IN THE SUPREME COURT OF THE UNITED STATES
October Term 2020

CASE NO. _____

_____

Eleventh Circuit Court of Appeals No. 19-10656
Southern District of Florida No. 18-cr-80153-WPD

DELSON MARC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
With Incorporated Appendix

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Questions Presented

In *Rehaif v. United States*, 139 S.Ct. 2191, 2194 (2019), this Court held that 18 U.S.C. Sections 922(g) and 924(a)(2) require that the government prove "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." One "relevant status" is that the defendant have a prior conviction for "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). There is a direct split between the Circuits in cases that were tried to a jury and were pending on direct appeal when this Court decided *Rehaif*. The two questions presented in this Petition are:

> ***The Circuits are split. Does this opinion directly conflict with United States v. Gary, 4th Cir. 2014, oral argument before this Court on April 20, 2021, in determining whether in light of Rehaif, a defendant's conviction may be affirmed even though the indictment did not charge, and the government did not prove, that the defendant knew his felon status, which is an essential element of 18 U.S.C. §922(g)?***
>
> ***Additionally, will the forthcoming resolution by this Court of the matter of Gregory Greer v. United States, Case No., 19-8709, oral argument on April 20, 2021, will be applicable to and dispositive of the questions raised in Delson Marc's case and in this Petition.***

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PETITION FOR WRIT OF CERTIORARI

PARTIES TO THE PROCEEDINGS

The Petitioner Delson Marc and one codefendant, Balmy Lincoln Joseph, were defendants in a criminal prosecution in the Southern District of Florida. Petitioner Delson Marc was the Appellant in the Eleventh Circuit Court of Appeals. The Respondent is the prosecution, the United States of America.

OPINION BELOW

This petition arises from the non-published decision of the Eleventh Circuit Court of Appeals entered on March 25, 2020 in *United States v. Delson Marc,* Appeal No. 19-10656, affirming and dismissing in part the appeal taken from Marc's conviction and sentence in the Southern District of Florida in Case No. 9:18-cr-80153-WPD.

Delson Marc appealed his conviction after pleading guilty to (1) conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. Sections 841(a)(1) and 846 (Count 4); (2) possession with intent to distribute heroin, in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2 (Count 5); and (3) felon in possession of a firearm in violation of 18 U.S.C. Section 922(g)(1) (Count 8). The Eleventh Circuit found that "[n]o reversible error has been shown; we affirm but dismiss this appeal in part."

Following the entry of his guilty plea, which included an appeal waiver, Mr. Marc twice attempted, unsuccessfully, to vacate the plea. Mr. Marc was adjudicated guilty and sentenced on February 11, 2019 as follows: 240 months as to Counts 4 and 5, and 120 months as to Count 8, all to run concurrently. Mr. Marc is presently in the custody of the State of Florida. According to the United States Bureau of Prisons website, his presumptive release date is in 2035.

Copies of the Eleventh Circuit opinion, the judgment of the district court, and the Eleventh Circuit order denying the timely-filed petition for rehearing, all are in the Appendix that is attached at the end of this Petition.

STATEMENT OF JURISDICTION

Final judgment against Delson Marc was entered on February 11, 2019. The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. §3231. A notice of appeal was timely filed pursuant to FRAP 4(b). The Eleventh Circuit had jurisdiction over the appeal under 28 U.S.C. §1291, and authority to review Marc's challenge to his sentence under 18 U.S.C. §3742(a).

The Eleventh Circuit's non-published opinion was entered on March 25, 2020. Mr. Marc timely filed a petition for rehearing that was denied by order of January 5, 2021. This petition is timely filed pursuant to Supreme Court Rule 13.1

in conjunction with this Court's Order of March 19, 2020, extending the time to file a Petition for Writ of Certiorari from 90 days to 150 days due to the Covid19 pandemic emergency. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Moreover, this Court has subject matter jurisdiction pursuant to Supreme Court Rule 10(a).

CONSTITUTIONAL and STATUTORY PROVISIONS

The United States Constitution

Fifth Amendment

> 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…

Sixth Amendment

> 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 assistance of counsel for his defense.

Title 18 United States Code Section 922(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…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.

The First Step Act, Title IV, Section 401

Due to its length, the complete text, content, and explanation of Section 401, as set forth by the United States Sentencing Commission in February, 2019, is attached in the Appendix at the end of this Petition,

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below With Relevant Facts

The record shows that Delson Marc entered a guilty plea based upon advice from retained counsel. About one month after Marc entered his guilty plea, Congress amended certain sentencing provisions in the First Step Act, **reducing the minimum mandatory sentence for two of three offenses to which Marc pleaded guilty, to one-half of the sentence in effect on the date of Marc's plea.** The **minimum mandatory was reduced from twenty years to ten** which would have significantly affected plea negotiations and the sentence imposed.

On June 21, 2019, this Court decided *Rehaif v. United States*, 139 S.Ct. 2191 (2019), holding that in prosecutions under 18 U.S.C. §§ 922(g) and 924(c) the government must prove both that the defendant knew he possessed a firearm and also that he knew that he belonged to the relevant category of persons barred from possessing a firearm. These required elements were omitted from the indictment, and proof of each essential element was lacking in the plea agreement and the factual proffer.

On July 23, 2018, in a criminal complaint, Delson Marc and Balmy Joseph first appeared in the Southern District of Florida, West Palm Beach Division. Both were detained. An eight-count indictment was returned alleging drug and firearm

offenses. Marc was charged in six counts. Three months later an eleven-count superseding indictment with a forfeiture claim was returned in which Marc was charged in nine counts. Marc moved for a separate trial. His motion was denied. Marc filed motions to suppress the firearm, bullets, and heroin; to compel *Giglio* and impeachment material; and for early release of *Brady* material. All motions were denied.

On November 5, 2019, trial was set to begin, and Marc pleaded guilty. Marc was found guilty as to Counts 4, 5, and 8 of the superseding indictment: conspiracy to possess heroin with intent to distribute, possession of heroin with intent to distribute, and possession of a firearm by a convicted felon. A written plea agreement and factual proffer were filed.

Before sentencing Marc moved to withdraw his plea. The court denied the motion, discharged retained counsel, and appointed new counsel. Marc filed a motion for return of fees paid to retained counsel. That was denied. A second motion to withdraw the guilty plea was filed. The second motion to withdraw was entertained just before sentencing and was denied.

Marc was sentenced to prison for 240 months, 5 years supervised release, and ordered to pay a $300.00 assessment. Final judgment was entered on February

11, 2019. A notice of appeal was filed on February 18. Counsel moved to withdraw. On February 27, 2019 undersigned was appointed for appeal.

The Plea Agreement

A seven-page plea agreement was filed on November 6, 2018. Marc agreed to plead guilty to Counts 4, 5, and 8. The government agreed to dismiss the other counts. The **agreement provided in paragraph 4 on page 2 that the two drug charges each had a mandatory minimum term of 20 years to life;** and the firearm violation in Count 8 had a 10-year maximum.

The parties agreed to **jointly recommend a sentence of 240 months incarceration** (20 years). The government agreed to dismiss Count 9 which carried a consecutive minimum mandatory five years. Marc agreed to forfeiture of a firearm, ammunition, and almost $27,000 in US currency, as well as other property derived from the offenses.

