No. 22-348

IN THE

Supreme Court of the United States

MARCOS F. SANTIAGO,

Petitioner,

v.

J.C. STREEVAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a felon who has spent less than a year in custody is entitled to a presumption that he lacked knowledge of his felon status and therefore, absent independent evidence of such knowledge, is entitled to postconviction relief under *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

RELATED PROCEEDINGS

United States v. Santiago, No. 03-cr-00157, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered February 24, 2005.

Santiago v. Rivers, No. 19-cv-50273, U.S. District Court for the Northern District of Illinois. Judgment entered July 20, 2020; order denying motion for consideration entered August 12, 2020.

Santiago v. Streeval, No. 20-2665, U.S. Court of Appeals for the Seventh Circuit. Judgment entered June 2, 2022.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is Marcos F. Santiago.

Respondent is J.C. Streeval.

There are no publicly held corporations involved in this proceeding.

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INTRODUCTION

In *Rehaif v. United States*, the Supreme Court declared that, in order to convict an individual of being a felon in possession of a firearm under 18 U.S.C. § 922(g), the Government must prove that the individual knew he was a felon at the time of the possession. 139 S. Ct. 2191, 2191 (2019). Marcos F. Santiago was convicted of being a felon in possession without the Government ever making that showing. He thus filed for postconviction relief under 28 U.S.C. § 2241, but the district court denied his petition because it was not "more likely than not that no reasonable juror would have found" Petitioner knew he was a felon. Pet.App.49a.

The Seventh Circuit recognized that Petitioner had spent less than five months in custody, all in pretrial detention, for the minor crime of criminal trespass. *Id.* at 11a. The Seventh Circuit nonetheless affirmed the district court, observing that "a person who is a felon 'ordinarily knows he is a felon.'" *Id.* at 15a. The Seventh Circuit thus, in effect, applied a presumption that felons, even those who have spent less than a year in custody, are aware of their felon status.

In doing so, the Seventh Circuit contradicted decisions in the First Circuit, Second Circuit, Fourth Circuit, Ninth Circuit, and Tenth Circuit that functionally apply the *opposite* presumption, namely that an individual who has spent less than a year in custody is *not aware* of his felon status.

The Seventh Circuit reached this conclusion by committing a series of legal errors. First, the Seventh Circuit disregarded relevant and analogous case law

from other Courts of Appeals arising in the plain error context. Second, the court placed disproportionate emphasis on dicta from this Court's decision in *Greer v. United States* and unjustifiably applied that reasoning in a disanalogous context. Finally, the Seventh Circuit impermissibly considered the conduct underlying Petitioner's felon-in-possession conviction to imply that Petitioner was aware of his felon status at the time of the conduct.

The Court should grant this petition to resolve this intractable split among the Court of Appeals, which is of outsized importance. Prior to *Rehaif*, not a single Court of Appeals required the Government to prove that a defendant's felon status was known to the defendant and so the Government regularly failed to do so. Moreover, the felon-in-possession statute is no minor provision: In 2021 alone, there were 7,454 convictions involving 18 U.S.C. § 922(g), comprising around 13 percent of all federal convictions. United States Sentencing Commission, *Quick Facts: Felon in Possession of a Firearm* (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY21.pdf. The upshot is that tens of thousands of individuals for whom the Government failed to make the requisite showing are in federal custody right now. Because criminal defendants were not on notice to contest their scienter, records are largely silent on the matter. Courts must therefore draw inferences from the few relevant facts that exist—most saliently, the length of a custodial sentence.

Alternatively, and at a minimum, Petitioner requests that the Court hold his petition for resolution of *Jones v. Hendrix*, No. 21-857 (U.S.). In that case,

the Court will resolve whether habeas petitioners may resort to § 2241 to file claims that otherwise would be second or successive § 2255 claims if their claim was foreclosed by circuit precedent prior—precisely the circumstances surrounding Petitioner's § 2241 motion. If the Court allows such petitions, it will also likely clarify the legal standard that applies to such claims, which may occasion a grant, vacate, and remand order. And if the Court disallows such claims, it can simply deny this petition at that time.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 36 F.4th 700 and reproduced at Appendix A. The district court's August 12, 2020, memorandum and order denying reconsideration is not reported but is reproduced in Appendix B. The district court's July 20, 2020, memorandum and order dismissing Petition's habeas petition is not reported but is reproduced in Appendix C.

