

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

**JEMONE WALKER,
*Petitioner,***

v.

**UNITED STATES OF AMERICA,
*Respondent.***

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the district court lacked subject matter jurisdiction over Mr. Walker's case because the indictment failed to state an offense against the laws of the United States.

II. Whether, when applying plain-error review based on an intervening United States Supreme Court decision, a circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial.

**PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS
DIRECTLY RELATED TO THIS CASE**

United States Supreme Court:

Jemone Walker v. United States, 140 S. Ct. 823 (Jan. 13, 2020)
(No. 19-6752) (denying certiorari review of original Eleventh Circuit opinion)

United States Court of Appeals for the Eleventh Circuit:

United States v. Jemone Walker, 793 F. App'x 865 (11th Cir. Oct. 30, 2019)
(No. 19-10792) (original Eleventh Circuit opinion affirming in part, vacating in part, and remanding for further proceedings)

United States v. Jemone Walker, 835 F. App'x 524 (11th Cir. Nov. 24, 2020)
(No. 20-10479) (Eleventh Circuit opinion affirming district court judgment entered on remand)

United States District Court for the Middle District of Florida:

United States v. Jemone Walker, 2019 WL 1494734 (M.D.Fla. Feb. 26, 2019)
(No. 3:18-CR-00045-BJD-JRK) (original district court judgment)

United States v. Jemone Walker, 2020 WL 1277629 (M.D.Fla. Jan. 24, 2020)
(No. 3:18-CR-00045-BJD-JRK) (district court judgment on remand)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jemone Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. *See* App. B.

OPINIONS BELOW

The Eleventh Circuit's original decision affirmed in part, vacated in part, and remanded for further proceedings. *See* App. A (*United States v. Jemone Walker*, 793 F. App'x 865 (11th Cir. Oct. 30, 2019) (No. 19-10792), *cert. denied*, 140 S. Ct. 823 (Jan. 13, 2020)). On remand, the United States District Court for the Middle District of Florida resentenced Mr. Walker. *See* App. E. He appealed from the new judgment, and the Eleventh Circuit affirmed in an unpublished decision. *See* App. B (*United States v. Jemone Walker*, 835 F. App'x 524 (11th Cir. Nov. 24, 2020) (No. 20-10479)).

JURISDICTION

The Eleventh Circuit issued its decision on November 24, 2020. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, by the timely filing of this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rules 29.2 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; 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.

The Sixth Amendment to the U.S. 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.

Section 922(g) of Title 18 of the U.S. Code 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 in or affecting commerce, any firearm or ammunition.

Section 924(a)(2) of Title 18 provides:

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

STATEMENT OF THE CASE

The grand jury indicted Mr. Walker for possessing a firearm as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). *See* App. C. Specifically, the indictment alleged that, on or about January 13, 2018, Mr. Walker, “having been previously convicted in any court of a crime punishable by imprisonment for a term exceeding one year, . . . did knowingly possess, in and affecting foreign commerce, a firearm . . . [i]n violation of 18 U.S.C. §§ 922(g)(1) and 924(e).” *Id.* The indictment listed the following felony convictions: armed robbery and attempted armed robbery on April 7,

2005; and attempted robbery, robbery, and possession of cocaine on August 7, 2014. *Id.* The indictment did not mention 18 U.S.C. § 924(a)(2) or allege that Mr. Walker knew his prohibited status. *Id.*

Acknowledging Eleventh Circuit precedent foreclosed his argument, Mr. Walker moved to dismiss the indictment, arguing that § 922(g) is unconstitutional under the Commerce Clause, facially and as applied to him. The motion was denied, and Mr. Walker proceeded to trial.

The evidence at trial showed that on January 13, 2018, Mr. Walker went to the house of his ex-girlfriend, Christina Steward, seeking to reconcile. Ms. Stewart had other plans. Unbeknownst to Mr. Walker, law enforcement had been contacted. When the officers arrived, Ms. Stewart invited them into the house, where they saw Mr. Walker bend down in front of a kitchen counter, concealing his arms. Upon seeing this, the officers ordered Mr. Walker to leave the kitchen and sit on the couch in the family room. The officers then found a gun and two live rounds of ammunition on the kitchen floor.

The jury was not instructed that Mr. Walker had to know he was a convicted felon at the time of the offense. *See* App. D. Nor was there any direct evidence that he had such knowledge. The jury found Mr. Walker guilty as charged in the indictment. Thereafter, the district court sentenced Mr. Walker, as an armed career criminal, to 188 months' imprisonment, followed by 36 months' supervised release. Mr. Walker appealed to the Eleventh Circuit. *See* Appeal No. 19-10792.

On appeal, Mr. Walker challenged his conviction, arguing the felon-in-possession statute violates the Commerce Clause. He also challenged his sentence under the Armed Career Criminal Act (ACCA) and the denial of his right to allocute. The Eleventh Circuit affirmed his conviction and the application of the ACCA. The court, however, vacated the sentence and remanded, because “the district court plainly erred when it failed to address him personally and provide him with an opportunity to allocute.” *United States v. Walker*, 793 F. App’x 865, 872 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 823 (2020).

On remand, the district court resentenced Mr. Walker, after affording him allocution. The court imposed the statutory mandatory minimum sentence of 180 months’ imprisonment, followed by 36 months’ supervised release. Mr. Walker timely appealed from the new judgment, entered on January 24, 2020. *See* App. D.

