

No.

In The Supreme Court Of The United States

Reuben Conway,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

RENE L. VALLADARES
Federal Public Defender
*Cristen C. Thayer
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Cristen_Thayer@fd.org
*Counsel for Petitioner

Dated: June 15, 2022.

Question Presented for Review

I. After Petitioner Reuben Conway was charged, convicted, and sentenced for prohibited person in possession of a firearm, this Court overturned near-unanimous circuit authority by holding the government must prove the defendant knew at the time of the alleged possession that he belonged to the category of persons barred from possessing a firearm. *Rehaif v. United States*, 139 S. Ct. 2191 (2019). This Court emphasized that this mens rea marked the distinction between innocent and criminal conduct. Yet Conway’s indictment failed to charge this critical element that is necessary to establish a federal crime.

Should this Court grant review to resolve whether an indictment “defect” can strip federal courts of jurisdiction?

Related Proceedings

Petitioner Reuben Conway appealed his judgment of conviction and sentence following a guilty plea in *United States v. Conway*, No. 2:16-cr-00013-GMN-NJK, Dkt. 54 (D. Nev. Nov. 13, 2017). The Ninth Circuit affirmed on March 22, 2022. *United States v. Conway*, 17-10497 (9th Cir. Mar. 22, 2022). *See* App. C. Conway remains in federal custody of the Bureau of Prisons, with an estimated release date of August 14, 2023.

Table of Contents

Question Presented for Review	ii
Related Proceedings.....	iii
Table of Contents	iv
Petition for Certiorari.....	1
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved.....	2
Statement of the Case	3
Reasons for Granting the Petition	4
I. This Court should resolve whether an indictment’s failure to charge the essential mens rea element renders federal courts without jurisdiction.	4
A. Federal courts are those of limited jurisdiction, and therefore may only preside over criminal matters charging “offenses against the laws of the United States.”	4
B. The Ninth Circuit’s decision widens the current circuit split about whether an indictment “defect” can ever leave federal courts without jurisdiction.	5
C. <i>Rehaif</i> ’s impact in this context presents an issue of national importance. 10	
Conclusion.....	11
Appendix	
Certificate of Service	

Table of Authorities

Federal Cases

<i>Greer v. United States</i> , 141 S. Ct. 2090 (2021)	10
<i>Lamar v. United States</i> , 240 U.S. 60 (1916)	6, 7
<i>Rehaif v. United States</i> , 139 S. Ct. 2191 (2019)	ii, 3, 4, 5, 11
<i>United States v. Al Hedaithy</i> , 392 F.3d 580 (3d Cir. 2004)	7
<i>United States v. Balde</i> , 943 F.3d 73 (2d Cir. 2019)	7
<i>United States v. Burghardt</i> , 939 F.3d 397 (1st Cir. 2019)	8
<i>United States v. Cotton</i> , 535 U.S. 625 (2002)	5, 6, 7, 10
<i>United States v. De Vaughn</i> , 694 F.3d 1141 (10th Cir. 2012)	8
<i>United States v. Dodd</i> , 225 F.3d 340 (3d Cir. 2000)	4
<i>United States v. Dowthard</i> , 948 F.3d 814 (7th Cir. 2020)	7-8
<i>United States v. Enslin</i> , 327 F.3d 788 (9th Cir. 2003)	4
<i>United States v. Espinoza</i> , 816 F. App'x 82 (9th Cir. 2020)	8
<i>United States v. Fogg</i> , 922 F.3d 389 (8th Cir. 2019)	8

<i>United States v. Games-Perez</i> , 667 F.3d 1136 (10th Cir. 2012)	4
<i>United States v. Gardner</i> , 488 F.3d 700 (6th Cir. 2007)	4
<i>United States v. Hobbs</i> , 953 F.3d 853 (6th Cir. 2020)	10
<i>United States v. Howard</i> , 947 F.3d 936 (6th Cir. 2020)	9
<i>United States v. Jackson</i> , 120 F.3d 1226 (11th Cir. 1997) (per curiam)	4
<i>United States v. Lane</i> , 267 F.3d 715 (7th Cir. 2001)	4
<i>United States v. Langley</i> , 62 F.3d 602 (4th Cir. 1995) (en banc)	4
<i>United States v. Lara</i> , 970 F.3d 68 (1st Cir. 2020)	7, 8
<i>United States v. Maez</i> , 960 F.3d 949 (7th Cir. 2020)	8
<i>United States v. Martin</i> , 526 F.3d 926 (6th Cir. 2008)	9
<i>United States v. McEachin</i> , No. 19-4255, 2021 WL 4060436 (4th Cir. Sept. 7, 2021)	8
<i>United States v. McIntosh</i> , 704 F.3d 894 (11th Cir. 2013)	8, 9
<i>United States v. Moore</i> , 954 F.3d 1322 (11th Cir. 2020)	9
<i>United States v. Muresanu</i> , 951 F.3d 833 (7th Cir. 2020)	5
<i>United States v. Nasir</i> , 982 F.3d 144 (3d Cir. 2020)	8

