Rule 11 error, a genuinely unknowing and involuntary plea requires no showing of a "reasonable probability that, but for the error, he would not have entered the plea." *See United States v. Dominguez Benitez*, 542 U.S. 74, 83, 84 & n.10 (2004) (citing *Boykin*, 395 U.S. at 243)).

It is true that structural errors requiring reversal are uncommon. The defining feature of a structural error is that it "'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2019) (quoting *Arizona v. Fulminante*, 499 U. S. 279, 310 (1991)). In *Weaver*, this Court identified three 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," such as the right for the defendant to conduct his own defense, (2) "the effects of the error are simply too hard to measure"; or (3) "the error always results in fundamental unfairness." 137 S. Ct. at 1908. "These categories are not rigid," however, and "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* The purpose of the structural error doctrine is to safeguard the framework of the trial process itself and, as most relevant here, "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* at 1907, 1908.

B. The Sixth Circuit's decision directly conflicts with the Fourth Circuit's correct holding in *Gary* that a constitutionally invalid plea amounts to structural error.

The circuits are now split on the question whether a *Rehaif* error is structural. The Fourth Circuit, consistent with this Court's precedent, has correctly held that "a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant's substantial rights." *Gary*, 954 F.3d at 200. The court reasoned that this *Rehaif* error has attributes of each of the three

rationales *Weaver* identifies as underlying structural error. The error "deprived [Gary] of his right to determine the best way to protect his liberty." *Id.* at 205-06. The "deprivation of Gary's autonomy interest under the Fifth Amendment due process clause has consequences that 'are necessarily unquantifiable and indeterminate,' . . . rendering the impact of the district court's error simply too difficult to measure." *Id.* at 206 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 150 (2006)). "It is impossible to know how Gary's counsel, but for the error, would have advised him, what evidence may have been presented in his defense, and ultimately what choice Gary would have made regarding whether to plead guilty or go to trial." *Id.* And "fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea," especially where "'the defendant's status is the 'crucial element' separating innocent from wrongful conduct." *Id.* at 206-07 (quoting *Rehaif*, 139 S. Ct. at 2197)). Thus, a "constitutionally invalid plea 'cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment [based on such a plea]' may be regarded as fundamentally fair.'" *Id.* at 207.

Finding further "that the error seriously affected the fairness, integrity and public reputation of the judicial proceedings," thereby satisfying *Olano*'s fourth prong, the Fourth Circuit concluded that "this type of error—this denial of due process—is a structural error that requires the vacatur of Gary's guilty plea and convictions." *Id.* at 201.

In contrast to the Fourth Circuit, several circuits, including the Sixth, have concluded that this type of *Rehaif* error is not structural, and the conflict is both intractable and untenable. The Fifth, Eighth, and Tenth Circuits, like the Sixth, hold that a defendant must show prejudice, which he could not do given existing information that each defendant served more than a year in prison for a previous offense. *See United States v. Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020) ("Demonstrating prejudice under *Rehaif* will be difficult for most convicted felons for one simple reason: Convicted felons typically know they're convicted felons."); *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020) (pointing to the presentence report "show[ing] he had previously been sentenced to multiple terms of imprisonment exceeding one year"); *United States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020) (holding that because defendant had served four years in prison for six felony offenses, he "cannot credibly claim he was unaware that he was a felon, nor did he try to before the district court").

These courts overlook that a defendant had no reason to develop the record regarding his knowledge during plea proceedings where knowledge was deemed irrelevant under binding precedent. They assume the impact of the error can be determined by the court's own examination of the record and its own view of the strength of proof as to the defendant's knowledge of status. They do not address the defendant's inability to reasonably develop a record on the issue when the significance of the element remains unknown to him and his counsel. In essence,

these courts directed verdicts for the government while the defendant remained unaware of the true nature of the crime. This cannot be right.

Mr. Bonds's case illustrates the defect in the reasoning adopted by these courts. The *Rehaif* error in this case prevented him from understanding the true nature of the charged offense, as well as the available theories of defense, preventing him from making an informed choice "about the proper way to protect his own liberty." *Id.*; *see also McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (holding that violation of defendant's autonomy interest in deciding objective of defense is structural error, so "is not subject to harmless-error review"). The court below faulted Mr. Bonds for not alleging on appeal that he would have gone to trial had he known the true nature of the crime, Pet. App. 3a, but there is no such requirement. *See Henderson*, 426 U.S. at 644 n.12 (treating defendant's assertion he would not have pled guilty as "hypothetical" and expressly "assum[ing] that he probably would have pleaded guilty anyway," yet still vacating the conviction).

