No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Randolph Burleson,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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December 16, 2020.

Questions Presented for Review

1. Circuit courts are split on whether federal courts have jurisdiction over a criminal matter when the charging document omits an essential mens rea element of the offense. The indictment charging Burleson with unlawful firearm possession under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) failed to allege the requisite element that Burleson knew of his relevant status as a person prohibited from possessing a firearm at the time of possession. By omitting the essential mens rea element of the offense, did the indictment fail to allege any federal offense at all, thereby depriving the federal courts of jurisdiction?

2. The indictment's omission of the essential mens rea element deprived Burleson of his Fifth Amendment right to indictment by grand jury and his Sixth Amendment right to notice of the charge against him. Did the Ninth Circuit erroneously fail to acknowledge and analyze these constitutional violations?

3. Circuit courts are split on whether a defendant's guilty plea to unlawful firearm possession under 18 U.S.C. §§ 922(g)(1) and 924(a)(2), made without knowledge or notice of the essential mens rea element, constitutes structural error. Burleson pleaded guilty to the single-count defective indictment without an understanding or notice of the government's obligation to prove the uncharged mens rea element. The district court's failure to inform him of the missing element resulted in a constitutionally invalid guilty plea. Did the Ninth Circuit erroneously review Burleson's invalid plea for plain error, rather than analyzing this fundamental flaw as structural error, which warranted automatic relief?

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Petition for Writ of Certiorari

Petitioner Randolph Burleson respectfully petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Ninth Circuit.

Related Proceedings and Orders Below

The district court for the District of Nevada issued final judgment in *United States v. Burleson*, No. 2:18-cr-00173-LRH-CWH, on July 18, 2019. Dist. Ct. Dkt. No. 53. The decision affirming judgment in the United States Court of Appeals for the Ninth Circuit, *United States v. Burleson*, No. 19-10262, App. Ct. Dkt. No. 36 (9th Cir. July 23, 2020), and the order denying panel and en banc rehearing in the United States Court of Appeals for the Ninth Circuit, *United States v. Burleson*, No. 19-10262, App. Ct. Dkt. No. 38 (9th Cir. Aug. 31, 2020), are attached in the Appendix.

Jurisdiction

The United States Court of Appeals for the Ninth Circuit issued a decision affirming Burleson's conviction on July 23, 2020 (Appendix A) and denied panel and en banc rehearing on August 31, 2020 (Appendix B). The Ninth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely per Supreme Court Rules 13.1 and 13.3, and this Court's Order dated March 19, 2020, regarding modified procedures in light of COVID-19.

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution guarantees:

> 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.

The Sixth Amendment to the United States Constitution guarantees:

> 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.

Title 18 of the United States Code, Section 922(g)(1), provides in relevant part:

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

Title 18 of the United States Code, Section 924(a)(2), provides: "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."

Title 18 of the United States Code, Section 3231, provides: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

Statement of the Case

Petitioner Randolph Burleson is currently serving a 57-month carceral sentence, unconstitutionally imposed. Burleson was convicted pursuant to his guilty plea to unlawful firearm possession, even though a grand jury did not charge, Burleson did not receive notice of, and the government did not prove the necessary mens rea element of the offense. Burleson therefore asks this Court to vacate his plea and conviction and dismiss the indictment as fatally defective.

I. The indictment omitted the material mens rea element for the federal offense of being a prohibited person in possession of a firearm.

A federal grand jury returned a single-count indictment against Burleson for unlawful possession of a firearm by a person previously convicted of a crime punishable by a term of imprisonment exceeding one year. *See* 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The indictment alleged Burleson was a person "having been convicted of a crime punishable by imprisonment for a term exceeding one

year" who "did knowingly possess a firearm . . . having been shipped and transported in interstate and foreign commerce" in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Dist. Ct. Dkt. No. 1. The indictment, which issued prior to this Court's decision in *Rehaif v. United States*, did not allege Burleson knew his status as a prohibited person when he possessed the firearm—the essential mens rea element of the offense. 139 S. Ct. 2191 (2019).

II. Burleson pleaded guilty to the defective indictment without knowledge or notice of the omitted mens rea element.

Following indictment and an unsuccessful suppression challenge, Burleson pleaded guilty to the single count, pursuant to a plea agreement. In recitation of the offense elements, the plea agreement alleged no mens rea other than knowing possession of a firearm. At the change of plea hearing, the district court explained the essential elements of the offense as (1) Burleson knowingly possessed a firearm (2) that had been transported in interstate commerce and (3) at the time of possession, Burleson had previously been convicted of an offense punishable by imprisonment for a term exceeding one year. Burleson admitted to the elements as explained by the court and a corresponding factual basis. Though undisputed that Burleson, in fact, had an eligible conviction, he was never informed the government needed to prove he knew his status, nor did he admit to having such knowledge.