<i>United States v. Schmidt</i> , 487 F.3d 253 (5th Cir. 2007)	4
<i>United States v. Scruggs</i> , 714 F.3d 258 (5th Cir. 2013)	7
<i>United States v. Smith</i> , 160 F.3d 117 (2d Cir. 1998)	4
<i>United States v. Smith</i> , 940 F.2d 710 (1st Cir. 1991)	4
<i>United States v. Thomas</i> , 615 F.3d 895 (8th Cir. 2010)	4
<i>United States v. Velasco-Medina</i> , 305 F.3d 839 (9th Cir. 2002)	5, 8
Federal Statutes	
18 U.S.C. § 922	2, 4, 10
18 U.S.C. § 924	2, 3
18 U.S.C. § 3231	<i>passim</i>
18 U.S.C. § 3742	1
18 U.S.C. §§ 922	3, 4
21 U.S.C. § 841	6, 7
28 U.S.C. § 1254	1
28 U.S.C. § 1291	1
Supreme Court Rules	
Sup. Ct. R. 13.1	1

Petition for Certiorari

Reuben Conway petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit decision affirming the judgment is unpublished and not reprinted. App. B. The district court's final judgment and the indictment are unpublished and not reprinted. App. A, B.

Jurisdiction

The Ninth Circuit affirmed Conway's judgment on March 22, 2022. App. B. The district court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit had jurisdiction over the final judgment per 28 U.S.C. § 1291 and 18 U.S.C. § 3742. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition is timely per Supreme Court Rule 13.1.

Constitutional and Statutory Provisions Involved

1. 18 U.S.C. § 922(g)(1)

(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.

2. 18 U.S.C. § 924(a)(2)

(a)(2) Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

3. 18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

Statement of the Case

In January 2016, the government indicted Conway with one count of being a prohibited person in possession of a firearm under 18 U.S.C. §§ 922(g) and 924(a). App. A. The indictment charged only that Conway was a prohibited person when he allegedly possessed the firearm, not that he knew he was a prohibited person at that time. App. A.

After Conway pled guilty, the district court sentenced him to 92 months in prison and a three-year term of supervised release. App. B. Conway timely appealed.

After Conway's conviction and sentencing, this Court held 18 U.S.C. §§ 922(g) and 924(a) require, as an essential element, that the defendant knew he belonged to the category of persons barred from possessing a firearm at the time of the alleged possession. *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). This Court made clear the *Rehaif* mens rea requirement was necessary "to make [Conway's] behavior wrongful," and therefore separated innocent from criminal conduct. *Id.* at 2197. Conway, however, was charged and convicted under §§ 922(g) and 924(a) with no allegation he knew he was a prohibited person. App. A, B.

Given *Rehaif*, Conway challenged whether the district court had jurisdiction to convict, as the indictment here failed to charge an offense under United States law. The Ninth Circuit affirmed, widening the dispute on whether an indictment "defect" can ever affect jurisdiction. App. C.

Reasons for Granting the Petition

I. This Court should resolve whether an indictment’s failure to charge the essential mens rea element renders federal courts without jurisdiction.

This Court holds that possessing a firearm can be an “entirely innocent” act: if a defendant lacks knowledge of the facts making his possession unlawful, he “lack[s] the intent needed to make his behavior wrongful.” *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019). Thus, an element of prohibited person in possession of a firearm under 18 U.S.C. §§ 922(g) and 924(a) is that the defendant knew he belonged to the category of persons barred from possessing a firearm at the time of the alleged possession. *Rehaif*, 139 S. Ct. at 2200. This Court’s *Rehaif* decision overturned near-unanimous circuit authority that held the knowledge requirement applied only to the possession element.¹

A. Federal courts are those of limited jurisdiction, and therefore may only preside over criminal matters charging “offenses against the laws of the United States.”