Mr. Bonds pled guilty to a crime without knowing its legal ramifications, including whether he had a defense to the unknown element the government would be required to prove. The resulting conviction is no more reliable than a jury verdict based on less than reasonable doubt. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). Again, it is essentially a directed verdict for the government, who was relieved of presenting any evidence or factual basis on the crucial *mens rea* element of the offense for which Mr. Bonds was convicted. *Id.* at 277, 280-81. The error is therefore

structural.[1] Only this Court can resolve the entrenched division among the lower courts.

The Fifth, Sixth, Eighth, and Tenth Circuits' reasoning also overlooks the true relevant category to which the government must prove the defendant knew he belonged. As explained next, the category, as properly understood, makes even more clear that the error is structural. At the very least, it makes clear that an appellate panel cannot assume the defendant's knowledge-of-status based solely on the amount of time served. The Sixth Circuit's error in this regard supplies an additional, and independent reason for intervention by this Court.

II. Even if the *Rehaif* error here does not mandate automatic reversal, the mere fact that the defendant served a prior sentence of more than one year cannot automatically satisfy § 922(g)(1)'s knowledge requirement.

According to the Sixth Circuit, following *Hobbs*, the government need only prove that Mr. Bonds had previously served more than a year in prison to meet the *mens rea* burden required under *Rehaif* and § 922(g)(1). Pet. App. 3a. This is incorrect.

Section 922(g)(1) criminalizes possession of a firearm by a person "who has been convicted of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). The Sixth Circuit, like the other lower courts, gloss over the "convicted" element under § 922(g)(1), which has a special legal meaning. By statute,

[1] The true-nature error here is therefore unlike the non-structural trial error at issue in *Neder v. United States*, 527 U.S. 1 (1999), where the defendant knew that the government must prove the element at issue and chose not to contest it when all thought, mistakenly as it turned out, the element was for the court to find, rather than the jury. *Id.* at 8.

"[a]ny conviction . . . for which a person has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such . . . restoration of rights expressly provides that the person may not [] possess [] firearms." 18 U.S.C. § 921(a)(20). Proving that Mr. Bonds knew his conviction is a "conviction" as specially defined in § 921(a)(20)—*i.e.*, one for which his right to possess a firearm had not been restored—is the only way to prove that he knew he "belonged in the category of persons barred from possessing a firearm" when he possessed the firearm. *Rehaif*, 139 S. Ct. at 2200. As *Rehaif* makes clear, the *mens rea* element includes knowledge of the "legal effect" of collateral matters. *Id.* at 2198.

In *Rehaif*, the relevant category was that the defendant was "illegally or unlawfully" present in the United States under § 922(g)(5). This Court held that "[a] defendant who does not know that he is an alien 'illegally or unlawfully in the United States' does not have the guilty state of mind that the statute's language and purposes require." 139 S. Ct. at 2198. The Court explained that the maxim "ignorance of the law is no excuse" does not apply to this type of collateral matter. That maxim "does not normally apply where a defendant 'has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding of the full significance of his conduct, thereby negating an element of the offense.'" *Id.* The Court analogized the collateral legal matter in § 922(g)(5) (relating to a complex question of immigration law) to the collateral legal matter in the statute addressed in *Liparota v. United States*, 471 U.S. 419 (1985) (relating to a question of the law regulating food stamps). In *Liparota*, the Court "required the

Government to prove that the defendant knew that his use of food stamps was unlawful—even though that was a question of law." *Rehaif*, 139 S. Ct. at 2198 (describing holding in *Liparota*, 471 U.S. at 425 n.9)).