After his plea, this Court decided *Rehaif*, clarifying the required elements for unlawful firearm possession offenses under 18 U.S.C. §§ 922(g) and 924(a)(2). Specifically, *Rehaif* held the government must prove a defendant both knew he

possessed a firearm and, at the time of that possession, knew he "belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. *Rehaif* overturned decades of circuit precedent.[1] Burleson's indictment failed to allege—and he did not plead to—this requisite mens rea element that he knew at the time of the firearm possession that he "belonged to the relevant category of persons barred from possessing a firearm." *Id.*

III. Burleson appealed and the Ninth Circuit affirmed.

Burleson timely appealed his conviction and sentence because, among other issues, the indictment omitted the requisite *Rehaif* mens rea element. The government had neither alleged nor proven Burleson knew his prohibited status at the time of alleged firearm possession. The indictment's failure to charge the essential mens rea element deprived the district court of jurisdiction because the indictment failed to allege a federal crime. The defect further deprived Burleson of

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[1] In the Ninth Circuit, pre-*Rehaif* precedent held the government did not need to prove knowledge of the prohibited status to convict a defendant of being a prohibited person in possession of a firearm. *See United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997). In fact, pre-*Rehaif*, every Circuit to reach this issue held that 18 U.S.C. § 922(g)'s mens rea knowledge requirement did not apply to the status element. *See United States v. Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012); *United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *United States v. Schmidt*, 487 F.3d 253, 254 (5th Cir. 2007); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam); *United States v. Langley*, 62 F.3d 602, 604-08 (4th Cir. 1995) (en banc); *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991). Other Circuits had not expressly addressed the issue but did not list knowledge of prohibitive status as an element of § 922(g). *See United States v. Gardner*, 488 F.3d 700, 713 (6th Cir. 2007); *United States v. Smith*, 160 F.3d 117, 121 n.2 (2d Cir. 1998).

his substantial Fifth Amendment right to indictment by grand jury and Sixth Amendment right to adequate notice of the charge against him. Finally, the district court's failure to adequately ensure Burleson understood each essential element of the offense to which he pled guilty resulted in an unknowing and unintelligent guilty plea.

Acknowledging the error, the Ninth Circuit panel held "[t]he omission of an element in the indictment does not affect jurisdiction." *United States v. Burleson*, 820 F. App'x 567, 569 (9th Cir. 2020). But the panel declined to address whether Burleson's invalid plea constituted structural error, finding this argument "forfeited," *id.* at 569 n.1, and instead held under the third and fourth prongs of plain error review that "[t]he record fails to establish a reasonable probability that he would not have pled guilty had the indictment not omitted the knowledge-of-status element," *id.* at 569. The panel pointed to what it believed was "overwhelming evidence that Burleson knew of his felony status." *Id.* Finally, the panel neither acknowledged nor addressed Burleson's Fifth and Sixth Amendment deprivations.

Burleson unsuccessfully petitioned for panel rehearing and rehearing en banc. *See* Appendix B. Burleson now respectfully petitions this Court for a writ of certiorari.

Reasons for Granting the Petition

It is undisputed that Burleson had a prohibited status prior to possessing a firearm. But as this Court recently clarified in *Rehaif*, a prohibited status alone

does not suffice to render firearm possession unlawful. In prosecutions under 18 U.S.C. §§ 922(g) and 924(a)(2), the government must prove the defendant *knew*—at the time of the alleged firearm possession—he or she "belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200.

Rehaif rests in part on a "presumption in favor of scienter" and fundamental fairness. *Id.* at 2195 (citing *Black's Law Dictionary* 1547 (10th ed. 2014)). The scienter presumption applies to criminal statutes because criminal liability cannot be imposed "on persons who, due to lack of knowledge, did not have a wrongful mental state." *Id.* at 2198. Possessing a firearm can be an "entirely innocent" act: if a defendant lacks knowledge of the facts and circumstances making his possession unlawful, he "lack[s] the intent needed to make his behavior wrongful." *Id.* at 2197. Here, because the indictment omitted the required status mens rea, Burleson was charged with and convicted of "an innocent mistake to which criminal sanctions normally do not attach"—not a cognizable federal crime. *Id.*

Numerous issues arose from the defective indictment, issues seemingly certain to arise again as split circuit courts grapple with the import and application of *Rehaif* to cases currently on review.

First, there is a circuit split over whether federal courts have jurisdiction to adjudicate a criminal matter for which the charging document omits an essential mens rea element. This split results in disparate outcomes for similarly situated defendants. This Court should grant certiorari to address the circuit split and clarify when a defective indictment deprives a federal court of jurisdiction.

Second, the panel erroneously failed to analyze Burleson's challenges to the violations of his Fifth and Sixth Amendment rights. This Court should instruct the circuits on how to analyze Fifth and Sixth Amendment-based challenges to pre-*Rehaif* indictments that omit the crucial mens rea element necessary to render firearm possession illegal.

Third, there is a circuit split over whether a defendant's pre-*Rehaif* guilty plea made without notice of the knowledge-of-status essential mens rea element constitutes structural error, requiring relief. This split also results in disparate outcomes for similarly situated defendants. This Court should grant certiorari to resolve the circuit split and clarify whether an involuntary and unintelligent guilty plea of this serious nature is a structural error affecting the framework of the proceedings, for which relief is automatic.

I. This Court should resolve the circuit split on whether federal courts have jurisdiction over a criminal matter when the charging document omits an essential mens rea element of the offense.