In every federal criminal prosecution, subject-matter jurisdiction is conferred by 18 U.S.C. § 3231. Through § 3231, Congress limited federal judicial jurisdiction,

¹ *United States v. Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012); *United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010); *United States v. Schmidt*, 487 F.3d 253, 254 (5th Cir. 2007); *United States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam); *United States v. Langley*, 62 F.3d 602, 604-08 (4th Cir. 1995) (en banc); *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991). Other Circuits had not expressly addressed the issue but did not list knowledge of prohibitive status as an element of § 922(g). See *United States v. Gardner*, 488 F.3d 700, 713 (6th Cir. 2007); *United States v. Smith*, 160 F.3d 117, 121 n.2 (2d Cir. 1998).

promulgating that the “district courts of the United States shall have original jurisdiction . . . of all offenses *against the laws of the United States*.” 18 U.S.C. § 3231 (emphasis added). Federal courts, then, lack jurisdiction over a criminal proceeding absent an allegation of an offense against the laws of the United States. The indictment here failed to charge this essential mens rea element, which rendered the allegation in the indictment “an innocent mistake to which criminal sanctions normally do not attach”—not a cognizable federal crime. *Rehaif*, 139 S. Ct. at 2197; App. A.

At issue is much more than an alleged “defect” in an indictment, the analytical framework the Ninth Circuit relied on to deny Conway’s claim below. App. B: 5a (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002); *United States v. Velasco-Medina*, 305 F.3d 839, 845–46 (9th Cir. 2002)). The district court lacked jurisdiction under 18 U.S.C. § 3231 to convict or sentence Pruitt because there was no federal crime alleged.

B. The Ninth Circuit’s decision widens the current circuit split about whether an indictment “defect” can ever leave federal courts without jurisdiction.

Circuits are split about whether an indictment “defect” can ever render the federal courts without jurisdiction. *See United States v. Muresanu*, 951 F.3d 833, 838 (7th Cir. 2020) (recognizing split). Some circuits hold certain defects in an indictment render the courts without jurisdiction, while others hold defects, no matter how severe, do not impact jurisdiction.

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

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

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

Id. at 65 (internal citation omitted).

But in rejecting jurisdictional challenges based on the indictment defects present in both *Lamar* and *Cotton*, these cases properly adhere to § 3231’s jurisdictional mandate. In *Lamar*, the indictment alleged all essential elements of “falsely pretend[ing] to be an officer,” thus alleging a cognizable crime. 240 U.S. at 64. Though the *Lamar* defendant argued the method for proving one element, “officer,” did not meet the statutory requirements, this argument went to his innocence and not whether the indictment alleged a cognizable crime. *Id.*

Similarly, the indictment in *Cotton*—which charged the defendant with conspiracy and possession with intent to distribute cocaine and cocaine base, but failed to “allege any of the threshold levels of drug quantity that lead to enhanced penalties under [21 U.S.C.] § 841(b)” —also alleged a cognizable offense. *Cotton*, 535 U.S. at 628. Because conspiring and possessing with intent to distribute *any* cocaine and cocaine base violates United States law, alleged drug quantity controlled only the statutory sentencing range, not the conviction for a cognizable crime itself. *See* § 841(a) and (b).

Relying on *Cotton*, the First, Second, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have drawn a hard line, holding that “defects” in an indictment—of whatever kind—do not affect subject matter jurisdiction.² *United States v. Lara*, 970 F.3d 68, 85–86 (1st Cir. 2020); *United States v. Balde*, 943 F.3d 73, 91–92 (2d Cir. 2019); *United States v. Scruggs*, 714 F.3d 258, 262–64 (5th Cir. 2013); *United*

² The Third Circuit has not squarely addressed the question but has suggested it reads *Cotton* similarly. *United States v. Al Hedaithy*, 392 F.3d 580, 588 (3d Cir. 2004).

States v. Dowthard, 948 F.3d 814, 817 (7th Cir. 2020); *United States v. Fogg*, 922 F.3d 389, 391 (8th Cir. 2019); *Velasco-Medina*, 305 F.3d at 845–46; *United States v. De Vaughn*, 694 F.3d 1141, 1147–48 (10th Cir. 2012). The Seventh Circuit holds without exception that “indictment defects are never jurisdictional.” *United States v. Maez*, 960 F.3d 949, 956 (7th Cir. 2020). The other Circuits in this group similarly hold under *Cotton* that an indictment defect can never deprive a court of the power to adjudicate a case and categorically deny the defendants claims challenging jurisdiction based on omission of the *Rehaif* mental element. *United States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019); *Lara*, 970 F.3d at 85–86; *United States v. McEachin*, No. 19-4255, 2021 WL 4060436, at *2 (4th Cir. Sept. 7, 2021) (unpublished disposition); *United States v. Espinoza*, 816 F. App’x 82, 84 (9th Cir. 2020) (unpublished disposition).³ And when rejecting the argument that an indictment’s omission of the *Rehaif* mens rea element deprived the court of jurisdiction, the Second Circuit expressed that only “an indictment that utterly fails, on its face, to charge any federal offense may fail to establish the jurisdiction of the federal court.” *Balde*, 943 F.3d at 89.

