No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN ANIBAL PATRONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

First, whether the district court's violation of *Rehaif v. United States*, 139 S. Ct. 2191 (2019)—when it omitted the knowledge of immigration status element under 18 U.S.C. § 922(g)(5)—entitles a defendant to relief, irrespective of whether the defendant can show a reasonable probability that, but for the error, he would have gone to trial.

Second, whether the pattern element of USSG § 4B1.3 requires proof of planned criminal acts that occur over at least one year, rather than weeks or months, where the livelihood element explicitly imposess a time-based requirement of twelve months.

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Opinion Below

The Federal Reporter has published the opinion of the court of appeals at 985 F.3d 81 (2021). The text of the opinion is reproduced in the Appendix at 1a-17a.

Jurisdiction

On January 14, 2021, the First Circuit entered its judgment affirming Mr. Patrone's convictions and sentence out of the U.S. District Court for the District of Massachusetts. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

Statutory and Regulatory Provisions Involved

18 U.S.C. § 922(g)(5)(A)

(g) It shall be unlawful for any person—

(5) who, being an alien—

(A) is illegally or unlawfully in the United States;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 3742(a)(2)

(a)Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(2)was imposed as a result of an incorrect application of the sentencing

guidelines

USSG § 2D1.1(b)(16)(E)

(16) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by 2 levels.

USSG § 4B1.3

If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than 13, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11.

Application Notes:

1. "Pattern of criminal conduct" means planned criminal acts occurring over a substantial period of time. Such acts may involve a single course of conduct or independent offenses.

2. "Engaged in as a livelihood" means that (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant

engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for the defendant's criminal conduct).

Supreme Court Rule 10(a)

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power

Statement of the case

I. Overview

This case arises from a government investigation and prosecution of a diffuse drug distribution and sale network in Lawrence, Massachusetts. App. 3a. As part of its investigation and prosecution, the Government arrested the defendant Juan Anibal Patrone. *Id.*

In a superseding indictment, the Government charged Mr. Patrone with two offenses: first, conspiring to traffic more than 400 grams of fentanyl, in violation of 21 U.S.C. § 846, and second, possessing a firearm as an alien unlawfully present in the United States, in violation of 18 U.S.C. § 922(g)(5)(A). App. at 5a.

Mr. Patrone's appeal and petition for certiorari arise from the district court's handling of Mr. Patrone's guilty plea to these offenses.

II. Background

Mr. Patrone is a citizen of Italy and the Domican Republic. App. at 3a. He grew up in the Dominican Republic, where he lived with his parents until the age of thirteen when he lost his father to a brutal murder. Mr. Patrone subsequently emigrated, entering the United States lawfully in 2009 or 2010 on a tourist visa. Mr. Patrone settled in Lawrence, Massachusetts, obtained a work permit, and applied to remain in the United States. *See* App. at 5a.

At some point in 2016, the Drug Enforcement Administration began to investigate a drug trafficking organization in Lawrence. *Id.* The investigation led agents to suspect Mr. Patrone's involvement in the widespread distribution of fentanyl and other drugs. *Id.* Agents engaged in a controlled purchase of fentanyl from Mr. Patrone on May 20, 2016. Approximately one year later, the Government arrested Mr. Patrone and others in connection with the investigation. *Id.* During the arrest, agents seized a firearm from Mr. Patrone's home. *Id.* The Government consequently charged Mr. Patrone with conspiring to traffic more than 400 grams of fentanyl, in violation of 21 U.S.C. § 846, and second, possessing a firearm as an alien unlawfully present in the

United States, in violation of 18 U.S.C. § 922(g)(5)(A). App. at 3a. The indictment charging the violation of § 922(g)(5) did not allege that Mr. Patrone knew that he bore a prohibited status. *See* App. 5a-6a.

III. Guilty Plea and Sentence

On September 19, 2018, Mr. Patrone pleaded guilty to the offenses without a plea agreement. App. 4a. During the plea, the Government did not proffer information related to Mr. Patrone's knowledge of his immigration status. *See id.* Neither the Government nor the district court informed Mr. Patrone that proof of his knowledge of his unlawful immigration status was an essential element of the firearm offense. *Id.*

The district court subsequently sentenced Mr. Patrone, first increasing his base offense level with the two-level enhancement for criminal livelihood under USSG § 2D1.1(b)(16)(E), before imposing a below-guidelines sentence of an aggregate 144-month term of imprisonment.