In the context of § 922(g)(1), the defendant's status likewise depends on a collateral legal matter: whether his conviction is a "conviction" as defined in § 921(a)(20), which in turn incorporates other complex questions of law. *E.g.*, *Walker v. United States*, 800 F.3d 720, 722-28 (6th Cir. 2015) (navigating tangle of state and federal law). The state at issue in this case, Tennessee, has changed its laws several times over the past decades, with some convictions during one period allowing for automatic restoration of firearms rights, resulting in one of the most "complex" and "confusing" schemes in the country. Collateral Consequences Resource Center, *Online Restoration of Rights Project* (Tennessee–Full Profile) (Dec. 2019).[2] A defendant who does not know his conviction is a "conviction" as legally defined in § 921(a)(20) "does not have the guilty state of mind that the statute's language and purpose require." *Rehaif*, 139 S. Ct. at 2198.

As a result, the Sixth Circuit is mistaken that evidence that a person served more than one year in prison for a prior offense necessarily proves that he knew his status as a felon prohibited from possessing a firearm. This Court should step in to clarify that the length of the sentence alone cannot prove that the defendant was

[2] Available at https://ccresourcecenter.org/state-restoration-profiles/tennessee-restoration-of-rights-pardon-expungement-sealing/ (last visited Nov. 10, 2020).

aware of his qualifying "conviction." Rather, the government must prove that a defendant knew of the legal effect of his prior conviction.

III. This case presents a good vehicle to resolve these extremely important questions.

The current split of authority results in inconsistent application of *Rehaif*, leading to substantial differences in outcomes. Indeed, when the Fourth Circuit recently denied the government's petition for rehearing *en banc* in *Gary*, the four concurring judges reasoned that, because "[m]any, many cases await the resolution of this question[,]" the issue "is of such importance that [] the Supreme Court should consider it promptly." *Gary*, 963 F.3d at 420.

Although the Solicitor General has identified *Gary* as a good case to resolve the conflict, *United States v. Gary*, No-20-444, Mr. Bonds's case is an equally good vehicle. The question of structural error was raised and fully briefed below. In affirming the conviction, the court of appeals relied on its published opinion in *Hobbs*. The court then denied Mr. Bonds's petition for rehearing *en banc*, indicating that the Sixth Circuit will not change its interpretation of the law in *Hobbs*. Mr. Bonds is currently serving a sentence of 186 months as a result of his unknowing and involuntary plea.

This case also presents the secondary question whether the mere fact of the length of Mr. Bonds's previous sentence necessarily proves that he knew he was previously "convicted" of a felony, thereby satisfying § 922(g)(1)'s *mens rea* requirement. This is an equally important, and related, question, presented squarely by this case. Mr. Bonds pointed to evidence that could support the defense that he was unaware that his right to possess a firearm had not been restored upon the

expiration of his parole in his state case, noting both Tennessee's complex law surrounding the loss and restoration of firearm rights and the ambiguous statements made by the state trial court judge at his state plea hearing.

Had he been aware of the government's true burden regarding his status, Mr. Bonds may well have made a different choice about whether to plead guilty or go to trial. This probability is made even more likely by the fact that he was subject to the ACCA's 15-year mandatory minimum, by which he lost most of the benefit of pleading guilty. (*See* Presentence Report, R. 20, ¶ 89 (showing that his guideline range after pleading guilty would have been 151 to 188 months, but was increased to 180 to 188 months due to the ACCA).) Had Mr. Bonds known about the *mens rea* requirement, proceeding to trial would not have been an irrational option. In fact, due to its effect on sentences, the ACCA has more of an impact on the decision to plead guilty or go to trial than any other mandatory minimum. The trial rate for all federal offenders is 2.7%, and the trial rate for all offenders subject to any mandatory minimum is 5.2%. *See* U.S. Sent'g Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 37 (2018). In contrast, the trial rate for offenders subject to the ACCA is 13.5%—five times the trial rate for all federal offenders generally. *Id.*

Here, where pleading guilty at best reduced Mr. Bonds's advisory guideline range by a few years, because he remained subject to the 15-year ACCA either way, there is a reasonable probability he would have taken his chances at trial. *Dominguez Benitez*, 542 U.S. at 83 (reasonable-probability standard requires only "that the

probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding"). As this Court recognizes, even "a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." *Lee v. United States*, 137 S. Ct. 1958, 1966-67 (2017). An appellate court cannot make that choice for him.

CONCLUSION

The petition for a writ of certiorari should be granted.

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