Congress limits federal judicial jurisdiction, stating the "district courts of the United States shall have original jurisdiction . . . of all offenses *against the laws of the United States*." 18 U.S.C. § 3231 (emphasis added). Thus, if an indictment fails to allege a federal crime *at all*, that indictment fails to confer jurisdiction on the federal courts. However, there is a circuit split regarding indictment defects and their jurisdictional import. *See United States v. Muresanu*, 951 F.3d 833, 838 (7th Cir. 2020) (recognizing split). Some circuits hold certain defects in an indictment

render the courts without jurisdiction, while others hold defects, no matter how severe, do not impact jurisdiction.

This split is particularly troublesome following this Court's *Rehaif* decision, as defendants like Burleson, indicted pre-*Rehaif* without any allegation of the necessary mens rea element, sustained convictions pursuant to proceedings lacking jurisdiction. This Court should grant certiorari to resolve the split.

This circuit conflict stems from this Court's decision addressing a defective indictment in *United States v. Cotton*, 535 U.S. 625 (2002). In *Cotton*, the indictment did "not allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)." *Id.* at 628. This Court held such "defects in an indictment do not deprive a court of its power to adjudicate a case." *Id.* at 630. Thus, the defect present there did not deprive the district court of jurisdiction. *Id.* at 632.

Cotton based its jurisdictional holding on *Lamar v. United States*, 240 U.S. 60 (1916). In *Lamar*, the defendant argued the indictment failed to allege a crime against him, leaving the court without jurisdiction. *Id.* at 64. The *Lamar* indictment charged the defendant with "falsely pretend[ing] to be an officer of the Government of the United States, to wit, a member of the House of Representatives . . . ." *Id.* Because a congressperson is not a United States officer, the defendant argued the indictment did not charge a crime and the court therefore did not have jurisdiction. *Id.* The *Lamar* Court rejected the defendant's jurisdictional argument:

> [T]he district court, which has jurisdiction of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

Id. at 65 (internal citation omitted).

But in rejecting the defendants' jurisdictional challenges based on the indictment defects present in both *Lamar* and *Cotton*, these cases properly adhere to § 3231's jurisdictional mandate. In *Lamar*, the indictment alleged all essential elements of "falsely pretend[ing] to be an officer," thus alleging a cognizable crime. 240 U.S. at 64. Though the *Lamar* defendant argued the method for proving one element, "officer," did not meet the statutory requirements, this argument went to his innocence, not whether the indictment alleged a cognizable crime. *Id.* And the indictment in *Cotton*—which charged the defendant with conspiracy and possession with intent to distribute cocaine and cocaine base under 21 U.S.C. §§ 846 and 841(a)(1), but failed to "allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)"—also alleged a cognizable offense. *Cotton*, 535 U.S. at 628. Because conspiring and possessing with intent to distribute *any* amount of cocaine and cocaine base violates United States law, alleged drug quantity controlled only the statutory sentencing range, not the conviction for a cognizable crime itself. *See* § 841(a) and (b). Thus, although the indictment failed to allege the quantity of drugs possessed and was therefore

defective, the quantity of drugs possessed did not determine whether the defendant was charged with a cognizable federal offense. *Cotton*, 535 U.S. at 627-29.

Adhering to this reasoning, the Eleventh Circuit finds that, when an indictment fails to allege a violation of valid federal law because of a defect, the defect renders the district court without jurisdiction. *United States v. Peter*, 310 F.3d 709, 713-14 (11th Cir. 2002) (holding *Cotton* "did not address whether the insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges, and on which a subsequent guilty plea is based, describe conduct that is not proscribed by the charging statute"); *but see United States v. Moore*, 954 F.3d 1322, 1336 (11th Cir. 2020) (holding, in context of *Rehaif*, "[s]o long as the conduct described in the indictment is a criminal offense, the mere omission of an element does not vitiate jurisdiction"). The Sixth Circuit has similarly held a jurisdictional challenge will be successful where "a defendant who enters a guilty plea must establish that the face of the indictment failed to charge the elements of a federal offense," *United States v. Martin*, 526 F.3d 926, 934 (6th Cir. 2008), though it has since broadly held—without acknowledging its decision in *Martin*—that an indictment's omission of the *Rehaif* mens rea element does not deprive the court of jurisdiction. *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *but see United States v. Howard*, 947 F.3d 936, 942 (6th Cir. 2020) (citing *Martin* favorably for the proposition "that a defendant challenges the court's jurisdiction when he asserts that the 'indictment failed to charge the elements of a federal offense'").

There does not appear to be a published Fourth Circuit case addressing whether indictment defects can affect jurisdiction. *But see United States v. Carr*, 303 F.3d 539, 543 (4th Cir. 2002) (defendant conceded at oral argument, after *Cotton* issued, that indictment defects do not preclude jurisdiction). However, district courts within the Fourth Circuit, relying on pre-*Cotton* Fourth Circuit precedent, recognize an indictment that omits an essential element of an offense fails to confer jurisdiction. *See, e.g., United States v. Woodley*, No. 4:17-cr-128, 2018 WL 773423, at *1 (E.D. Va. Feb. 7, 2018); *United States v. McTague*, No. 5:14-cr-055, 2017 WL 1378425, at *11 (W.D. Va. Apr. 10, 2017); *United States v. Weaver*, No. 2:09-cr-222, 2010 WL 1633319, at *1 (S.D.W. Va. Apr. 20, 2010).