JURISDICTION

The Seventh Circuit entered judgment dismissing Petitioner's appeal on June 2, 2022, Pet.App.1a. On August 8, 2022, Justice Barrett extended the time within which to file a petition for writ of certiorari to and including October 28, 2022. No. 22A105 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1) provides as follows:

(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.

28 U.S.C. § 2241(a) provides as follows:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2255(e) provides as follows:

(e) An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(h) provides as follows:

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

> (1) newly discovered evidence that, if proven and viewed in light of the evidence

> as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT

1. On April 2, 2004, following a jury trial, Marcos F. Santiago was convicted of three counts of Hobbs Act robbery, 18 U.S.C. § 1951(a), two counts of possession of a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A), and two counts of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). Pet.App.3a. With regard to the felon-in-possession charge, the court failed to instruct the jury to determine whether Petitioner was aware of his felon status and the jury made no such finding. *Id.* at 5a. Petitioner was sentenced to a concurrent 42-month term of imprisonment for the three Hobbs Act robbery convictions and the two felon-in-possession convictions, a mandatory consecutive five-year sentence for the first conviction of possessing a firearm in furtherance of a crime of violence, and a mandatory consecutive 25-year sentence for the second conviction of possessing a firearm in furtherance of a crime of violence, for a total sentence of 402 months of imprisonment. *Id.* at 3a. This petition concerns only the felon-in-possession convictions.

2. Petitioner's federal felon-in-possession convictions are premised upon three minor incidents

from the same evening in 1999: Petitioner snatched a purse from his mother, a shoebox with video-game cartridges from his sister, and a transistor radio from a parking-garage booth. *Id.* at 25a–26a (Wood, J., dissenting). Petitioner pleaded guilty to criminal trespass and was sentenced to time served and up to 23 months of imprisonment. *Id.* at 11a (majority opinion). At the time of sentencing, Petitioner had served four months and 20 days in custody. *Id.* He was granted immediate parole and never served another day in custody for these crimes. *Id.*

Petitioner violated his parole on two occasions, but neither incident resulted in additional time in custody for his predicate offense. First, in June 2000, the Lancaster County court found that Petitioner had violated his parole by engaging in disorderly conduct. *Id.* The court resentenced Petitioner to serve the balance of his maximum sentence, but again granted him immediate parole. *Id.* Second, in October 2000, the Lancaster County court found that Petitioner had violated his parole by failing to pay criminal monetary penalties. *Id.* Once again, the court resentenced Petitioner to serve the balance of his maximum sentence, but granted him immediate parole. *Id.*

3. Santiago filed the instant habeas petition under 28 U.S.C. § 2241 in the Northern District of Illinois. The petition seeks vacatur of Santiago's felon-in-possession convictions because the Government had failed to prove that Santiago knew that he was a felon at the time he possessed the firearm, a requirement made clear by *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

The district court denied Santiago's petition. The court noted that Petitioner must demonstrate a miscarriage of justice to warrant relief under the savings clause of 28 U.S.C. § 2255(e). Pet.App.49a. To demonstrate a miscarriage of justice, Petitioner was required to demonstrate actual innocence—that it was "more likely than not that no reasonable juror would have found" that Petitioner knew he was a felon. *Id.* The district court held that Petitioner was unable to do so because he was "convicted in 1999 of theft and criminal trespass and sentenced to a term of imprisonment up 'to 23 months.'" *Id.* at 50a. The court noted that "[P]etitioner's original sentence on that conviction was four months and 20 days," but observed that "he was resentenced twice (on two parole violations) to serve the balance of the remaining time." *Id.* "Under these facts," the district court concluded, Petitioner "cannot meet his burden of showing he was 'actually innocent'" because "[n]o reasonable jury would find that [P]etitioner did not know that he had previously been convicted of a crime that carried a sentence of imprisonment in excess of one year." *Id.*