Because the plea was entered on the day that trial was set to begin, there was no acceptance of responsibility, and the agreement included **an appeal waiver**.

The Factual Proffer

There was a seven-page proffer of facts stating *inter alia*: In January 2018, a West Palm Beach detective received information about a large-scale heroin distributor. The CI described the person and gave a phone number. The individual was in the trucking business in West Palm Beach on Benoist Farms Road, was observed with 4-5 "bricked-up" ounces of heroin, and bragged about importing substantial amounts of heroin. The CI described the person's vehicles. A detective attempted surveillance on Benoist Farms Road and noticed someone fitting the description driving by slowly in a Nissan Altima, writing down the undercover vehicle's license plate. Surveillance was terminated.

Later that day detectives directed the CI to call and arrange a meeting. Detectives watched a silver Nissan Altima head to the location where the CI would meet with the individual. They listened as the man told the CI that he only made "large plays;" he would not sell heroin for less than $300.00; and that "the dirt road" meant the tractor-trailer yard on Benoist Farms Road. This person who earlier had "counter-surveill[ed]" the undercover vehicle, was identified as Delson Marc, known to local and federal law enforcement as a large-scale heroin dealer.

The next day the CI was instructed to purchase heroin for $300.00 from Mr. Marc. The CI made a controlled call to Marc and said he was on his way

to the "dirt road." The CI was equipped to video- and audio-record the transaction. Mr. Marc gave the CI heroin capsules in exchange for $300.00, and said they were potent. The CI gave the capsules to the detectives. The capsules tested positive for heroin.

On February 7, 2018 law enforcement tried to introduce an undercover officer to Delson Marc through the CI. The CI had arranged to purchase heroin for $2,200.00, but Mr. Marc refused to exit his car to meet with a the undercover agent. The informant handed the money to Marc. Marc drove away. The CI said that Marc was nervous about meeting a stranger. The substance tested positive for heroin.

On February 22, 2018, the CI told agents that Mr. Marc was going to come by the CI's residence. Officers watched Marc arrive, meet with the CI, give him two heroin capsules, and tell the CI to test the quality and strength. Marc left. The CI gave the capsules to the agents. Marc returned with another capsule for the CI to test. The CI said the second was better than the first. Marc left. The agents took the capsule. It tested positive for heroin. They were unable to arrange any further transactions with Marc.

In July 2018 Marc was spotted driving, followed by a tow truck. Detectives made a traffic stop of the tow truck. When Marc saw that police cars had stopped

the truck he fled the scene at high speed. Marc and two passengers including Balmy Joseph abandoned the car and fled on foot. On the ground next to the abandoned vehicle officers found a purple Crown Royal bag containing heroin that was packaged for distribution. Marc and Joseph were not caught. The other passenger was captured by a K-9. The substance was positive for heroin.

There was an outstanding state warrant for Delson Marc for fleeing and eluding. Detectives and U.S. Marshals searched for him. On July 12, 2018 they stopped Marc in a car adjacent to Marc's recreational vehicle located at Doerr's Trailers on Benoist Farms Road in West Palm Beach. Backup units arrived and found Marc seated in the front passenger seat of a Nissan Maxima. The Maxima tried to flee but was blocked. The driver and backseat passenger fled on foot with a backpack. Marc was taken into custody. He had over $2,000 cash and seven cell phones in his possession. On July 13th detectives obtained a search warrant for Marc's RV after a narcotics K-9 alerted on it. In the RV detectives found a bag that contained a Springfield Armory, Model XD-40 caliber pistol, six rounds of Barnes.40 caliber ammunition, other ammunition, and dozens of capsules packaged for distribution. The capsules testified positive for heroin.

Prior to Marc's arrest detectives located his Cadillac Escalade parked in the Luma Apartment Complex in West Palm Beach. Detectives showed photos of

Delson Marc and his associates to the leasing staff. One employee identified a photograph of Balmy Joseph as the person who rented apartment no. 5304, but said he used a different name. Joseph rented the apartment in 2017, using the date of birth, social security number, and driver's license number for someone identified as W.D. W.D. was interviewed and said that he did not know Balmy Joseph and did not give him permission to use his identity.

On July 18, 2018 officers executed a state search warrant at apartment 5304 and the detached garage. They saw Balmy Joseph standing outside. As K-9 officers approached Joseph broke two cell phones. He denied living there. He said he was a visitor. A key to apartment 5304 was found in his pocket.

The search warrant authorized a search of the residence and the detached garage for evidence related to fraudulent use of personal information and fraud. When they found narcotics the officers obtained narcotics search warrants for the residence and the garage. They found heroin, prescription medications, keys, a remote garage door opener, cash, and a drug ledger. In the garage they found four Forgiato tire rims. Officers listened to Marc's telephone calls from jail, and his DNA was found on various pieces of evidence.

The proffer also stated that Marc was a convicted felon as of July 2018, as follows: March 2017 possession of codeine in Broward County Florida; January

2016, felon in possession of a firearm in Palm Beach County, Florida; and August 2008 fleeing or eluding in Palm Beach County. The firearm and ammunition found in the search of the RV were determined to have been manufactured outside Florida, and therefore had traveled in interstate commerce.

Two Motions to Withdraw the Plea Agreement

The plea was entered in November 2018. On January 4, 2019 Marc filed a *pro se* motion to withdraw the plea alleging that although he was represented by counsel, he asked to withdraw the plea because "he did not knowingly, voluntarily and intelligently plead pursuant to the written agreement knowing all the facts and circumstances to which he was pleading guilty to [sic]." The motion further alleged that counsel failed to make …

> …full disclosure of the Plea Agreement or the cause and effects of the Plea Agreement. The Defendant is not an Attorney, nor is the Defendant knowledgeable of the Federal Statutes … he was charged with in the indictment…. the Defendant relied solely upon his Attorney action and demands that he plead guilty.

The motion alleged that Marc was not told by counsel about the Federal Sentencing Guidelines, or that he was waiving his right to appeal. Marc said he did not realize that he would not receive a 3-point reduction for acceptance of responsibility. He did not even know what it meant, but subsequently learned that it "… could have reduc[ed] his sentence dramatically; " and that **the government**

included in paragraph 10 that the defendant agreed that he would not seek or receive an acceptance-of-responsibility reduction, which is a highly-sought benefit for defendants who plead guilty (emphasis in original):

> Surely the Defendant would not give up such a benefit had the Attorney explain[ed] to him exactly what he was given [sic] up and what ACCEPTANCE OF REPONSIBILITY meant.

The motion alleged that the **government further violated his constitutional protections by waiving the right to appeal** in paragraph 12. On January 11, 2019 at a hearing on the *pro se* motion to withdraw the plea agreement the court allowed Marc's three retained attorneys to withdraw, and appointed CJA counsel. A written order was entered denying the motion to withdraw the plea agreement ***without prejudice***, to be refiled by new CJA counsel, Attorney Barry Wax.