Conversely, the First, Second, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits rely on *Cotton*'s language that "defects in an indictment do not deprive a court of its power to adjudicate a case" and *Lamar*'s language that "[t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case" to find indictment defects, including omitted essential elements, do not affect jurisdiction. *See, e.g., United States v. Lara*, 970 F.3d 68, 85-86 (1st Cir. 2020); *United States v. Balde*, 943 F.3d 73, 91-92 (2d Cir. 2019); *United States v. Scruggs*, 714 F.3d 258, 262-64 (5th Cir. 2013); *United States v. Dowthard*, 948 F.3d 814, 817 (7th Cir. 2020); *United States v. Fogg*, 922 F.3d 389, 391 (8th Cir. 2019); *United States v. Velasco-Medina*, 305 F.3d 839, 845-46 (9th Cir. 2002); *United States v. De Vaughn*, 694 F.3d 1141, 1147-48 (10th Cir. 2012). The Third Circuit

has not squarely addressed the question but has indicated it reads *Cotton* similarly. *See United States v. Al Hedaithy*, 392 F.3d 580, 588 (3d Cir. 2004).

Here, the panel summarily rejected Burleson's jurisdictional argument, citing to *Cotton*, 535 U.S. at 630. *Burleson*, 820 F. App'x at 569. As wrongfully convicted defendants like Burleson challenge their unlawful firearm possession convictions under this Court's decision in *Rehaif*, the circuit split concerning the jurisdictional impact of defective indictments—indictments that fail to allege a federal offense—will continue to create discord among the lower courts. It is imperative for this Court to resolve the split.

II. The defective indictment and resulting proceedings deprived Burleson of his Fifth Amendment right to indictment by grand jury and his Sixth Amendment right to notice of the accusation.

The Founders believed the grand jury function "so essential to basic liberties" they placed it in the Constitution. *United States v. Calandra*, 414 U.S. 338, 343 (1974). The basic purpose of the grand jury is "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Russell v. United States*, 369 U.S. 749, 761 (1962).

"Any discussion of the purpose served by a grand jury indictment in the administration of federal criminal law must begin with the Fifth and Sixth Amendments to the Constitution." *Russell*, 369 U.S. at 760. The Fifth Amendment mandates "that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.'" *Calandra*, 414 U.S. at 343; U.S. Const. amend. V. The deprivation of "the defendant's substantial right to be tried

only on charges presented in an indictment returned by a grand jury . . . is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

Relatedly, the Sixth Amendment guarantees an accused "the constitutional right 'to be informed of the nature and cause of the accusation.'" *United States v. Cruikshank*, 92 U.S. 542, 557-58 (1875) (quoting U.S. Const. amend. VI). Together, the Fifth and Sixth Amendments guarantee "substantial safeguards to a criminal defendant, which an indictment is designed to provide." *Russell*, 369 U.S. at 763 (internal quotation marks omitted).

Given the gravity of the protections at stake, mere recitation of statutory language in an indictment is insufficient to ensure these foundational guarantees. "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *Russell*, 369 U.S. at 764. The indictment must set forth *all* necessary elements and facts to provide sufficient notice and allow preparation of an adequate defense. Otherwise, "a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Id.* at 770. Our system of justice does not "allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment," for such subsequent determination "would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Id.*

While a conviction may stand where the indictment contains "'minor and technical deficiencies which did not prejudice the accused," *Russell*, 369 U.S. at 763 (quoting *Smith v. United States*, 360 U.S. 1, 9 (1959)), a conviction *cannot* stand if the indictment's omission "deprive[s] the defendant of one of the significant protections which the guaranty of a grand jury indictment was intended to confer," *id.* One such "significant safeguard" that an indictment must provide is notice of the elements of the offense so the defendant knows "what he must be prepared to meet." *Id.*; *see also Henderson v. Morgan*, 426 U.S. 637, 647 (1976) (automatically reversing where defendant lacked notice of second-degree murder mens rea element). Thus, where conviction requires identification and proof of a specific allegation, the indictment's omission of that allegation violates the defendant's grand jury and associated notice rights, requiring vacatur of the conviction.

This Court so held in *Russell*, where the defendants were convicted of refusing to answer questions when summoned before a congressional subcommittee, yet the indictments did not identify which areas of inquiry the defendants refused to answer. 369 U.S. at 751-52, 764. Recognizing the "very core of criminality" under the charged statute turned on the "subject under inquiry of the questions which the defendant refused to answer," this Court held the indictment's omission violated the defendants' grand jury rights and vacated their convictions. *Id.* at 764-65.

