No. 21-1082

In The

Supreme Court of the United States

TARRESSE LEONARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent cites three reasons this Court should deny certiorari, none of which hold weight. First, the court of appeals incorrectly applied a harmless error standard when it should have treated the omission of an essential element as structural error. Second, the circuit split is not stale but over-ripe; and the courts of appeals are not as lopsided on this question as Respondent's over-simplification of the case law suggests. Third, and finally, this case presents a good vehicle to answer the Question Presented because Tarresse Leonard's indictment was defective.

I. The omission of an essential element from the indictment was structural error under the reasoning of this Court's precedents.

Respondent identifies facts but draws the wrong conclusion from those facts when it asserts that because grand jury proceedings are so one-sided anyway, an indictment's failure to allege an essential element can be harmless. Quite the contrary. It is precisely because grand jury proceedings are so one-sided—the accused has no opportunity to hold the government accountable to its burden of probable cause—that an indictment's failure to allege an essential element of an offense constitutes structural error and renders a prosecution fundamentally unfair. In grand jury proceedings, the requirement that an indictment allege essential elements safeguards the fundamental rights of the accused.

It is also important to remember "[f]undamental unfairness" is not "the sole criterion of structural error." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). This Court has also rested conclusions of structural error "upon the difficulty of assessing the effect of the error," and "on the irrelevance of harmlessness," among other things. *Id*. *See also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (identifying fundamental unfairness as one of "at least three broad rationales" that have led this Court to find structural error). In elaborating the fundamental-unfairness category of cases, this Court has emphasized that an error "can count as structural even if the error does not lead to fundamental unfairness in every case." *Id*.

Grand jury proceedings are secret proceedings at which a defendant and his attorney even may not be present. When a grand jury returns an indictment that omits an essential element of the offense, "the effect of the violation cannot be ascertained." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). In such cases, it is "impossible for the government to show that the error was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 87 (1967).

Contrary to what the government contends, it matters not that the Fifth Amendment right to a grand jury has not been incorporated against the States through the Fourteenth Amendment. First, Respondent's argument in this respect is based on the flawed premise that the error must lead to fundamental unfairness to be structural. Fundamental unfairness is not this Court's only rationale for finding structural

error. For example, having twelve jurors is not a requirement of fundamental fairness. This Court has held it is constitutional in both state and federal cases to have juries as small as six people, *Williams v. Florida*, 399 U.S. 78 (1970), and many states follow that. But twelve jurors are required by the Federal Rules of Criminal Procedure, and violation of that rule has been found by at least some courts to be structural error. *See United States v. Curbelo*, 343 F. 3d 273 (4th Cir. 2003).

Second, even if fundamental unfairness were a requirement, it would be met here. This is a federal case, not a state case. In federal cases, the grand jury clause is part of the bill of rights and serves as a fundamental protection against the federal government. The exceptions to the Grand Jury Clause are few and are constitutionally based. *See Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018) (noting that the Framers "exempt[ed] from the Fifth Amendment's Grand Jury Clause all cases arising in the land or naval forces") (citation omitted). As this Court explained over six decades ago, "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." *Smith v. United States*, 360 U.S. 1, 9 (1959). "The Fifth Amendment made the [grand jury indictment] mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings." *Id*. For this safeguard to function properly, indictments must allege essential elements.

Third, this Court has found grand jury errors to be structural although the grand jury clause has not been incorporated. *See Vasquez*, 474 U.S. at 260-64 (1986); *Ballard v. United States*, 329 U.S. 187, 195-96 (1946).

Respondent's brief also makes light of the error in this case being not a trial error. A trial error "is markedly different" from "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), and it is hard to read this Court's decision in *Fulminante* as "doing anything other than dividing constitutional error into two comprehensive categories." *Gonzalez-Lopez*, 548 U.S. at 149 n.4. The error in this case falls into the structural defect category. It cannot be deemed harmless by looking to whether there was sufficient evidence presented to the grand jury to demonstrate probable cause that the omitted element was satisfied. That distinguishes this case from the facts before this Court in *Greer v. United States*, 141 S. Ct. 2090 (2021) (addressing omission of essential elements from jury instructions or plea colloquies).

This Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), likewise does not control the outcome here. First, the error in *Cotton* was forfeited and this Court accordingly did not rule on whether omissions of *Apprendi* elements are subject to automatic dismissal when timely raised. *Id*. at 632-33 (expressly reserving whether such errors are structural). This Court has unanimously recognized that even structural errors, if not preserved, do not entitle the

defendant to automatic reversal on plain-error review. *See Johnson v. United States*, 520 U.S. 461, 467 (1997). Even the dissenting justices in *Neder v. United States*—who would have found structural error based on failure to submit an offense element to the jury—recognized that the error would not be subject to automatic reversal if the objection was not made at trial. *See Neder*, 527 U.S. 1, 34 (1999) (Scalia, J., concurring in part and dissenting in part). *Cotton* therefore does not affect the outcome of this case because, as a leading criminal procedure treatise has recognized, "[t]he application of the plain error standard to an essential-elements defect not properly raised below does not invariably require that a harmless error standard, rather than an automatic reversal standard, be applied to an essential-elements defect that was properly raised and preserved for appellate review." Wayne LaFave, Jerold Israel, Nancy King, and Orin Kerr, 5 Crim. Procedure, § 19.3(b) (4th ed. 2021).