On February 4, 2019, a second motion to withdraw the plea of guilty was filed by Barry Wax. The motion explained that Marc previously had a team of three attorneys. In the plea agreement he agreed to plead guilty to three charges in the Superseding Indictment (Counts 4, 5, and 8), and the Government agreed to dismiss Counts 1, 2, 3, 6, and 9, charging other heroin and firearm offenses. During the plea colloquy the court advised Marc that he was subject to a 20-year minimum mandatory sentence for each of the three charges to which he was

pleading guilty because of Previous Conviction Information filed by the government pursuant to 21 U.S.C. §851, for the prior conviction in Broward County for codeine-possession, all of which was later rendered erroneous due to a change in the law, favorable to the defense as to §851. In December 2018 the United States Congress passed the First Step Act providing federal sentencing reform that would apply to Delson Marc's case. Title 21 U.S.C. Section §841(b)(1)(A)(viii), was amended to preclude a §851 information unless the prior conviction for a felony drug offense was a ***serious drug felony or serious violent felony***.

The Information for the Broward conviction for possession of codeine could not support an 851 enhancement. Marc was no longer facing a 20-year minimum mandatory jail term for Counts 4 and 5. Now he was facing a 10-year minimum mandatory term for each count. Marc relied on the advice of counsel and the court when he pled guilty; but that advice was rendered inaccurate within about a month after entering the plea.

The second motion to withdraw further alleged that Marc repeatedly was advised by his team of attorneys that if he were found guilty, the lowest possible sentence he could receive for Counts 4 and 5 was twenty years. Counsel presented

the plea agreement to Marc on the morning of trial and told him that if he pled guilty the government would dismiss Count 9 (possession of a firearm in furtherance of a drug trafficking crime), which carried a ***consecutive five-year minimum mandatory*** term.

The motion alleged that Marc received more erroneous advice that his advisory guidelines range was 262-327 months, greater than the 240 months which induced Marc to reluctantly accept the plea in which he waived acceptance of responsibility, the right to request a downward departure, and the right to appeal the sentence, all of which he should have had.

The government filed a response in opposition arguing, *inter alia*, that during the plea colloquy when the court reviewed the terms and provisions of the plea agreement, Marc answered the court's questions with responses indicating that he wished to plead guilty and throw himself on the mercy of the court. The government argued that Marc had close assistance of counsel, the plea was knowing and voluntary, guilty pleas promote judicial economy, withdrawal of a plea prejudices the government, and Marc's admission of factual guilt all were reasons to deny the motion to withdraw the plea.

Hearing on Second Motion to Withdraw Plea & The Sentencing

On February 8, 2019 the court heard arguments on the second motion to withdraw the plea, denied the motion, and proceeded with sentencing. Counsel argued that the motion should be granted and the plea withdrawn because the First Step Act changed the applicability of the §851 enhancement for Counts 4 and 5; that although the plea colloquy was lengthy and extensive, Marc articulated his desire to proceed to trial many times; that Marc was entitled to the benefit of at least two points for acceptance of responsibility even if the plea occurred on the day trial was to begin, and he never would have waived that if he understood what it meant; and there was an obvious alteration made to plea agreement document regarding the date on which the plea was signed by Mr. Marc.

Marc stated that his previous attorneys negotiated with the government without his consent and without the consent of family members who paid substantial attorneys' fees; that the plea agreement was a conflict of interest and a miscarriage of justice because it was negotiated unbeknownst to Marc and without his permission; his family was misled to believe that there would be a trial; Marc stated that he was never involved in a conspiracy with codefendant Balmy Joseph, and the court should investigate the grand jury because there was no testimony about an alleged conspiracy.

The court ruled that lawyers do not need family consent to participate in plea negotiations and that the court has nothing to do with attorney's fees. The court said that it discharged the previous lawyers due to a breakdown of communication between counsel and Mr. Marc. The court said that the evidence in Balmy Joseph's trial, and also in Marc's proffer, was sufficient to support a conspiracy conviction, and ruled that the plea was voluntary:

> … I've read the transcript. And changing your mind later on for whatever reason isn't a valid reason, a fair and just reason to withdraw the plea, and I find that the motion to withdraw the plea is denied and I'll enter an order to that effect.

With that ruling, sentencing commenced. The court overruled defense objection to an enhancement for fleeing and eluding. The court said that it watched the video and Marc was speeding away so the police had to stop their pursuit. Defense counsel argued that it was for an offense other than that charged in this case, but the court said that it heard the evidence in Balmy Joseph's trial.

The government requested the 240 months that was agreed in the plea agreement. Defense counsel also recommended 20 years.

The court overruled the objection to the enhancement for fleeing and eluding. Offense level 36 with criminal history category IV was an advisory range of 262 to 327 months; and that whether or not it overruled the objection to fleeing and eluding "… the court would have imposed the same sentence, and that is . . .

[to] honor the plea agreement and impose a 240-month sentence." The court also said:

> …had this been a trial, had the government not … recommended a 20-year sentence, and had the trial turned out the similar type of evidence as I heard in Balmy Joseph's trial, then I very well may have gone above the guide-lines and imposed a life sentence in this case.

Sentence was imposed: 240 months, five years supervised release, a $300.00 assessment, and special conditions of supervised release. Defense counsel objected to the denial of the second motion to withdraw guilty plea; adopted all arguments made in support of the motion; and objected to the denial of the enhancement for reckless endangerment.

On appeal, the Eleventh Circuit affirmed as to all issues raised, including error in denying the motion to withdraw the guilty plea based upon changes in the law one month after the plea was entered; that the plea was based on erroneous information because it was founded on insufficient proof of the firearm offense based on this Court's decision in *Rehaif;* and that the indictment failed to allege an essential element of Section 922(g).

REASONS FOR GRANTING THE WRIT

The Circuits are split. This opinion directly conflicts with United States v. Gary, 4th Cir. 2014, oral argument before this Court on April 20, 2021, in determining whether in light of Rehaif, a defendant's conviction may be affirmed even though the indictment did not charge, and the government did not prove, that the defendant knew his felon status, which is an essential element of 18 U.S.C. §922(g).

Additionally, forthcoming resolution by this Court of the matter of Gregory Greer v. United States, Case No., 19-8709, oral argument on April 20, 2021, will be applicable to and dispositive of Delson Marc's case as presented in this Petition.

Based upon *Rehaif v. United States*, Marc's plea was founded upon a defective and deficient indictment that failed to charge every essential element of the firearm offense. Title 18, U.S.C. §922(g) standing alone, fails to charge a federal crime. Based upon *Rehaif* the 922(g) charge should be dismissed. A conviction on that charge may not stand due to lack of jurisdiction.

Regardless of the entry of a guilty plea, regardless of an appeal waiver in the plea agreement, regardless of Eleventh Circuit precedent for the proposition that a defendant may waive any non-jurisdictional defect, ***lack of jurisdiction is a matter that cannot be waived, and that may be raised at any time***.

Count 8 of the indictment alleged that on or about July 12, in Palm Beach County, Florida, Delson Marc having been previously convicted of a crime punish-

able by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1). Count 8 fails to also mention Section 924(a)(2).