Judgment entered on May 6, 2019. Mr. Patrone filed a timely notice of appeal. The case was docketed in the Court of Appeals for the First Circuit on May 15, 2019.

IV. Direct Appeal

While Mr. Patrone's appeal was pending, this Court decided *Rehaif v. United States*, holding in relevant part that scienter of status is an essential element of § 922(g) violations. *See Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019). As a consequence, Mr. Patrone argued in his appeal that his firearm conviction violated *Rehaif*. App. at 6a-7a. Mr. Patrone also argued that the district court incorrectly imposed the two-level

enhancement for criminal livelihood where there was scant evidence that Mr. Patrone engaged in planned criminal conduct for much more than twelve months. *See* App. at 17a.

In a January 14, 2021 published opinion, the First Circuit affirmed the judgment of conviction and sentence. Regarding Mr. Patrone's *Rehaif* claim, the First Circuit concluded that the error was not structural and that Mr. Patrone had failed to establish that he would have gone to trial but for the *Rehaif* error. App. at 9a, 15a. The First Circuit likewise rejected Mr. Patrone's sentencing argument about the livelihood enhancement. App. at 19a.

This timely petition follows.

Reasons for Granting the Petition

Mr. Patrone's petition raises a *Rehaif* claim that this Court has already recognized as a part of a compelling circuit split worthy of review. "A petition for a writ of certiorari will be granted only for compelling reasons," such as where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). As explained more fully below, the First Circuit's determination of Mr. Patrone's primary issue—whether the district court's *Rehaif* error is structural—conflicts with the Fourth Circuit's decision in *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), *cert. granted*, 141 S.Ct. 974 (2021), a case for which this Court granted certiorari earlier this year. Put differently, this Court has already recognized the compelling nature of Mr. Patrone's issue and granted a similar petition. As such, Mr. Patrone requests that the Court also grant this petition.

This Court should grant Mr. Patrone's petition because Mr. Patrone's case raises the same *Rehaif* issues upon which this Court has already granted certiorari in *Gary* in recognition of a circuit split on this very issue.

If this Court agrees with the Fourth Circuit in *Gary* that *Rehaif* errors are structural, it should also reverse the First Circuit's decision in this case and remand for further proceedings. So-called structural errors are "a special category of forfeited errors that can be corrected regardless of their effect on the outcome." *See Olano*, 507 U.S. at 735. These errors do not require a defendant to specifically show prejudice in order to show that the error affected his substantial rights. *See United States v. Marcus*, 560 U.S. 258, 263 (2010) (some "structural errors" could affect substantial rights regardless of their actual impact on an appellant's trial). Because structural errors represent

"fundamental flaws" that "undermine[] the structural integrity of the criminal tribunal itself," they are per-se prejudicial and satisfy the third prong of the *Olano* plain-error analysis. *See Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986). In *Gary*, the Fourth Circuit held that a guilty plea tendered without knowledge of all the elements of an offense constitutes structural error. *Gary*, 954 F.3d at 207. *Cf. McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[B]ecause a guilty plea is an admission of **all the elements** of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.") (emphasis added). By contrast, the First Circuit rejected such a claim and held that courts should review these types of errors under standard plain-error review. *See, e.g.*, *United States v. Patrone*, 985 F.3d 81, 86 (1st Cir. 2021); *see also United States v. Williams*, 946 F.3d 968, 973 (7th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019); *United States v. Reed*, 941 F.3d 1018, 1021-22 (11th Cir. 2019).

This Court's action on the Government's petition for certiorari in *Gary* suggests that it should take similar action on Mr. Patrone's case. On January 8, 2021, this Court granted the Government's petition for certiorari in *Gary*. The Court has scheduled oral argument in *Gary* for April 20, 2021, and the matter will be pending until this Court renders judgment. The deadline for Mr. Patrone to file a petition for certiorari is April 14, 2021, before the Court hears the argument in *Gary*. Both Mr. Patrone and the defendant in *Gary* argue that a *Rehaif* error is structural and thus undermines the process itself, removing the need to show individual prejudice. *Compare Gary*, 954 F.3d at 204, *with* App. at 8a-9a. It would be unfair to reject Mr. Patrone's petition in these

circumstances, as such a rejection would arbitrarily deny Mr. Patrone the benefit of any ruling in *Gary* on the circuit split that both *Gary* and Mr. Patrone's case present.