4. A divided panel of the Seventh Circuit affirmed. The Seventh Circuit agreed that Petitioner was required to demonstrate "that the government's failure to prove knowledge of his felon status caused a miscarriage of justice because he was actually innocent of the felon-in-possession crimes." *Id.* at 8a. That, in turn, required Petitioner to demonstrate "that more likely than not . . . no reasonable juror would find him guilty beyond a reasonable doubt." *Id.* at 9a.

The court held that Petitioner failed to make the required showing. It recognized that "the facts presented here allow some room for debate about whether Santiago knew he had been convicted of a crime punishable by more than one year in prison" because—most notably—Petitioner "was in custody for less than five months, and even that was pretrial detention." *Id.* at 14a. "Nevertheless," the court concluded that Petitioner had not "offered evidence that would require any reasonable juror to find a reasonable doubt." *Id.* at 15a. Quoting the Supreme Court's decision in *Greer v. United States*, 141 S. Ct. 2090 (2021), the court reasoned, "a felon 'ordinarily knows he is a felon,' and 'That simple truth is not lost upon juries.'" Pet.App.15a. The court added that, given that Petitioner's firearm possession occurred "*while he was planning and carrying out those three armed robberies*," "common sense" dictated that Petitioner knew of his predicate felon status. *Id.* (emphasis in original).

5. Judge Wood dissented. She stressed that Petitioner "served a little over four months in pretrial detention between his arrest and plea hearing" and "did not spend a day in prison serving his sentence, let alone more than a year." *Id.* at 27a (Wood, J., dissenting). "That fact, on its own," Judge Wood observed, "ma[de] Santiago's petition something of a unicorn among this court's experiences with *Rehaif* claims." *Id.* Although "[s]ome prison terms suggest a felony. Santiago's did not." *Id.* Ultimately, Judge Wood would have remanded for an evidentiary hearing, where Petitioner could testify regarding his state of mind and where the district court could further investigate what he was told at his

resentencing hearings for his parole violations. *Id.* at 28a–29a.

Finally, Judge Wood questioned whether the "no-reasonable-juror" standard was appropriate for "federal legal-innocence claims," rather than claims challenging state convictions on the basis of newly discovered evidence. *Id.* at 34a–37a. This context, Judge Wood argued, "implicate[s] no comity interest and a reduced finality interest." *Id.* at 37a. Judge Wood suggested that courts instead use the harmless-error test of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which calls for a showing of a "'substantial and injurious effect or influence' in determining the outcome of the case" before habeas corpus relief is available. Pet.App.38a (Wood, J., dissenting).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF OTHER CIRCUITS.

The Seventh Circuit's decision below essentially presumed that Petitioner was aware of his felon status despite spending less than a year in custody. In doing so, the Seventh Circuit deviated from the First Circuit, Second Circuit, Fourth Circuit, Ninth Circuit, and Tenth Circuit, which have effectively applied an opposite presumption for individuals who have spent less than a year in custody and have been granted relief.

A. In the decision below, the Seventh Circuit recognized that Petitioner was "in custody for less than five months, and even that was pretrial detention." Pet.App.14a. Moreover, the Seventh Circuit acknowledged that Petitioner had been convicted of the "arguably minor crime of criminal

trespass." *Id.* at 14a–15a. Nonetheless, it held that Petitioner was aware of his felon status because "a person who is a felon 'ordinarily knows he is a felon.'" *Id.* at 15a. In other words, the Seventh Circuit tacitly applied a presumption that a felon, even one who spends less than a year in custody, is aware of his felon status.

B. The Seventh Circuit's decision conflicts with the rule in five other Courts of Appeals that functionally apply the *opposite* presumption. In these Courts of Appeals, individuals who spend less than a year in custody are presumed not to know of their felon status.