A criminal conviction will not be upheld if the indictment upon which it is based does not set forth the essential elements of the offense. *United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992) (*en banc*). This rule serves two purposes. First it informs the defendant of the nature and cause of the accusation as required by the Sixth Amendment of the Constitution. *Id*. That notice furnishes the accused with such a description of the charge against him that will enable him to prepare and present a defense and avail himself of the protections against double jeopardy. *United States v. Cruikshank,* 92 U.S. 542, 558 (1875).

The rule also fulfills the Fifth Amendment's indictment requirement ensuring that a grand jury will return an indictment only when it finds probable cause to support all of the necessary elements of the crime. *Gayle*, 967 F.2d 485. The purpose of that requirement is to limit a defendant's jeopardy to offenses charged by a group of fellow citizens acting independently of either the prosecutor or the judge. *Stirone v. United States*, 361 U.S. 212, 218 (1960).

The decision in Delson Marc's case directly conflicts with *United States v. Gary*, 963 F.3d 420 (4th Cir. 2020), this Court's Case No. No.20-444, oral argument April 20, 2021, and likely also will be governed by the outcome of *Gregory Greer v. United States*. that also presented oral argument on April 20th.

Michael Gary pleaded guilty to two counts under Section 922(g)(1). In his Rule 11 hearing Gary admitted that he had (1) previously been convicted of a crime punishable by imprisonment for more than a year, that he (2) possessed a firearm, and (3) that the firearm had traveled in interstate or foreign commerce. Gary was never advised, nor did he admit what *Rehaif* now requires: that he "knew he had the relevant status" as a convicted felon when he possessed the guns. Although Gary did not raise the issue in the district court, Fourth Circuit Chief Justice Gregory reversed Gary's conviction, finding that ***a Rehaif violation is structural error,*** which *per se* violates defendant's substantial rights, and satisfies the difficult-to-meet plain error standard. As a general rule, if a defendant shows (1) error that was (2) plain and (3) affected his substantial rights, an appellate court may exercise its discretion to correct error that seriously affects the fairness, integrity or public reputation of judicial proceedings.

In *Gary,* the Fourth Circuit took a different approach, focusing on the question of whether acceptance of a guilty plea without informing the defendant of

every element of the offense, was constitutional error rendering the plea invalid. Acknowledging that there was plain error, the government nonetheless denied that it affected Gary's substantial rights, because, the government argued, there was ample evidence (including serving two years in jail) proving that Gary knew that he was a convicted felon.

The Fourth Circuit easily rejected that argument, finding that the district court's actions fell into the category of "***structural error***" which must be corrected regardless of any effect on the outcome, and regardless of whether objections were made and preserved. *Gary* presents three separate justifications for that holding: (1) the error violated Gary's right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest; (2) deprivation of Gary's autonomy interest under the Fifth Amendment due process clause has consequences that "are necessarily unquantifiable and indeterminate"; and (3) "fundamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea." Having made those findings the Fourth Circuit exercised its discretion to vacate Gary's convictions, stating that it "…cannot imagine a circumstance where, faced with such constitutional infirmity and deprivation of rights as presented in this case, we would not exercise our discretion to recognize error and grant relief."

While the government concedes that the *mens rea* element was missing from Marc's indictment, unlike the Fourth Circuit in *Gary*, the Eleventh Circuit failed to explain how the rest of the indictment satisfies the Sixth Amendment requirement to provide Marc with "knowledge" of his convicted status, one element of 18 U.S.C. §922(g)(1).

The Eleventh Circuit relied on *United States v. Brown***,** 752 F.3d 1344, 1354 (11th Cir. 2014), which is inapplicable. Unlike *Brown,* the government already acknowledged that Marc's indictment failed to provide notice of the "status-knowledge" requirement. In *Brown,* not only did the indictment state the facts of the offense, but also recited all statutory elements.

In *Class v. United States*, 138 S.Ct. 798 (2018), this Court made clear that an appeal waiver, even to the validity of the conviction, cannot bar a claim that the defendant pleaded guilty to a non-offense. This is the established law of the Eleventh Circuit going back to the Old Fifth Circuit well before *Class*. *See Adams v. Murphy*, 653 F.2d 224, 225 (5th Cir. 1981) ("Nowhere in this country can any man be condemned for a nonexistent crime.")

In *Rehaif*, this Court held that under Section 922(g) nine categories of persons, felons being the first, are prohibited from possessing a firearm or ammunition by virtue of their status. While 922(g)(1) prohibits felons from pos-

sessing a firearm that provision does not actually criminalize the conduct; that is done by 18 U.S.C. Section 924(a)(2), which provides that whoever knowingly violates 922(g) shall be imprisoned not more than 10 years. Now, pursuant to *Rehaif*, a valid prosecution depends on both 922(g) and 924(a)(2). The crucial role of 924(a)(2) has been overlooked here.

Rehaif addressed whether in a prosecution under both 922(g) and 924(a)(2), the government must prove that a defendant knows of his status as a person barred from possessing a firearm, 139 S.Ct. at 2195, and answered affirmatively holding that "knowingly" in 924(a)(2) applies both to the defendant's conduct and to his status. To convict a defendant, therefore, the government must show that the defendant knew that he possessed a firearm and that he had the relevant status when he possessed it. *Rehaif* at 2194 and 2220.

Rehaif relied on the long-standing presumption traceable to common law that Congress intends to require a defendant to possess a culpable mental state as to every statutory element that criminalizes otherwise innocent conduct. *Id*. at 2195. Rather than find a convincing reason to depart from the ordinary presumption in favor of scienter, this Court found that the statutory test supported the presumption. *Ibid*.

Rehaif emphasizes that the term "knowingly" in 924(a)(2) modifies the verb "violates" and its direct object 922(g). *Ibid*. This Court found no reason to interpret "knowingly" as applying to the second element (possession) but not to the first (status); and to the contrary, found that 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 that he violated the material elements of 922(g). *Id* at 2196.

Marc's indictment alleged that having previously been convicted of a felony, he did "knowingly possess a firearm in and affecting foreign commerce, in violation of 18 U.S.C. 922(g)(1)." ***That allegation does not state a federal offense***. The grand jury alleged that Marc was a felon, but failed to allege that he ***knew*** that he was a felon. *Rehaif* held that such knowledge is an essential element.

Next, the indictment charged a violation of 922(g)(1) but did not mention 924(a)(2). *Rehaif* is clear that 922(g) is not a freestanding offense. A valid prosecution depends upon both 922(g) which prohibits certain conduct by certain persons, and also 924(a)(2) which criminalizes the knowing violation of that prohibition. The grand jury failed to charge an essential element of the offense, specifically knowledge of his status. The grand jury failed to cite the indispensable statutory requirement of *mens rea*, criminalizing certain conduct.

No other allegations in the indictment may cure these fatal deficiencies.

The effect of the insufficiency of the indictment is explained in *United States v. Martinez*. 800 F.3d 1293, 1294 (11th Cir. 2015), where the grand jury charged the defendant with knowingly transmitting an interstate threat in violation of 18 USC 875(c). *Id* at 1294. In *Elonis v. United States*, 135 S.Ct. 2001 (2015), this Court held that Section 875(c) requires proof of the defendant's subjective intent, abrogating precedent to the contrary. In light of *Elonis*, the Eleventh Circuit held that the indictment was insufficient because it failed to allege Martinez's *mens rea*, or any other fact from which intent could be inferred. *Id*. at 1295. As a result the indictment did not meet the Fifth Amendment requirement that the grand jury find probable cause for each element of a violation of 875(c). *Ibid*.