On appeal, Mr. Walker argued that the indictment in his case was jurisdictionally defective in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *See* No. 20-10479. The indictment, he explained, did not allege that Mr. Walker knew his relevant status when he possessed the firearm and ammunition. Nor did the indictment cite or track the language of § 924(a)(2). The defective indictment thus failed to allege an offense against the law of the United States and deprived the district court of jurisdiction. Mr. Walker, however, acknowledged that the Eleventh Circuit had already rejected this argument in *United States v. Moore*, 954 F.3d 1322, 1332–37 (11th Cir. 2020).

Based on its binding precedent, the Eleventh Circuit ruled that although the indictment was defective, the omission of the knowledge-of-status element did not deprive the district court of jurisdiction. The appellate court recognized that jurisdictional defects cannot be waived. But since Eleventh Circuit precedent held the defective indictment was not jurisdictional, the court decided that the law-of-the-case doctrine precluded Mr. Walker’s argument because he did not raise it in his first appeal. *United States v. Walker*, 835 F. App’x 524 (11th Cir. Nov. 24, 2020).

REASONS FOR GRANTING THE WRIT

In prosecutions under §§ 922(g) and 924(a)(2), the crucial mens rea element—the element that separates innocent from unlawful firearm possession—is the defendant’s knowledge of his status as a prohibited person. *See Rehaif*, 139 S. Ct. at 2197 . That crucial element was omitted from every aspect of Mr. Walker’s trial proceedings—it was not pled in the indictment; the jury was not instructed on it; and the government produced insufficient evidence to prove it at trial.

I. The district court lacked subject matter jurisdiction over Mr. Walker’s case because the indictment failed to state an offense against the laws of the United States.

In *Rehaif*, this Court made clear that the government may prosecute and convict a defendant only under both §§ 922(g) and 924(a)(2). That is, § 922(g), standing alone, is not a federal offense. The Court explained that § 922(g) states: “[i]t shall be unlawful’ for certain individuals to possess firearms.” *Id.* at 2194. “A separate provision, § 924(a)(2),” the Court continued, “adds that anyone who ‘*knowingly* violates’ the first provision shall be fined or imprisoned for up to 10 years.” *Id.*

The question at issue in *Rehaif* was what the word “knowingly” in § 924(a)(2) requires the government to prove. *Id.* Turning first to the statutory text, the Court explained: “The term ‘knowingly’ in § 924(a)(2) modifies the verb ‘violates’ and its direct object, which in this case is § 922(g). The proper interpretation of the statute thus turns on what it means for a defendant to know that he has ‘violate[d]’ § 922(g).” *Id.* at 2195. The Court answered that question by concluding: “[W]e think that by specifying that a defendant may be convicted only if he ‘knowingly violates’ § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g).” *Id.* at 2196.

The Court thus interpreted § 924(a)(2) to require knowledge of one’s § 922(g) status. Its holding also established that the two provisions must operate in tandem—§ 922 (g)(1) is not a freestanding criminal offense. *See id.* at 2195 (“prosecutions under § 922(g) and § 924(a)(2)”); *id.* at 2197 (“defendants under § 922(g) and § 924(a)(2)”; *id.* at 2200 (“a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2)”).

The indictment here does not allege the knowledge-of-status element; nor does it cite or track the language of § 924(a)(2). *See* App. C. Accordingly, Mr. Walker maintains that the indictment failed to charge an “offense[] against the laws of the United States.” *See* 18 U.S.C. § 3231. As such, the district court lacked jurisdiction over Mr. Walker’s case.

II. When applying plain-error review based on an intervening United States Supreme Court decision, a circuit court of appeals may not review matters outside the trial record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial.

In addition to being omitted from the indictment, the knowledge-of-status element was not addressed at Mr. Walker's trial. The jury was not instructed to find, and the government did not prove, that Mr. Walker knew he was a felon when he possessed the firearm and ammunition. Before *Rehaif*, uniform circuit precedent held such was unnecessary because knowledge of status was not an element of §§ 922(g) and 924(a)(2). Since *Rehaif*, the courts have struggled with how to apply plain-error review in this context.¹

Contrary to the Third Circuit, the Eleventh Circuit has held that in reviewing the indictment, jury instructions, and sufficiency of the evidence for the effect of plain *Rehaif* error, appellate courts can rely on evidence from outside the trial record. See *United States v. Greer*, 798 F. App'x 483, 485 (11th Cir. 2020), *cert. granted*, 141 S. Ct. 974 (2021); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019). The Third Circuit, however, has held that the right to due process and the right to trial by jury, as well as this Court's precedents, require that plain-error review of pre-*Rehaif* trial cases must be limited to the trial record. See *United States v. Nasir*, 982 F.3d 144, 162 (3d Cir. 2020) (en banc).

¹ A court may grant relief under the plain-error standard if it finds: 1) that there is an error, 2) that the error is plain, 3) that the error affects the defendant's substantial rights, and 4) that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. See *United States v. Olano*, 507 U.S. 725, 732–37 (1993).

This Court recently heard argument in *Greer* to resolve this circuit split on the proper application of the plain-error standard in the wake of *Rehaif*. Accordingly, this case should be held pending the decision in *Greer*.

CONCLUSION

For the foregoing reasons, the petition should be granted. In the alternative, this case should be held pending the decision in *Greer v. United. States*, No. 19-8709.

Respectfully submitted,

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