It would also be particularly unfair to reject Mr. Patrone's case while accepting *Gary* because the circumstances of convictions under prohibited immigration statuses weigh against the need to demonstrate prejudice. In *Gary*, the Fourth Circuit recognized that notwithstanding the defendant's possible awareness of his status as a felon from the lengthy prison term he previously served, the *Rehaif* error rendered his plea non-intelligent—that is, that the defendant had failed to receive adequate information about the mens rea requirement before tendering his plea. *Gary*, 954 F.3d at 203. Mr. Patrone likewise received inadequate information about the mens rea requirement, but the complicated nature of immigration statuses make it less likely that a § 922(g)(5) defendant like Mr. Patrone would have any idea that he or she is unlawfully present in the United States. For example, the record shows that Mr. Patrone "lawfully entered the United States," "obtained a work permit," and was "applying to remain in the United States" at the time of his arrest. App. at 5a. Nothing indicates specifically that Mr. Patrone knew that he was out of status at the time of the offense.

As Mr. Patrone's example demonstrates, status as a felon is entirely distinct from the status of an alien "illegally or unlawfully in the United States." 18 U.S.C. 922(g)(5)(A). It is often easy to know whether one "has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." *United States v. Hollingshed*, 940 F.3d 410, 415–16 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2545 (2020). The vast majority of felony convictions are by guilty plea, at which the court informs the

defendant of the maximum punishment and potentially imposes a lengthy term of imprisonment. Felony convictions also carry serious collateral consequences: disenfranchisement, state prohibitions against owning a firearm, ineligibility for public funds, and difficulty finding employment or housing. For all these reasons, it can be hard not to know about a felony conviction. *See, e.g.*, *United States v. Lavalais*, 960 F.3d 180, 187–88 (5th Cir. 2020) ("[C]onvicted felons typically know they're convicted felons.").

By contrast, it can be difficult or impossible to know one's immigration status, making it more likely that a *Rehaif* error results in prejudice. *See, e.g.*, *United States v. Balde*, 943 F.3d 73, 97 (2d Cir. 2019) ("Resolving those [immigration] questions required multiple hearings before the district court in which an able and experienced judge found the questions difficult to resolve, a plea agreement that reserved Balde's right to appeal the district court's adverse conclusion, and ultimately this panel's lengthy original opinion addressing the complexities of Balde's immigration status."). The immigration laws of the United States are complex, abstruse, and ministerial in nature. *See Arizona v. United States*, 567 U.S. 387, 395 (2012) ("Federal governance of immigration and alien status is extensive and complex. "); *see also Padilla v. Kentucky*, 559 U.S. 356, 379-80 (2010) ("Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien.... [This] is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes;

[and] the frequency with which immigration law changes....”). Thus, the likelihood of prejudice from a *Rehaif* error in the immigration context is greater than the likelihood of prejudice in the felon context. The Court should grant Mr. Patrone’s petition to avoid leaving Mr. Patrone and similarly situated defendants in a worse position than *Gary*-like defendants.

Yet even though *Rehaif* errors are especially unjust for defendants convicted under 922(g)(5), granting relief in this case to correct that injustice will not cause a flood of unnecessary litigation. One analysis of federal prosecution statistics reveal that section 922(g)(5) defendants represent only “3.3 percent of [federal] gun prosecutions during the last five years.” TRAC, Syracuse Univ., *Federal Weapons Prosecutions Rise for Third Consecutive Year* (Nov. 29, 2017), https://trac.syr.edu/tracreports/crim/492/. Federal firearm prosecutions likewise only stand for approximately twelve percent of all federal prosecutions. *See, e.g.*, U.S. Sentencing Comm’n, *Overview of Federal Criminal Cases, Fiscal Year 2017* (June 2018), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf. So although granting certiorari in Mr. Patrone’s case will provide justice for many defendants across the country, the number of cases constitutes merely a small fraction of the total number of annual federal prosecutions, meaning that it will not flood the district courts with new cases. The Court should therefore grant this petition.

In addition to the *Rehaif* issue, this Court should also resolve inconsistencies between the plain language of the "substantial period of time" of the livelihood sentencing enhancement and judicial interpretations of that same clause.