Second, *Cotton* dealt with an *Apprendi* error and not a *Rehaif* error. There is a material difference between *mens rea* elements and other elements, and there is likewise a material difference between a quantitative element (as in *Apprendi*) and a qualitative element (at issue here). Elements about the defendant's mental state, and whether he possessed the requisite *mens rea*, are different from elements about how much money was taken or how much drugs were possessed. And these distinctions are emphasized at the grand jury stage. *Rehaif* errors much more directly implicate the fundamental rights protected by the grand jury

clause than do *Apprendi* errors because they relate to the conviction and not just the length or manner of sentence. As commentators have said: "From the prosecutions perspective, the essential elements requirement clearly is the most critical pleading requirement." *Id*.

This argument follows the view of the only Justice of this Court who has spoken on the question presented by this case. Justice Scalia answered this question in Mr. Leonard's favor and said he would find "the error to be structural." *United States v. Resendiz-Ponce*, 549 U.S. 102, 117 (2007) (Scalia, J., dissenting). This Court should grant certiorari, adopt that view, and hold that *Rehaif* errors in indictments are subject to automatic dismissal when the objection is timely raised *before trial* as here.

II. There is an entrenched circuit split.

Speaking on the question presented by this case, Justice Scalia in *United States v. Resendiz-Ponce* said: "[T]he full Court will undoubtedly have to speak to the point on another day." 549 U.S. 102, 117 (2007). That day has come. Commentators agree that "the conflict among the Circuit remains," and have predicted that it is "likely that [this] Court will grant certiorari in some other case to resolve that issue." Wayne LaFave, Jerold Israel, Nancy King, and Orin Kerr, 5 Crim. Procedure, § 19.3(b) (4th ed. 2021). This is that case.

The Ninth Circuit, as Respondent recognizes, applies the automatic dismissal rule to indictments that

omit essential elements—creating a direct conflict with the circuits that review omission of essential offense elements, when timely raised, for harmless error. *See United States v. DuBo*, 186 F.3d 1177, 1179-81 (9th Cir. 1999) (en banc), and *cf. United States v. Stevenson*, 832 F.3d 412, 427 (3d Cir. 2016); *United States v. Dentler*, 492 F.3d 306 (5th Cir. 2007); *United States v. Rankin*, 929 F.3d 399, 404 (6th Cir. 2019); *United States v. Maez*, 960 F.3d 949, 958 (7th Cir. 2020).

The D.C. Circuit has technically left the question presented open, *see United States v. Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004), but signaled that it shares the view of the Ninth Circuit. Its decision in *United States v. Verrusio* contained a detailed analysis of whether the error occurred and never once mentioned that if it did, it would be subject to harmless error review. 762 F.3d 1, 13-15 (D.C. Cir. 2014). It would be strange for the court to go through such a thorough, pages-long analysis if ultimately the error could be deemed harmless. *Verrusio*, when read with the D.C. Circuit's statements in *Pickett* that "an indictment defective for the omission of a sentencing factor under *Apprendi*" differs from an indictment defective for omitting an essential element, strongly suggests that it too would join the view of the Ninth. *Pickett*, 353 F.3d at 68. This strong suggestion is buttressed by a concurrence in *Pickett* emphasizing that *Apprendi* cases are "readily distinguished" and that under the logic of this Court's precedents, harmless-error review is inappropriate. *See id*. at 70-71 (Rogers, J., concurring).

And even though the Eleventh Circuit in Mr. Leonard's case applied harmless error review, the circuit's own first-in-time rule governing intra-circuit splits mandates that when its precedents are read correctly, *United States v. Martinez*, 800 F.3d 1293 (11th Cir. 2015), and not the decision below, prescribes the rule for indictments omitting essential elements of an offense. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (decisions of prior panels bind subsequent panels and can be overturned only by the court sitting en banc). And that rule is automatic dismissal.[1] The Respondent attempts to get around this by arguing that the government in *Martinez* conceded dismissal was appropriate, but it does not matter that the government once agreed the error was structural and has now changed its mind. The government in that case could have conceded there was an error but asked the court to apply harmless-error review as it does here. But it chose not to do so, and it now must face the consequences of the published decision that resulted. The bottom line is that the indictment in *Martinez*, like Mr. Leonard's indictment, omitted an essential element. And all parties, and the Eleventh Circuit, agreed there that automatic dismissal is appropriate. Mr. Leonard may benefit from the same rule.