The same grand jury and notice rights are implicated here, where Burleson's indictment omitted the crucial mens rea element. It is specific knowledge of one's prohibited status *at the time of possession* that differentiates cognizable offenses

from "entirely innocent" conduct. *Rehaif*, 139 S. Ct. at 2198. If a defendant lacks knowledge of the facts and circumstances making his possession unlawful, he "lack[s] the intent needed to make his behavior wrongful." *Id.* Without alleging any mens rea as to prohibited status, the indictment charged Burleson with nothing more than "an innocent mistake to which criminal sanctions normally do not attach." *Id.* at 2197.

Yet the panel here refused to analyze Burleson's deprivation of Fifth and Sixth Amendment rights, declining entirely to address and protect these essential constitutional guarantees. The right to an indictment by a grand jury is particularly significant in the post-*Rehaif* cases making their way through the courts, as pre-*Rehaif* grand juries lacked the ability to consider whether the defendant knew his or her prohibitive status. *See Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting) (recognizing that "[a] great many convictions will be subject to challenge" because of *Rehaif*). Similarly, defendants convicted pursuant to defective pre-*Rehaif* indictments lacked *any* notice of the essential mens rea element. It is imperative that this Court instruct the circuits on how to analyze Fifth Amendment grand jury challenges, as well as Sixth Amendment notice challenges, to pre-*Rehaif* indictments that omitted the crucial mens rea element necessary to render firearm possession illegal.

III. Burleson's conviction by an involuntary and unintelligent guilty plea constitutes structural error, warranting automatic relief.

When Burleson entered his pre-*Rehaif* guilty plea, no one understood 18 U.S.C. §§ 922(g) and 924(a) to require that Burleson "knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. In his colloquy, Burleson admitted he had been convicted of a crime punishable by a term of imprisonment of more than one year. However, Burleson never admitted that he knew at the time of the alleged possession of the firearm that he had been convicted of an offense punishable by more than one year in prison. Neither Burleson, "nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged," and therefore, his plea was "constitutionally invalid." *Bousley v. United States*, 523 U.S. 614, 618-19 (1998).

A. The district court's failure to ensure Burleson understood the nature of the charge to which he pleaded guilty violated the core principles of due process and resulted in structural error.

"A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" *Bousley*, 523 U.S. at 618 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). This Court has "long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.* (citations omitted). A plea that does not evidence that

understanding therefore "cannot support a judgment of guilt." *Henderson*, 426 U.S. at 644-45.

Recognizing a conviction entered pursuant to an unintelligent plea violates due process, circuits have split regarding the proper remedy. The Fourth Circuit, in *United States v. Gary*, held a defendant's invalid pre-*Rehaif* guilty plea made without knowledge of the knowledge-of-status mens rea element constitutes structural error. 954 F.3d 194, 202-07 (4th Cir. 2020), *pet'n for reh'g en banc denied*, 963 F.3d 420, *pet'n for cert. docketed*, No. 20-444 (Oct. 5, 2020). Subsequently, the Fifth, Eighth, and Tenth Circuits held to the contrary. *See United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020), *pet'n for cert. docketed*, No. 20-5489 (Aug. 20, 2020); *United States v. Coleman*, 961 F.3d 1024 (8th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1202 (10th Cir. 2020), *pet'n for cert. docketed*, No. 20-6162 (Oct. 23, 2020).

The Fourth Circuit, through *Gary*, is the only circuit that honors this Court's precedent. Indeed, this Court applied the structural error rule to an involuntary plea, even if not identifying the doctrine by name. *See Henderson*, 426 U.S. at 647. In *Henderson*, the defendant pleaded guilty to "second-degree murder without being informed that intent to cause the death of his victim was an element of the offense." 426 U.S. at 638. "Defense counsel did not purport to stipulate to that [requisite intent]; they did not explain to [the defendant] that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent." *Id.* at 646. Given these circumstances, this Court could

not "conclude that his plea to the unexplained charge of second-degree murder was voluntary," and granted automatic relief. *Id.*

As the Fourth Circuit reasoned in *Gary*, this Court's precedent compels the conclusion that such error is structural, requiring automatic reversal. *Gary*, 954 F.3d at 202-07 (applying plain error framework to review of the structural error). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (citations omitted). Where an error "'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself,'" it is structural, "'def[ying] analysis by harmless error standards.'" *Id.* at 1907-08 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)); *see Gary*, 954 F.3d at 206.

That the nature of the error in *Henderson*—complete omission of an essential element of the offense, as in *Gary* and as here—precluded any harmlessness analysis makes sense in light of the "three broad rationales" which support deeming an error structural: first, where "the right at issue does not protect the defendant from erroneous conviction but instead protects some other interest"; second, where "the effects of the error are simply too hard to measure"; and third, where "the error always results in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Because "[t]hese three categories are not rigid" two or more may support concluding an error is structural. *Id.* A court's acceptance of an unintelligent guilty plea implicates all three rationales.