1. The Second Circuit has repeatedly applied a presumption against scienter in these circumstances, in function if not in form. Consider, for example, *United States v. Black*, 845 F. App'x 42, 47 (2d Cir. 2021). There, the Second Circuit granted relief to a defendant where his predicate conviction "resulted only in a six-month term of imprisonment, not a year." *Id.* Accordingly, the court concluded that "the record did not contain sufficient evidence to show that [the defendant] was on notice of his status as a person who was convicted of a felony punishable by a sentence exceeding one year." *Id.* The court reached this conclusion despite the fact that the defendant had even "stipulated that he had been convicted of 'a felony offense,'" unlike Petitioner here. *Id.*

The same is true of the defendant in *United States v. Morales*, 819 F. App'x 53 (2d Cir. 2020). It did not matter to the court that the defendant "was informed by the sentencing judge that she would have a felony record." *Id.* at 55. The defendant had received a

"conditional discharge," meaning "she served no carceral or probationary sentence, for each of her two predicate offenses." *Id.* Accordingly, the defendant's "actual sentence" did not "necessarily put her on notice of her status," entitling her to relief. *Id.*

Much the same in *United States v. Johnson*, where the Second Circuit granted relief to a defendant "who had not been sentenced to more than a year in prison for his two felony convictions at the time he was arrested for possession of a firearm." 820 F. App'x 29, 34 (2d Cir. 2020). "So even though those crimes were still *punishable* with sentences of more than a year, thus making him a member of the § 922(g)(1) class, it is not clear that he *knew* of his membership, as is necessary under *Rehaif*." *Id.* (emphasis in original).

Finally, in *United States v. Philippe*, the Second Circuit granted relief to a defendant because he "was not sentenced to a term of imprisonment greater than one year for his prior felony conviction, but instead received only a sentence of time served." 842 F. App'x 685, 690 (2d Cir. 2021). Here too the court found that this brief custodial stay overrode the defendant's stipulation to his prior felony at his felon-in-possession trial. *Id.* at 689.

2. The First Circuit follows the same approach as the Second Circuit, as exemplified by the court's decision in *United States v. Guzmán-Merced*, 984 F.3d 18 (1st Cir. 2020). In that case, the court granted the defendant relief under *Rehaif* stressing that the defendant "did not serve even a day in prison for his prior offenses, and the suspended sentence he was given did not exceed one year for any of the three felony counts he was convicted of." *Id.* at 20.

The First Circuit contrasted Guzmán-Merced's case with a prior First Circuit case, *United States v. Burghardt*, 939 F.3d 397 (1st Cir. 2019). There, the defendant had been sentenced to 2–10 years on two prior offenses, 7.5–15 years on another offense, and 2–5 years on a fourth offense. *Id.* at 404. There was no "reason to doubt that a person actually sentenced to several years in prison knew that his crime was punishable by more than a year in prison." *Guzmán-Merced*, 984 F.3d at 20. But a person who spent less than a year in custody had to be treated differently.

3. The Fourth Circuit has likewise given individuals who have spent less than a year in custody the benefit of the doubt. In granting relief to the defendant in *United States v. Heyward*, the court stressed "[t]he circumstances of [the defendant's] prior convictions" in general and his limited time in custody in particular. 42 F.4th 460, 470 (4th Cir. 2022). "For the qualifying conviction, [the defendant] received a suspended sentence of exactly one year and was ordered to serve 'only [six months'] probation.'" *Id.* That "tend[ed] to show" the defendant "lacked the necessary knowledge to be convicted," entitling him to relief. *Id.*

The Fourth Circuit applied the same reasoning in a case involving an analogous statute prohibiting firearm possession by individuals who have been convicted of a misdemeanor punishable by more than two years of imprisonment—rather than a felony punishable by one year of imprisonment. *See* 18 U.S.C. § 921(a)(20)(B). In granting relief to the defendant, the Fourth Circuit stressed that "[t]he longest term of custody [the defendant] received was 17 months' imprisonment for misdemeanor drug

possession," well below the 24-month benchmark applicable there. *United States v. Barronette*, 46 F.4th 177, 199 (4th Cir. 2022). On another occasion, the defendant had been "sentenced to three years' imprisonment, but all but three months of that sentence were suspended." *Id.*

Although involving a different prohibition, *Baronette* applies the very same logic as the Fourth Circuit's decision in *Heyward*. Indeed, later in the opinion, the court emphasized again: "He never served more than two years in prison." *Id.* at 201.