But even if this Court thinks the Ninth Circuit is the only circuit to squarely hold that omissions of

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[1] The Eleventh Circuit's decision in *United States v. Sanchez*, 269 F.3d 1250, 1273 (11th Cir. 2001) relied upon by the panel in the decision below, does not control here because it dealt with an *Apprendi* error, not an omission of an essential offense element.

essential offense elements from indictments are subject to automatic dismissal, that does not make the circuit split any less real. A lopsided circuit split is a circuit split nonetheless—and the split is not nearly as lopsided as Respondent would have this Court believe. Respondent assumes that omissions of sentencing-enhancement factors and omissions of essential offense elements should be treated the exact same, and ignores the case law and commentary explaining there are material differences between these two scenarios. *See* Brief in Opp. at 11.

All parties agree that the question presented divides the Ninth Circuit from the Third, Fifth, Sixth, and Seventh Circuits, and that creates a meaningful enough split to grant certiorari. *See United States v. DuBo*, 186 F.3d 1177, 1179-81 (9th Cir. 1999) (en banc), and *cf. United States v. Stevenson*, 832 F.3d 412, 427 (3d Cir. 2016); *United States v. Dentler*, 492 F.3d 306 (5th Cir. 2007); *United States v. Rankin*, 929 F.3d 399, 404 (6th Cir. 2019); *United States v. Maez*, 960 F.3d 949, 958 (7th Cir. 2020).

Respondent also would include the First, Fourth, and Tenth Circuits in the latter category, but Respondent's view in that respect is mistaken. *United States v. Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001), involved an omission-of-essential-element claim that the defendant raised for the first time on appeal. *See* Brief for Appellee, *Corporan-Cuevas*, 2000 WL 35562911 (Dec. 18, 2000). In those circumstances, the First Circuit in *Corporan-Cuevas* reviewed for harmless error (and not for plain error as some circuits may have

done). 244 F.3d at 202. The Fourth Circuit's decision in *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003) involved the omission of aggravating sentencing factors and not essential offense elements, as did the Eighth Circuit's decision in *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005). And although there is broad language in the Tenth Circuit's opinion, the court in *Prentiss* was neither confronted with an indictment that failed to provide the defendant with notice of the charges against him nor with a defendant who timely challenged the sufficiency of his indictment. *Pickett*, 353 F.3d at 70 (Rogers, J., concurring) (citing *United States v. Prentiss*, 256 F.3d 971, 981 (10th Cir. 2001)).

III. Mr. Leonard's indictment omitted an essential offense element, making this case a good vehicle to consider the Question Presented.

As Respondent recognizes, an indictment must "contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend." *Resendiz-Ponce*, 549 U.S. at 108 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Mr. Leonard's indictment did no such thing. The indictment alleged that Mr. Leonard "possessed a firearm, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, and did so knowingly." Using the phrase "did so" limits "knowingly" to apply to the active verb in the sentence—that is, possession. The indictment therefore adequately alleged that Mr. Leonard "possessed a firearm and did so knowingly." The clause, "having

previously been convicted of a crime punishable by imprisonment for a term of one year" modifies only the possession and is *not* modified by the phrase "and did so knowingly." Rather, the second and third clauses in the sentence *both* modify possession, but do not modify or relate at all to one another. Under common sense construction of the sentence, "did so knowingly" is only reasonably read to refer to possession. It therefore did not put Mr. Leonard on fair notice of the charges against him.

Consider a sentence that reads: "Mr. Leonard possessed a firearm, having previously been unaware that he was a felon, and did so knowingly." There would be no dispute "did so knowingly" referred only to possession of a firearm. The rules of construction do not hinge on the substance of the sentence, but rather on how the sentence is structured. Just because the charge as written does not contain facts that preclude the possibility that Mr. Leonard had knowledge of his felon status does not mean it *alleges*, as it must, that he had knowledge of such status. This error was compounded by the indictment's failure to cite § 924(a)(2).

If the charge in Mr. Leonard's indictment is ambiguous, the rule of lenity counsels for finding defect, especially given "lenity's relationship to due process." (Gorsuch, J., concurring). This case directly implicates "the right of every person to suffer only those punishments dictated by the plain meaning of words." *Id*. (citing *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820)).

Finally, Respondent's brief begs the question presented when, citing *Greer*, it asserts that Mr. Leonard must provide this Court a reason to conclude that he "would have offered the jury evidence to prove" that he was unaware of his felon status. Brief in Opp. at 16 (citing *Greer*, 141 S. Ct. at 2098). But *Greer* imposed a standard for courts reviewing for plain error. As Mr. Leonard argued in his petition, it makes no sense to require that test when the *Rehaif* error occurs in the indictment, rather than in jury instructions or at plea colloquies. Pet. at 13. As Respondent recognizes, "the accused has no right to present evidence at all" before the grand jury. Brief in Opp. at 8. This, among other things, is what makes the error structural, and is among the reasons this Court should grant certiorari to correct the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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