The Constitution's insistence on a voluntary and intelligent plea guards against more than erroneous conviction. It protects an accused's "right to make an *informed* choice on whether to plead guilty or to exercise his right to go to trial," *i.e.*, "his right to determine the best way to protect his liberty." *Gary*, 954 F.3d at 205-06 (emphasis in original). Reserved solely to the defendant is the "right to make the fundamental choices about his own defense." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) (holding usurpation of defendant's right to determine whether to maintain innocence or admit guilt at trial constitutes structural error). Our system guards this "inestimable worth of free choice" independent of whether the defendant's decisions actually work to his benefit in avoiding conviction. *Faretta v. California*, 422 U.S. 806, 834 (1975). Thus, whether the prosecutor in *Henderson* "had overwhelming evidence of guilt available," as this Court assumed, could not save the defendant's involuntary plea. *Henderson*, 426 U.S. at 644-45. Indeed, not even the defendant's own admission he killed the victim could "serve as a substitute for either a finding after trial, or a voluntary admission, that [he] had the requisite intent." *Id.* at 646.

While this Court has explained that relief for a technical violation of Federal Rule of Criminal Procedure 11 requires the defendant show a reasonable probability that but for that error he would not have pleaded guilty, *United States v. Dominguez Benitez*, 542 U.S. 74, 80-84 (2004), this Court was careful to note a "point of contrast with the constitutional question whether a defendant's guilty plea was knowing and voluntary," *id.* at 84 n.10. Where the claim is the denial of

constitutional due process, the conviction cannot "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id.* That is the case here.

Moreover, the deprivation of this "autonomy interest" yields "consequences that 'are necessarily unquantifiable and indeterminate,' . . . rendering the impact of the district court's error simply too difficult to measure." *Gary*, 954 F.3d at 206 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 150 (2006)). Without knowledge of the requisite mens rea element, it is impossible to know whether Burleson would have entered a guilty plea had he received adequate notice of the missing element. Similarly, it is impossible to know what advice Burleson's counsel would have given him or what evidence may have been discovered and presented in his defense, but for the error.

Finally, "fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea." *Gary*, 954 F.3d at 206. The Sixth Amendment's protections, including the right to notice, "guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice." *Faretta*, 422 U.S. at 818. Thus, whether a defendant chooses to forego his right to trial and instead plead guilty the choice is his "alone to make—after he has been fully informed by the nature of the charges against him and the consequences of his plea." *Gary*, 954 F.3d at 208. "The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v.*

Wiggins, 465 U.S. 168, 177 n.8 (1984) (discussing Sixth Amendment right to self-representation).

Here, the panel invoked forfeiture principles to avoid analyzing Burleson's unconstitutional guilty plea as structural error, instead finding "[t]he record fail[ed] to establish a reasonable probability that he would not have pled guilty had the indictment not omitted the knowledge-of-status element." *Burleson*, 820 F. App'x at 569. As a threshold matter, the panel improperly found Burleson's structural error argument forfeited as, although his opening brief on appeal argued plain error without reference to the structural error doctrine by name, the panel was "not bound by a party's concession as to the meaning of the law" per Ninth Circuit precedent. *United States v. Ogles*, 440 F.3d 1095, 1099 (9th Cir. 2006). This Court holds the same. *Grove City Coll. v. Bell*, 465 U.S. 555, 562 n.10 (1984). "The law, as the saying goes, is what it is." *United States v. Dominguez*, 954 F.3d 1251, 1262 n.7 (9th Cir. 2020). The panel's forfeiture invocation not only precluded relief for Burleson, but permitted the panel to avoid grappling with the import of *Rehaif* for cases currently on direct review—cases where the defendant had no meaningful avenue to challenge the defects rendering his plea invalid until *after* he had entered it. *See Rehaif*, 139 S. Ct. 2191, 2201 (Alito, J., dissenting) ("A great many convictions will be subject to challenge," given that *Rehaif* "overturn[ed] the long-established interpretation of . . . 18 U.S.C. § 922(g). . . .").

More importantly, by declining to find structural error, the panel's unpublished disposition contravenes this Court's precedent, adds to the growing

split among circuit courts, and results in disparate outcomes for similarly situated defendants. This Court should grant certiorari to resolve the circuit split over whether an unintelligent guilty plea of this nature constitutes structural error.

B. Plain error review does not apply to this structural error.

At the time Burleson entered his plea, every federal circuit court to have reached the issue, including the Ninth Circuit, held the knowing mens rea requirement in §§ 922(g)(1) and 924(a)(2) applied only to possession, not the defendant's status. *See supra,* p. 5 n.1. This Court's subsequent decision in *Rehaif* upended the former circuit consensus, creating an interpretation "so novel that its legal basis [was] not reasonably available to counsel" at the time of Burleson's change of plea hearing. *Reed v. Ross*, 468 U.S. 1, 16 (1984) (holding, in the post-conviction context, "that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). Because *Rehaif* "overturn[ed] a longstanding and widespread practice to which this Court ha[d] not spoken, but which a near-unanimous body of lower court authority ha[d] expressly approved," Burleson previously had "no reasonable basis" to urge the district court to adopt the position *Rehaif* ultimately endorsed. *Id.* at 17 (citation and internal quotation marks omitted).

Because any pre-*Rehaif* objection to the omitted mens rea element made by Burleson would have been futile under the then-existing circuit consensus, plain error review should not apply. Ordinarily, "[t]he plain-error rule serves many

interests, judicial efficiency and finality being chief among them." *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020) (Alito, J., concurring). For example, in certain circumstances, "[r]equiring a party to bring an error to the attention of the court enables the court to correct itself, obviating the need for an appeal." *Id.* (Alito, J., concurring).