If the Court grants this petition to review the *Rehaif* issue, Mr. Patrone requests that the Court also review the First Circuit's interpretation of the livelihood enhancement under USSG § 2D1.1(b)(16)(E). On appeal, a court may review a sentence for whether the district court imposed it "as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. § 3742(a)(2). Here, the district court applied the livelihood enhancement, and the First Circuit affirmed this application, even though there was scant evidence that Mr. Patrone engaged in a criminal livelihood for much more than one year. As a consequence, the guidelines calculations were two-levels too high, and there is a "reasonable probability of a different outcome" had the district court used the proper sentencing range. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). The Court should therefore remand the case for resentencing.

The application of the criminal-livelihood enhancement to Mr. Patrone's case constitutes clear error because the evidence was insufficient to show the criminal acts occurred "over a substantial period of time." *See* USSG § 4B1.3, cmt. 1. The sentencing guidelines for drug trafficking provide for a two-level enhancement for certain defendants who commit the offense "as part of a pattern of criminal conduct engaged in as a livelihood." USSG § 2D1.1(b)(16)(E). The commentary to § 2D1.1 explains that this enhancement requires proof of two elements—a "pattern of criminal conduct" and "engage[ment] in [it] as a livelihood," both as defined in USSG § 4B1.3. *See* § 2D1.1, cmt. 20(C). The commentary to § 4B1.3 defines the pattern element as "planned criminal acts

occurring over a substantial period of time." § 4B1.3, cmt. 1. The commentary defines the livelihood element as requiring that "(A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period." § 4B1.3, cmt. 2. With regard to the pattern element, these definitions do not specify what period of time constitutes a "substantial period of time." See § 4B1.3, cmt. 1.

A careful reading of the guidelines and commentary show that a "substantial period of time" is on the order of years, rather than weeks or months. Merriam-Webster defines substantial to mean "considerable in quantity" or "significantly great." *See* "Substantial," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/substantial (2019). A "substantial period of time" must therefore be a "considerable" or "significantly great" period of time. *See id.* Although there is no hard and fast rule as to what constitutes a substantial period of time, common sense dictates that in this context such a period must extend more than "a few weeks or months." *Cf. H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242 (1989) (using the phrase "substantial period of time" in defining continuity in the context of RICO claims); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 447 (1st Cir. 1990) (finding alleged criminal conduct spanning "years" rather than "a few weeks or months" to constitute a "substantial period of time"); *Walk v. Baltimore & Ohio R.R.*, 890 F.2d 688, 690 (4th Cir. 1989) ("[W]e conclude that activity continuing, as here alleged, for

a period of ten years, must be considered to have 'extended over a substantial period of time....'"). *Cf. also United States v. Nelson*, 793 F.3d 202, 205 (1st Cir. 2015) (acknowledging a sentence of 168 months to constitute a "substantial period of time"); *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 706 (4th Cir. 1986) (describing the number of years required for employees to qualify for certain retirement benefits as a "substantial period of time"). *But see Villafranca v. Lynch*, 797 F.3d 91, 96 (1st Cir. 2015) (in an asylum case, finding that staying in a country for six months constitutes a "substantial period of time" for purposes of inferring that there is no objectively reasonable fear of persecution).

The language in the guidelines and commentary supports this conclusion. In construing the sentencing guidelines, a reviewing court should apply the same canons of construction that it applies to statutes. *See United States v. DeLuca*, 17 F.3d 6, 10 (1st Cir. 1994). For example, courts apply the canon against surplusage when interpreting sentencing guidelines, such that "no construction should be adopted which would render ... words or phrases meaningless, redundant or superfluous." *See id. Accord Nat'l Ass'n Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) ("[W]e have cautioned against reading a text in a way that makes part of it redundant."). Here, the pattern element contains two sub-parts—(A) "planned criminal acts" and (B) the occurrence of those acts "over a substantial period of time." USSG § 4B1.3, cmt. 1. Similarly, the livelihood element contains two sub-parts—(A) a certain level of income derived from "the pattern of criminal conduct" during any twelve-month period and (B) the "pattern of criminal conduct" being the defendant's primary occupation during