Here as in *Martinez*, an intervening decision of this Court abrogated the Eleventh Circuit's precedent making clear that a particular *mens rea* is required to state an offense. The indictment here even more deficient than the indictment in *Martinez* because it did not even cite 924(a)(2), the statute that criminalizes the prohibited conduct and supplies the *mens rea* element.

The government might argue that Marc failed to raise this argument below, but that is not a basis to uphold this non-offense. *De novo* review applies because jurisdictional challenges to indictments are reviewed *de novo*,*United Statesv. Sper-*

razza, 804 F.3d 1113, 1119 (11th Cir., 2015); and the Eleventh Circuit even has established precedent recognizing that the failure to allege a crime is a jurisdictional defect. *United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 2013); *see United States v. St. Hubert*, 909 F.3d 335, 342-44 (11th Cir. 2018) (re-affirming that precedent).

The government's position in the Eleventh Circuit failed to recognize that the charged conduct, knowing firearm possession by a felon, is not a federal offense under *Rehaif*. *See, United States v. McIntosh*, 704 F.3d 894, 902-03 (11th Cir. 2013). It is "outside the reach" of any criminal statute; "proof of that alleged conduct, no matter how overwhelming, would have brought [the government] no closer to showing the crime charged." *United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2002). No completed crime was charged because the indictment did not cite Section 924(a)(2). Any position to the contrary is irreconcilable with the indictment and *Rehaif*.

Marc's indictment affirmatively charged a non-offense factually and legally. This case may be distinguished from cases such as *United States v. Cotton*, 535 U.S. 625 (2002), where the indictment omitted drug quantity for sentencing purposes but still charged an underlying drug offense. The indictment here did not even cite 924(a)(2), and certainly did not track its language in its entirety.

In *Reed v. Ross*, 468 U.S. 1 (1984), this Court held that where a claim is so novel that its legal basis is "not reasonably available to counsel," a defendant has cause for failure to raise the claim and overcome procedural default. A claim is not "reasonably available" where a decision of the Court overturns a long-standing and widespread practice to which the Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id*. at 17. The Eleventh Circuit long held that knowledge of status was not an element. *United States v Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997). The other circuits agreed. *Rehaif*, 139 S.Ct. at 2210 n.6 (Alito, J.) (dissenting) (citing cases).

If plain error review applies, Marc satisfies it. There was "error" that was "clear" or "obvious" in light of *Rehaif*. *United States v. Olano*, 507 U.S. 725, 732-33 (1993). It would not matter even if error became plain while the case was on direct appeal. *Henderson v. United States*, 568 U.S. 266, 269, 279 (2013).

The right to have the grand jury make the charge on its own judgment is a "substantial right" which cannot be revoked with or without court amendment. *Stirone,* 361 U.S. at 219. The only way to remedy such a defect in an indictment is to rewrite it, and only the grand jury may do that. *Russell v. United States*, 369 U.S. 749, 770 (1962). If any other body could change the charging part of an indictment to modify it to what it should be, or what the grand jury would probably

have done, the grand jury right would be "frittered away" and almost destroyed. *Russell*, 369 U.S. 771; *United States v. Lang*, 732 F.3d 1246, 1249 (11th Cir. 2013). There is no way for a court to review a record and then speculate what the grand jury might have done. The fact is Marc was convicted without being charged with a crime.

Convicting a defendant of an unindicted crime seriously affects the fairness, integrity, and public reputation of judicial proceedings, and is "***fatal error***." *Stirone*, 361 U.S. at 219 (emphasis added). The indictment does not cite 924(a)(2), nor does it or quote the "knowingly violates" language upon which *Rehaif*'s holding was based. Nor can the missing *mens rea* be inferred from other allegations in the indictment. None of the conclusory allegations in the indictment could have alerted Mr. Marc to the fact that the government had to prove knowledge of his felon status. This issue is rapidly-evolving. Both Gregory Greer and Michael Gary had oral argument before this Court on April 20, 2021.

Rehaif makes clear that while 922(g)(1) prohibits felons from possessing a firearm, that prohibition is not criminal. Rather, it becomes criminal only when it is "knowingly violated," with Section 924(a)(2) being the operative offense.

Marc asked that the indictment be dismissed because he was indicted for a nonexistent offense. For the foregoing reasons his conviction should have been vacated as a matter of law.

A defective indictment is not subject to harmless error. While the Eleventh Circuit suggests otherwise, the issue is debatable. *United States v. Inzunza*, 638 F.3d 1006, 1016-17 (9th Cir. 2011) (A defective indictment is a ***structural flaw*** and thus not subject to harmless error review). That is because the Fifth and Sixth Amendments not only guarantee charging by a grand jury, but also the right to be informed of the nature and cause of the accusation. *See, eg., United States v. Radowitz*, 507 F.3d 108, 111-12 (3d Cir. 1974) (An indictment fulfills the Sixth Amendment "apprise" requirement by providing the defendant with notice of the charges against him to allow him to prepare a defense).

Further Marc relies on this Court's decisions in *Russell v. United States,* 369 U.S. at 763, 768 n.15, 771, and *Hamling v. United Stat es*, 418 U.S. 87, 117-18, 94 S.Ct. 2887 (1974). *Russell* held that "[a]n indictment must furnish the defendant with a sufficient description of the charges against him to enable him to prepare his defense, to ensure that the defendant is prosecuted on the basis of facts presented by the grand jury to enable him to plead jeopardy against a later prosecution, and to inform the court of facts alleged so it can determine the sufficiency of the Charge." *Russell*, 369 U.S. at 763, 768 n.15. To perform these functions the indictment must set forth the elements of the offense charged and contain a serious statement of the facts and circumstances that will in-

form the accused of the specific offense with which he is charged. *Hamling, supra*, 418 U.S. at 117-18.

Finally, the issue of whether the plea was knowingly and voluntarily entered also must be revisited. The Eleventh Circuit seems to suggest that Marc's plea agreement allowed the district court to disregard Rule 11 of the Federal Rules of Criminal Procedure. Rule 11(b)(3) requires that before accepting a plea of guilty, the district court "***must*** determine that there is a factual basis for the plea." *United States v. Frye,* 402 F.3d 1123, 1128 (11th Cir. 2006).

Rule 11(b)(3)'s requirement is to protect a defendant who mistakenly believes that his conduct constitutes the criminal defense to which he is pleading guilty. *McCarthy v. United States*, 394 U.S. 459, 467, 90 S.Ct. 1166, 1171 (1969). It is clear from Delson Marc's plea colloquy that the plea agreement was null and void under Rule 11(b)(3), where the Court stated at page 54, Change of Plea Hearing:

> THE COURT: All right. There being no exception or objection to the facts summarized, there having been a stipulated factual basis, I find the facts which the government is prepared to prove are sufficient to constitute the crimes of … possession of a firearm and ammunition by a convicted felon.