The Eleventh Circuit has taken a more nuanced approach, recognizing that “indictment errors are not all the same’ and should not be treated categorically.” *United States v. McIntosh*, 704 F.3d 894, 902 (11th Cir. 2013). Some indictments

³ The Third Circuit has also summarily rejected this *Rehaif* claim, though based solely upon its law that an indictment is not defective if its language “echoes the language of the statute.” *United States v. Nasir*, 982 F.3d 144, 162 n.15 (3d Cir. 2020).

“charge no federal crime at all,” such as offenses not set forth in the United States Code. *Id.* But some, such as the *Cotton* indictment, still charge “a complete federal offense” even though they omit an allegation necessary for an enhanced sentence. *Id.* And in the *Rehaif* context, the Eleventh Circuit placed the error in the latter category, concluding that “[s]o long as the conduct described in the indictment is a criminal offense, the mere omission of an element does not vitiate jurisdiction.” *United States v. Moore*, 954 F.3d 1322, 1336 (11th Cir. 2020). To so hold, the Circuit applied the rule that an indictment is sufficient if it “track[s] the statutory language and stat[es] approximately the time and place of an alleged crime.” *Id.* The Circuit did not grapple with the watershed import of *Rehaif*. The Circuit did not address that *Rehaif* eviscerated the Circuit’s prior improper reading of the illegal firearm possession statutes, nor that the missing mens rea element marks the distinction between innocent conduct and a federal offense.

The Sixth Circuit has recognized, in the context of a defendant who pled guilty to illegal possession of a firearm, that a defendant successfully challenges jurisdiction if he establishes “that the face of the indictment failed to charge the elements of a federal offense.” *United States v. Martin*, 526 F.3d 926, 934 (6th Cir. 2008) (holding that, pre-*Rehaif*, the indictment charged all the elements of § 922(g)(1)); *see also United States v. Howard*, 947 F.3d 936, 942 (6th Cir. 2020) (citing *Martin* favorably for the proposition “that a defendant challenges the court’s jurisdiction when he asserts that the ‘indictment failed to charge the elements of a federal offense’”). In the *Rehaif* context, however, the Sixth Circuit relied on

Cotton’s statement that “defects in an indictment do not deprive a court of its power to adjudicate a case” to hold that an indictment’s omission of the *Rehaif* mens rea element did not deprive the court of jurisdiction. *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020) (quoting *Cotton*, 535 U.S. at 630). Like the Eleventh Circuit, the Sixth Circuit also failed to address the unique issues posed by omission of the *Rehaif* mens rea element.

C. *Rehaif*’s impact in this context presents an issue of national importance.

Rehaif’s implications are widespread and of national importance. Federal prosecutions for unlawful firearm possession under 18 U.S.C. § 922(g) account for just over ten percent of all federal criminal cases. U.S. Sent. Comm’n, *Quick Facts: Felon in Possession of a Firearm* (May 2021). In fiscal year 2020, 6,782 cases involved convictions under § 922(g), representing only a slight decline from fiscal year 2019’s significant high over the previous four years. *Id.* (reporting 4,984 unlawful possession cases in fiscal year 2015 and progression through fiscal year 2019). Unlawful firearms offenses thus continue to represent a steady and significant portion of federal convictions. And this Court has already addressed the framework through which to review the validity of defendants’ pre-*Rehaif* guilty plea and jury trial convictions. *Greer v. United States*, 141 S. Ct. 2090, 2096 (2021).

As outlined here, *Rehaif* presents a unique wrinkle in the debate over when, and whether, a “defect” in an indictment strips the courts of jurisdiction. This Court’s pronouncement in *Rehaif* of the previously missing mens rea element demolished the wall of Circuit authority to the contrary and demarcated the

difference between “an innocent mistake to which criminal sanctions normally do not attach” and a federal crime. *Rehaif*, 139 S. Ct. at 2197. This Court should grant certiorari to review how the defective indictment framework applies here, and whether the critical mens rea omission requires dismissal.

Conclusion

Petitioner Conway requests that the Court grant his petition for a writ of certiorari.

Dated: June 15, 2022.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

s/ Cristen Thayer

Cristen Thayer
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Cristen_Thayer@fd.org