These interests are not served here, however. Courts "have recognized that it may be inappropriate to penalize a defendant for his counsel's failure to object to an error where such objection was either unlikely or futile." *United States v. Kyle*, 734 F.3d 956, 962 (9th Cir. 2013); *United States v. Uscanga-Mora*, 562 F.3d 1289, 1294 (10th Cir. 2009) ("[C]ounsel will not be stuck with plain error review for having failed to voice an objection when doing so would have been futile."). The "failure to raise a futile objection does not waive the objection." *United States v. Martinez*, 850 F.3d 1097, 1100 n.1 (9th Cir. 2017) (quoting *Kyle*, 734 F.3d at 963 n.4).

In a related context, Justice Scalia explained, "When the law is settled against a defendant at trial he is not remiss for failing to bring his claim of error to the court's attention. It would be futile." *Henderson v. United States*, 568 U.S. 266, 284 (2013) (Scalia, J., dissenting). "To penalize defendants for failing to challenge entrenched precedent would only encourage frivolous objections and appeals," *United States v. McGuire*, 79 F.3d 1396, 1412 (5th Cir.) (Wiener, J., concurring), *reh'g en banc granted*, *opinion vacated*, 90 F.3d 107 (5th Cir. 1996), *and on reh'g en banc*, 99 F.3d 671 (5th Cir. 1996), "impeding the proceeding and wasting judicial resources," *United States v. Baumgardner*, 85 F.3d 1305, 1309 (8th Cir. 1996); *see*

also United States v. Washington, 12 F.3d 1128, 1139 (D.C. Cir. 1994) (acknowledging "the principle that it would be unfair, and even contrary to the efficient administration of justice, to expect a defendant to object at trial where existing law appears so clear as to foreclose any possibility of success"). Requiring futile objections "would therefore disserve efficiency." *Henderson*, 568 U.S. at 284. (Scalia, J., dissenting).

Nevertheless, relying on this Court's decision in *Johnson v. United States*, 520 U.S. 461, 466 (1997), some circuits have continued to apply plain error review to unobjected-to errors, even "when a 'solid wall of circuit authority'" precluded a favorable ruling on the objection. *See, e.g., United States v. Knoll*, 116 F.3d 994, 1000 (2d Cir. 1997) (citation omitted). *Johnson*, however, is distinguishable from Burleson's case in one important respect: though this Court reviewed the *Johnson* defendant's claim—arising out of and previously foreclosed by the Eleventh Circuit—for plain error, 520 U.S. at 467-68 & 468 n.1, at the time of the defendant's trial, circuits were split as to the underlying legal issue, *see United States v. Gaudin*, 515 U.S. 506, 527 (1995) (Rehnquist, C.J., concurring). Presumably, "the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court . . . reasonably foreseeable" to the defendant. *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (applying decision broadly interpreting criminal statute retroactively to defendant's case, despite Eighth Circuit's previously narrow interpretation).

Conversely, no circuit split existed here. Decades of precedent foreclosed any such notice or path to relief, leaving Burleson with no reasonable basis on which to object. Plain error review should not apply.

C. Even under plain error review, Burleson's conviction by invalid plea necessarily meets the four-prong test, warranting relief.

Even if this Court analyzes Burleson's invalid plea for plain error, relief is warranted. Relief for unpreserved error under plain error review requires the defendant demonstrate: (1) the proceedings before the district court involved error, (2) the error is plain, (3) the error affected his substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 735-36 (1993); Fed. R. Crim. P. 52(b).

The failure to ensure Burleson entered a constitutionally valid plea constituted error that was plain. Under the first prong, the district court's acceptance of Burleson's unintelligent plea was error. *See supra*, pp. 17-23. For purposes of the second prong, reviewing courts look to the law as it stands at the time of appeal, rather than as it stood at the time of the district court proceeding. *Henderson v. United States*, 568 U.S. 266, 279 (2013). Under the rule *Rehaif* has now established, the absence of any allegation in the indictment, evidence at trial, or notice of the missing element that Burleson knew of his prohibited status is a clear and obvious error, satisfying the first two prongs of plain error review.

This Court has thus far declined to answer the question whether structural error necessarily affects the defendant's substantial rights under the third prong.

United States v. Marcus, 560 U.S. 258, 263 (2010) (citing *Puckett v. United States*, 556 U.S. 129, 140 (2009); *United States v. Olano*, 507 U.S. 725, 735 (1993); *Johnson v. United States*, 520 U.S. 461, 469 (1997); *Cotton*, 535 U.S. at 632). Circuit courts to have addressed the issue, however, seem to agree structural error meets the third prong without a further showing of prejudice. *See Gary*, 954 F.3d at 203; *United States v. McAllister*, 693 F.3d 572, 582 n.5 (6th Cir. 2012); *United States v. Maez*, 960 F.3d 949, 957 (7th Cir. 2020); *United States v. Becerra*, 939 F.3d 995, 1005 (9th Cir. 2019).