that same twelve-month period. § 4B1.3, cmt. 2. Read in conjunction, the phrase "substantial period of time" has no meaning unless it exceeds the twelve-month period that the livelihood element references. Put differently, the second half of the livelihood element imposes a time requirement—"the totality of the circumstances shows that [the pattern of] criminal conduct was the defendant's primary occupation in that twelve-month period." *See* § 4B1.3, cmt. 2 (emphasis added). *Accord United States v. Gordon*, 852 F.3d 126, 134–35 (1st Cir. 2017) (interpreting this prong to apply where the evidence showed that the defendant "held a leadership role in a substantial drug-trafficking organization ... during the year preceding his arrest"); *United States v. Blake*, 81 F.3d 498, 504 (4th Cir. 1996) ("Section 4B1.3 instructs the court to examine a defendant's conduct during a 12–month period."). This time requirement effectively swallows the "substantial period" requirement of the pattern element unless "substantial period" requires some longer period of time than twelve months. To avoid rendering the "substantial period" language surplusage, the Court should therefore find that the "substantial period" requires a finding that the planned criminal acts occurred over a period of time that exceeds twelve months. *See* USSG § 4B1.3, cmt. 1.

The language of the guidelines notwithstanding, many circuit courts across the country have found relatively short periods of time to satisfy the "substantial period" requirement. *See, e.g.*, *United States v. Pristell*, 941 F.3d 44, 52–53 (2d Cir. 2019) (6 months); *United States v. Reed*, 951 F.2d 97, 101 (6th Cir. 1991) (7 months); *United States v. Cryer*, 925 F.2d 828, 830 (5th Cir. 1991) (4 months); *United States v. Irvin*, 906 F.2d 1424, 1426 (10th Cir. 1990) (finding that a time period 5 to 7 months satisfies § 4B1.3); *United*

States v. Hearrin, 892 F.2d 756, 758 (8th Cir. 1990) ("extensive"criminal conduct over 8 months). This Court should grant this petition to reconcile the language of the sentencing guidelines and the decisions of these circuit courts.

Proper review of this issue will have a significant effect on Mr. Patrone's case. First, the evidence is insufficient to suggest that Mr. Patrone engaged in planned criminal conduct for much more than twelve months. At the Rule 11 hearing, Mr. Patrone admitted to conduct that spanned from a May 20, 2016 phone call to his May 30, 2017 arrest. *Accord* App. at 17a. The bulk of his relevant conduct, however, occurred over the six-month period before his arrest during which the Government intercepted many of his phone calls. The earliest incident that the Government can cite is a May 20, 2016 controlled purchase of 10 grams of heroin by a confidential source. *See* App. at 17a. Although the Government claimed that Mr. Patrone had told family that he had been "in the business for seven years," the record lacks information corroborating this puffery. *Conta* App. at 5a. The Government provided no other information at sentencing concerning Mr. Patrone's actions outside the narrow timeframe in the superseding indictment. This narrow timeframe may be sufficient to satisfy the livelihood element, *see Gordon*, 852 F.3d at 134–35, but it cannot satisfy the pattern element and its "substantial period of time" requirement. See USSG § 4B1.3, cmt. 1. If this Court adopts such a ruling, Mr. Patrone would receive an immediate two-point reduction to his sentencing guidelines score, resulting in a meaningfully lower guideline sentence.[1] The Court should therefore grant the petition to review the First Circuit's refusal to apply a

[1] Mr. Patrone's offense level before the 2 point enhancement was 39; with a criminal history category of I, his range at 39 would be 262 to 327 months, while at 41 it was 324 to 405 months. App. 23a.

twelve-month requirement to the "substantial period of time" requirement. *See* App. at 19a.

Conclusion

Mr. Patrone's case is even more favorable than *Gary* for applying structural error because, as the First Circuit agrees, it is unclear whether he in fact knew his status, and immigration status is inherently difficult to know—unlike status as a convicted felon. It is also an important case as it involves two circuit splits; one on the structural error issue and one interpreting the sentencing guidelines. If this Court does not grant certiorari, Mr. Patrone and a modest set of others convicted under 922(g)(5) subjected to *Rehaif* errors will be robbed of their fair opportunity for relief from the Constitutional wrong they suffered. A grant of certiorari gives the Court the opportunity to vindicate public policy concerns underpinning scienter requirements and the sole and fundamental right of defendants to choose trial.

Respectfully submitted,
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By his attorneys

Date: June 8, 2021

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