The Eleventh Circuit has found no violation of substantial rights in almost every case coming before it raising a *Rehaif* error, because there was **some record evidence that those defendants had served more than one year in custody**. *See, for example United States v. Stokeling*, 2020 U.S. App. LEXIS, 183 (11th Cir.2020) (finding that Stokeling's indictment and Rule 11 colloquy suffered from *Rehaif* defects, but there was no violation of substantial rights; and during the plea colloquy he admitted that he had three prior felonies and that he served twelve years in prison; *United States v. Greer*, 2020 U.S. App. LEXIS 412 (11th Cir. 2020) (finding no substantial rights violation in *Rehaif* error where the presentence investigation report established that Greer had accrued five felony convictions and had served separate sentences of 36 months and 20 months in prison). No such facts are present in Delson Marc's case. And in any event, this Court's decision on Greer's pending Petition will govern the decision in Marc's case.

Conclusion

Based upon the foregoing arguments and authorities, Petitioner Delson Marc respectfully prays that this Honorable Court will issue its most gracious writ, and will find that Delson Marc's guilty plea should have been vacated because sentencing laws changed after entry of the plea and prior to the sentencing; and/or

that his conviction for possession of a firearm by a convicted felon should be vacated based upon *Rehaif,* and/or based upon the outcomes of the pending Petitions on behalf of Michael Gary and Gregory Greer; and/or because the charged 922(g) violation was not a violation of federal criminal law based upon what was - and was not charged in the indictment. Delson Marc asks this Court to Grant his Petition, Vacate his convictions, and Remand the cause to the Eleventh Circuit with specific instructions to revisit, reconsider, and remand to the district court with appropriate instructions.

May 13, 2021

Very respectfully submitted,

/s/ Sheryl J. Lowenthal

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OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS

APPEAL NO. 19-10656

March 25, 2020

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DELSON MARC, Defendant-Appellant.

No. 19-10656

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

March 25, 2020

[DO NOT PUBLISH]

Non-Argument Calendar

D.C. Docket No. 9:18-cr-80153-WPD-1

Appeal from the United States District Court for the Southern District of Florida

Before GRANT, LUCK, and EDMONDSON, Circuit Judges.

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PER CURIAM:

Delson Marc appeals his convictions after pleading guilty to (1) conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), 846 (Count 4); (2) possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count 5); and (3) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 8). No reversible error has been shown; we affirm but dismiss this appeal in part.

I.

Marc first challenges the district court's denial of his second motion to withdraw his guilty plea. Briefly stated, Marc contends that the First Step Act[1] -- enacted over a month after Marc pleaded guilty but before sentencing -- rendered Marc's plea unknowing and involuntary. Marc contends that his lawyers advised him incorrectly about the consequences of pleading guilty. Marc says he entered a guilty plea based on his lawyers' erroneous advice that he faced a 20-year mandatory minimum sentence on Counts 4 and 5. But pursuant to the later-enacted First Step Act, Marc says he would no longer be subject to an enhanced

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sentence under 21 U.S.C. § 851 and, thus, would face only a 10-year mandatory minimum on Count 4 and 5.[2] Marc also contends that his lawyers pressured him to plead guilty and denied him access to all discovery.

We review the denial of a motion to withdraw a guilty plea under an abuse-of-discretion standard. United States v. Brehm, 442 F.3d 1291, 1298 (11th Cir. 2006).

A defendant -- like Marc -- who seeks to withdraw a guilty plea after the court has accepted the plea but before sentencing bears the burden of demonstrating a "fair and just reason" for doing so. See Fed. R. Crim. P. 11(d)(2)(B); United States v. Izquierdo, 448 F.3d 1269, 1276 (11th Cir. 2006). We construe liberally whether a defendant's pre-sentence motion to withdraw is supported by a "fair and just reason." See United States v. Buckles, 843 F.2d 469, 471 (11th Cir. 1988). A defendant, however, has "no absolute right to withdraw a

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guilty plea." Id. Instead, whether a defendant will be allowed to withdraw his plea is a decision "left to the sound discretion of the trial court." Id.

In determining whether a defendant has satisfied his burden of showing a "fair and just reason" for withdrawal of his guilty plea, the district court must "consider the totality of the circumstances surrounding the plea." Id. at 471-72. In particular, the district court

considers "(1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea." Brehm, 442 F.3d at 1298. If the defendant cannot satisfy the first two factors, we have said that the district court need not give "considerable weight" or "particular attention" to the remaining factors. United States v. Gonzalez-Mercado, 808 F.2d 796, 801 (11th Cir. 1987).

The district court abused no discretion in denying Marc's motion to withdraw his guilty plea. About the assistance from counsel, Marc was represented by three criminal defense lawyers, two of whom were present at Marc's plea hearing. Marc testified at his plea hearing that he had discussed with his lawyers -- and understood -- the charges against him, the possible sentences, and the terms of the plea agreement. Marc also conferred several times with his lawyers during the plea hearing. Marc then testified that he was "definitely"

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satisfied with his lawyers' representation and that he had no additional questions for his lawyers.

Statements made under oath by a defendant during a plea colloquy receive a strong presumption of truthfulness. United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994). A defendant "bears a heavy burden" to show that statements made under oath were false. United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988).

Marc's testimony at the plea hearing -- that he had discussed fully his case with his lawyers and needed no more time to do so -- contradicts his later assertion that his lawyers denied him access to some discovery. Moreover, Marc has provided no explanation about how the purportedly unavailable audio and video evidence would have changed his decision to plead guilty. Given the record in this case, Marc has not satisfied his "heavy burden" of showing that his earlier statements made under oath were false.

About the voluntariness of Marc's plea, Marc said repeatedly during the plea hearing that he was pleading guilty freely and voluntarily. Marc's later assertion that his lawyers pressured him to plead guilty is belied by Marc's testimony at the plea hearing that he was not coerced into pleading guilty and was, instead, pleading guilty because he was guilty of the charged offenses. The district court also noted that Marc's lawyers made a "good decision" on Marc's behalf to negotiate the plea

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agreement under which the government agreed to dismiss a count under 18 U.S.C. § 924(c) that carried a 5-year consecutive sentence. Marc also said several times that he understood the charges against him and understood that -- based on the then existing law -- the minimum sentence he could receive was 20 years' imprisonment and that the district court could impose a sentence of more than 20 years.

Marc now contends that his plea was rendered involuntary and unknowing by a later event: the later enactment of the First Step Act. This argument is without merit. The voluntariness of a guilty plea is determined by considering all the circumstances surrounding the plea, including "the possibility of a heavier sentence following a guilty verdict after a trial." Brady v. United States, 397 U.S. 742, 749 (1970). "[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rests on a faulty premise." Id. at 757 (emphasis added). This conclusion is true when the defendant's

decision to plead guilty was made in reliance on his lawyer's then-correct advice about the applicable law. Id.; see United States v. Maldenaldo Sanchez, 269 F.3d 1250, 1285 (11th Cir. 2001) (en banc), abrogated on other grounds by United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005) (rejecting -- based on Brady -- defendants' argument that a later change in the law "retroactively invalidated" their otherwise valid guilty pleas).