Here, the panel faulted Burleson for failing to develop a record that "establish[ed] a reasonable probability that he would not have pled guilty had the indictment not omitted the knowledge-of-status element." *Burleson*, 820 F. App'x at 569. The panel further believed "overwhelming evidence" demonstrated "Burleson knew of his felony status." *Id.* But the panel engaged in the wrong analysis. Without requisite notice of the missing element, Burleson could not make an informed decision whether to plead guilty, affecting the very framework within which the prosecution proceeded. *Gary*, 954 F.3d at 204-07. Indeed, without knowledge of the government's mens rea burden, Burleson (and other similarly situated defendants) would have had no reason to challenge or develop record evidence relevant to prejudice. "A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense. . . ." *Descamps v. United States*, 570 U.S. 254, 270 (2013). In this context, the district court's acceptance of Burleson's invalid guilty plea necessarily affected his substantial rights.

Finally, under the fourth prong of plain error review, because "the structural integrity of the judicial process is not only at stake but undermined when we permit convictions based on constitutionally invalid guilty pleas to stand," the very "fairness, integrity or public reputation of [the] judicial proceedings" is seriously impaired. *Gary*, 954 F.3d at 208. In *Olano*, this Court "rejected a narrower rule that would have called for relief only in those circumstances in which a miscarriage of justice would otherwise result, that is to say, where a defendant is actually innocent." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (citation and internal quotation marks omitted). Fourth-prong review is broader, and must "focus[] instead on principles of fairness, integrity, and public reputation." *Id.*

Here, conviction pursuant to an invalid guilty plea "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' independent of [Burleson's] innocence." *Olano*, 507 U.S. at 736-37. Burleson's case thus falls within the "broader category of errors that warrant correction on plain-error review." *Rosales-Mireles*, 138 S. Ct. at 1906. This Court should grant certiorari to resolve the split on this issue.

IV. Burleson's petition for certiorari raises questions of exceptional importance and his case presents an appropriate vehicle for review.

Given the substantial number of prosecutions under 18 U.S.C. § 922(g), combined with the fact that the overwhelming majority of federal criminal convictions result from defendants' guilty pleas, the questions presented herein are of exceptional importance to federal courts. Moreover, given the widening circuit

splits on these issues, similarly situated defendants receive disparate treatment—with some obtaining relief for unconstitutional convictions and others denied.

Federal prosecutions for unlawful firearm possession under 18 U.S.C. § 922(g) currently account for approximately ten percent of all federal criminal cases. *Quick Facts, Felon in Possession of a Firearm*, U.S. Sentencing Comm'n, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf (last accessed Nov. 30, 2020) (providing data for fiscal year 2019). In fiscal year 2019, 7,647 cases involved convictions under § 922(g), representing a steady and significant increase in unlawful firearm convictions over the previous four years. *Id.* (reporting 4,984 unlawful possession cases in fiscal year 2015 and progression through fiscal year 2019).

Moreover, "the vast majority of federal criminal cases are resolved through guilty pleas." *Gary*, 954 F.3d at 207. In 2019, guilty pleas accounted for over ninety-seven percent of total convictions in the federal criminal justice system, compared to just over two percent of convictions obtained following trial. *See 2019 Annual Report and Sourcebook of Federal Sentencing Statistics*, U.S. Sentencing Comm'n, Table 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf (last accessed Nov. 30, 2020). As this Court has recognized, "ours is for the most part a system of pleas, not a system of trials," *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citation and internal quotation marks omitted), and guilty

pleas therefore "are indispensable in the operation of the modern criminal justice system." *Dominguez Benitez*, 542 U.S. at 83 (citation omitted).

With respect to whether an invalid guilty plea constitutes structural error, the government has recently agreed this issue is one "of significant practical importance," and urged this Court's review. Petition for a Writ of Certiorari, *United States v. Gary*, No. 20-444, at 21 (Oct. 5, 2020); Brief in Opposition for the United States, *Lavalais v. United States*, No. 20-5489, at 10 (Oct. 5, 2020) (reiterating that whether a defendant is "automatically entitled to plain-error relief if the district court failed to advise him that one element of that offense is knowledge of his status as a felon" constitutes an issue which "warrants the Court's review this Term."). And as with an invalid plea, the related issues flowing from the defective indictment—the lack of jurisdiction and deprivation of Fifth and Sixth Amendment rights—are virtually certain to continue to arise as lower courts continue to grapple with *Rehaif*'s mandate.

Burleson's petition, raising these three inter-related, purely legal questions, presents an appropriate vehicle for this Court's review. The defective indictment, which failed to allege a federal crime, stripped the court of jurisdiction, deprived Burleson of his Fifth Amendment right to indictment by grand jury and Sixth Amendment right to notice, and ultimately resulted in an unconstitutional conviction obtained by an involuntary plea.

Burleson's conviction, and countless others like it across the nation, cannot stand. This Court's guidance is essential to instruct the circuit courts of appeal on the correct application of the law.

Conclusion

Burleson respectfully requests this Court grant the petition for certiorari.

Respectfully submitted,

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