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Although Marc asserts that his lawyers told him erroneously that the lowest possible sentence he faced was 20 years' imprisonment, Marc concedes that his lawyers' advice was correct when Marc entered his guilty plea. That the passage of the First Step Act might have changed Marc's calculus about the benefits of pleading guilty does not render retroactively his plea involuntary or unknowing. See Brady, 397 U.S. at 757 ("A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.").

Because Marc has failed to show either that he received less than the close assistance of counsel before or during his plea or that his plea was not entered knowingly and voluntarily, we need not give particular attention to the remaining two factors. See Gonzalez-Mercado, 808 F.2d at 801. On this record, Marc has failed to show a fair and just reason for withdrawing his plea; the district court abused no discretion in denying Marc's motion.

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II.

Marc also challenges his conviction under 18 U.S.C. § 922(g) for being a felon in possession of a firearm.[3] Briefly stated, Marc contends -- in the light of the Supreme Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019) -- that both his indictment and section 922(g) are constitutionally deficient for failing to list as an element of the offense knowledge of the firearm possession or knowledge of status as a convicted felon.

An appeal waiver looms over this case. We review de novo the validity of an appeal waiver. United States v. Johnson, 541 F.3d 1064, 1066 (11th Cir. 2008). An appeal waiver is enforceable if it is made knowingly and voluntarily. United States v. Bushert, 997 F.2d 1343, 1351 (11th Cir. 1993). To establish that the waiver was knowing and voluntary, the government must show either that "(1) the district court specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, or (2) it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver." Id. "An appeal waiver includes the waiver of the right to appeal difficult or debatable

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legal issues or even blatant error." United States v. Grinard-Henry, 399 F.3d 1294, 1296 (11th Cir. 2005).

We conclude that Marc's appellate arguments based on Rehaif are barred by his appeal waiver. Marc's written plea agreement provided expressly that Marc waived the right "to assert any claim that: (1) the statute(s) to which the defendant is pleading guilty is/are unconstitutional; and/or (2) the admitted conduct does not fall within the scope of the statute(s) of conviction."

During Marc's plea colloquy, the district court discussed in detail the terms of the appeal waiver. Among other things, the district court explained that Marc was waiving the right to appeal the final judgment

or sentence, except in limited circumstances -- circumstances not applicable in this case. The district court also said expressly that Marc was "giving up any complaint that the statutes are unconstitutional or that your conduct doesn't fall within the scope of the statutes." Marc said that he had discussed the appeal waiver with his lawyers, that he understood the appeal waiver, and that he had reviewed and signed the plea agreement. Because the record demonstrates that Marc waived knowingly and voluntarily his right to appeal his convictions, we will enforce the plea agreement's appeal waiver.

We also reject Marc's contention that his indictment contained a jurisdictional defect not subject to waiver. Marc's indictment charged a violation

of a valid federal statute -- 18 U.S.C. § 922(g) -- and, thus, invoked the district court's subject-matter jurisdiction over the offense. See United States v. Brown, 752 F.3d 1344, 1354 (11th Cir 2014). That the indictment failed to charge an essential element of the offense "does not strip the district court of jurisdiction over the case." See id. Because the purported defect in the indictment was non-jurisdictional, Marc waived his right to challenge the indictment by executing a valid appeal waiver and by entering an unconditional guilty plea. See id.; United States v. Betancourth, 554 F.3d 1329, 1332 (11th Cir. 2009) ("A defendant who enters an unconditional plea of guilty waives all nonjurisdictional challenges to the conviction . . .").

Accordingly, we dismiss Marc's appeal to the extent he challenges his conviction under section 922(g).

AFFIRMED; APPEAL DISMISSED IN PART.

Footnotes:

1. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018).

2. To be clear, Marc makes no argument that he was erroneously denied the benefit of the First Step Act later at his sentencing. At sentencing, the district court recognized that -- under the First Step Act -- Marc was no longer subject to a mandatory minimum sentence of 20 years' imprisonment. Nevertheless, the district court determined that a 20-year sentence was an appropriate sentence given the circumstances of Marc's offense and, thus, accepted the 20-year sentencing recommendation in the plea agreement.

Instead, Marc's argument on appeal is a focused argument: that, had he known he would be subject to a lower mandatory minimum sentence, he would not have pleaded guilty and would not have agreed to a recommended 20-year sentence.

Marc's sentencing guidelines range for the pertinent crimes was greater than 20 years at all pertinent times.

3. In the light of the record -- including the parties' appellate briefs -- we construe Marc's 18 February 2019 notice of appeal as also appealing timely the 11 February 2019 final judgment of conviction. For background see Nichols v. Ala. State Bar, 815 F.3d 726, 731 (11th Cir. 2016).

DELSON MARC

PETITION FOR WRIT OF CERTIORARI

APPENDIX TO THE PETITION

FINAL JUDGMENT AND SENTENCE IN A CRIMINAL CASE

SOUTHERN DISTRICT OF FLORIDA
CASE NO. 9:18-cr-80153-WPD

DOCKET NO. 167

ENTERED ON FEBRUARY 11, 2019

UNITED STATES DISTRICT COURT

Southern District of Florida
Fort Lauderdale Division

UNITED STATES OF AMERICA
v.
DELSON MARC

JUDGMENT IN A CRIMINAL CASE

Case Number: **18-80153-CR-DIMITROULEAS**
USM Number: **18953-104**

Counsel For Defendant: **Barry Wax, Esq.**
Counsel For The United States: **Rinku Tribuiani, John Parnofiello, AUSA**
Court Reporter:**Francine Salopek**

The defendant pleaded guilty to count(s) 4, 5, and 8.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 USC 846	Conspiracy to possess with intent to distribute One kilogram or more of a mixture and substance containing a detectable amount of heroin	07/18/2018	4
21 USC 841(a)(1)	Possession with intent to distribute one kilogram or more of a mixture and substance containing a detectable amount of heroin	07/18/2018	5
18 USC 922(g)(1)	Felon in possession of a firearm	07/12/2018	8

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining counts are dismissed on the motion of the government.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **2/8/2019**

William P. Dimitrouleas
United States District Judge

Date: Feb. 11, 2019

DEFENDANT: **DELSON MARC**
CASE NUMBER: **18-80153-CR-DIMITROULEAS**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **240 months consisting of 240 months as to each of Counts 4 and 5 and 120 months as to Count 8. All Counts are to run concurrent.**

The court makes the following recommendations to the Bureau of Prisons: The Court recommends participation in the RDAP program and that the defendant be designated to a facility in Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **DELSON MARC**
CASE NUMBER: **18-80153-CR-DIMITROULEAS**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years on each of Counts 4 and 5 and 3 years as to Count 8. All Counts are to run concurrent.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **DELSON MARC**
CASE NUMBER: **18-80153-CR-DIMITROULEAS**

SPECIAL CONDITIONS OF SUPERVISION

Association Restriction - The defendant is prohibited from associating with Balmy Joseph while on supervised release.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **DELSON MARC**
CASE NUMBER: **18-80153-CR-DIMITROULEAS**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$300.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **DELSON MARC**
CASE NUMBER: **18-80153-CR-DIMITROULEAS**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

F. Special instructions regarding the payment of criminal monetary penalties:
Any unpaid monetary penalties are to be paid during the term of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Government shall file a preliminary order of forfeiture within 3 days.

The defendant shall forfeit the defendant's interest in the following property to the United States:
One (1) Springfield Armory, Model XD-40, .40 caliber pistol bearing serial number US411460; Approximately six (6) rounds of Barnes .40 caliber ammunition; Approximately one (1) round of Speer .40 caliber ammunition; Approximately three (3) rounds of Federal .40 caliber ammunition; Approximately eight (8) rounds of Winchester .40 caliber ammunition; Approximately $26,700.00 in United States currency.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DELSON MARC

PETITION FOR WRIT OF CERTIORARI

APPENDIX TO THE PETITION

ORDER OF THE ELEVENTH CIRCUIT COURT OF APPEALS

DENYING THE PETITION FOR A PANEL REHEARING

ENTERED ON JANUARY 5, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10656-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DELSON MARC,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: GRANT, LUCK and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by DELSON MARC is DENIED.

ORD-41

DELSON MARC

PETITION FOR WRIT OF CERTIORARI

APPENDIX TO THE PETITION

THE FIRST STEP ACT, TITLE IV
SECTION 401
TEXT, CONTEXT, CONTENT, AND EXPLANATIONS
THE UNITED STATES SENTENCING COMMISSION
FEBRUARY 2019

United States Sentencing Commission | Office of Education & Sentencing Practice

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First Step Act

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First Step Act

Signed Into Law on December 21st, 2018

The First Step Act (P.L. 115-391) was signed into law by the President on December 21, 2018. The Act deals mostly with reentry of the incarcerated, directing the Federal Bureau of Prisons to take specific actions regarding programming, good-time credit, and compassionate release, among other issues. The Act does not contain any directives to the Commission.

Related to its sentencing reform provisions (**Title IV**), the Act makes important changes to mandatory minimum penalties and to the safety valve provision (a provision that allows courts to sentence a defendant without regard to the mandatory minimum). Specifically, in relation to Title IV, the Act:

- **reduces certain enhanced mandatory minimum penalties for some drug offenders (Section 401);**
- **broadens the existing safety valve at 18 U.S.C. § 3553(f), increasing the number of offenders eligible for relief from mandatory minimum penalties (Section 402);**
- **reduces the severity of the "stacking" of multiple § 924(c) offenses (Section 403); and**
- **applies retroactively the Fair Sentencing Act of 2010 which reduced mandatory minimum penalties for crack cocaine offenses (Section 404).**

First Step Act Provisions	
Title I	Recidivism Reduction
Title II	Lieutenant Osvaldo Albarati Correctional Officer Self-Protection Act of 2018
Title III	Restraints on Pregnant Prisoners Prohibited
Title IV	Sentencing Reform
Title V	Second Chance Act of 2007 Reauthorized
Title VI	Miscellaneous (includes recidivism reduction, reentry programming, prison conditions, treatment for opioid and heroin abuse, and more)

Changes to Drug Mandatory Minimum Penalties
Section 401

DRUG OFFENSES
The First Step Act made changes to both the length of certain mandatory minimum penalties and the types of prior offenses that can trigger enhanced penalties.

Statutory Provision	Statutory Penalty	Enhanced Penalty BEFORE First Step Act	Enhanced Penalty AFTER First Step Act
21 U.S.C. § 841(b)(1)(A)	10-year Mandatory Minimum	**20-year** Mandatory Minimum (after one prior conviction for a felony drug offense) **Life** (after two or more prior convictions for a **felony drug offense**)	**15-year** Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony) **25-year** Mandatory Minimum (after two or more prior convictions for a **serious drug felony or serious violent felony**)
21 U.S.C. § 841(b)(1)(B)	5-year Mandatory Minimum	**10-year** Mandatory Minimum (after one prior conviction for a **felony drug offense**)	**10-year** Mandatory Minimum (after one prior conviction for a **serious drug felony or serious violent felony**)
21 U.S.C. § 960(b)(1)	10-year Mandatory Minimum	**20-year** Mandatory Minimum (after one prior conviction for a **felony drug offense**)	**15-year** Mandatory Minimum (after one prior conviction for a **serious drug felony or serious violent felony**)
21 U.S.C. § 960(b)(2)	5-year Mandatory Minimum	**10-year Mandatory Minimum** (after one prior conviction for a **felony drug offense**)	**10-year** Mandatory Minimum (after one prior conviction for a **serious drug felony or serious violent felony**)

Note that §§841(b)(1)(C) and (D) were NOT amended.

Mandatory Minimum Penalties
Changes to § 851 Enhancements for Repeat Offenders

The First Step Act not only reduced the mandatory minimum penalties, but also changed the conditions under which they apply.

Higher mandatory minimum penalties apply if the defendant has a prior conviction for a "serious drug felony" or for a "serious violent felony" and the prosecution files a notice of enhancement under 21 U.S.C. § 851. The First Step Act not only reduced the mandatory minimum penalties, but also changed the conditions under which they apply. The defendant's prior convictions must meet the new definitions of "serious drug felony" or "serious violent felony." The defendant must have served a term of imprisonment of more than 12 months on the prior offense and must have been released within 15 years of the current federal offense. In addition, for any "serious drug felony" or a "serious violent felony" based on 18 U.S.C. § 3559(c)(2), the offense must have been punishable by a term of imprisonment of 10 years or more.

"Serious Drug Felony" & "Serious Violent Felony"

An offense prohibited by 18 U.S.C. § 924(e)(2)(A) for which the defendant served a term of imprisonment of more than 12 months and was released from any term of imprisonment within 15 years of the instant offense. Section 924(e)(2)(A) defines "serious drug felony" as an offense under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), Chapter 705 of Title 46 (Maritime Law Enforcement) or under state law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment is ten years or more.

An offense for which the defendant served a term of imprisonment of more than 12 months that is either a violation of 18 U.S.C. § 3559(c)(2) or 18 U.S.C. § 113 (assaults within maritime or territorial jurisdiction), if the offense was committed in the maritime or territorial jurisdiction of the United States. Section 3559(c)(2)(F) defines "serious violent felony" as enumerated offenses such as murder, certain sex offenses, kidnapping, extortion, arson, and certain firearms offenses, among others, or as any offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense" and is punishable by a maximum term of imprisonment of ten years or more.

Effective date of these changes: The Act provides that these changes shall apply to any offense that was committed before the date of enactment of the Act if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018].

Safety Valve
Section 402

NOTE
The new statutory safety valve provision applies to crimes under Title 46 (Maritime Offenses).

Old Limitation

(1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History category);

. . .

Note that this limitation still exists in §5C1.2.

New Limitation

(1) The defendant does not have:
- (A) more than four criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
- (B) a prior 3-point offense, as determined under the sentencing guidelines; and
- (C) a prior 2-point violent offense, as determined under the sentencing guidelines;

Definition of Violent Offense: As used in this section, the term "violent offense" means a crime of violence, as defined in [18 U.S.C.] section 16, that is punishable by imprisonment.

Effective date of these changes: The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.