4. The Ninth Circuit has followed suit. In *United States v. Werle*, the Ninth Circuit vacated a summary denial of a § 2255 habeas petition where the petitioner "served less than a year [] (215 and 288 days)" for his predicate crimes. 35 F.4th 1195, 1203 (9th Cir. 2022).

The Government argued that it was sufficient the petitioner had been *sentenced* to over a year in prison, regardless of the time the petitioner had spent in custody. The Ninth Circuit disagreed. "The reason a defendant who was sentenced to more than one year in prison 'ordinarily' will not be able to establish prejudice," the court explained, "is that defendants sentenced to more than one year in prison ordinarily *serve* more than one year in prison, and spending more than one year in prison is not something one is likely to forget." *Id.* (emphasis in original). But this "general proposition" has no purchase when the individual in fact spent less than a year in prison.

5. Finally, the Tenth Circuit has applied the same rule as the aforementioned Courts of Appeals. Indeed, surveying cases from across the country, the Tenth Circuit observed that defendants who had been denied

relief under *Rehaif* "actually had served prison terms based on their prior convictions that exceeded one year." *United States v. Wilson*, 853 F. App'x 297, 307 (10th Cir. 2021).

That straightforward diagnostic easily resolved the case before it. The defendant had been "sentenced to eight years' imprisonment for his adult felony conviction"—but "in virtually the same breath, the court remanded Mr. Wilson to the custody of Youth Offender Services in lieu of that sentence." *Id.* The defendant then spent his entire custodial sentence "in a juvenile facility, not an adult prison." *Id.* The court therefore could not say that the defendant "knew—based on this eight-year sentence—that he was a convicted felon," entitling him to relief. *Id.*

This case, the Tenth Circuit stressed, was nothing like *United States v. Trujillo*, another Tenth Circuit case, in which a defendant who had "served a total of four years in prison for six felony offenses" was denied relief. 960 F.3d 1196, 1208 (10th Cir. 2020).

* * *

These cases lay bare the fact that Petitioner's case would have been resolved differently in almost any other court in the country. There is no indication that this deep and entrenched circuit split will resolve itself without this Court's guidance. The Court should therefore grant this petition to ensure that courts treat similarly situated *Rehaif* claimants in a similar manner.

II. THE SEVENTH CIRCUIT'S DECISION BELOW WAS ERRONEOUS.

The Seventh Circuit's effective presumption that Petitioner had knowledge of his felon status—despite

spending less than five months in custody—was erroneous and warrants correction.

A. An individual who spends *more than a year* "cannot plausibly argue that he did not know his conviction had a maximum punishment exceeding a year." *United States v. Williams*, 946 F.3d 968, 973 (7th Cir. 2020). But, conversely, a custodial stay of *less than a year*—standing alone—does not place an individual on notice that they were convicted of a crime "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Indeed, *Rehaif* itself recognized that "a person who was convicted of a prior crime but sentenced only to probation" might not know that the crime was punishable by more than one year in prison. *Rehaif*, 139 S. Ct. at 2198. Habeas petitioners who have spent less than a year in custody are thus entitled to a presumption that they lacked knowledge of their felon status.

Such a presumption would force the Government to come forward with some independent corroboration of knowledge to justify denial of a habeas petition. The Government could, for example, point out that the habeas petitioner was previously convicted for being a felon-in-possession which is "enough on its own to inform him of his status" as a felon. *United States v. Gilcrest*, 792 F. App'x 734, 739 (11th Cir. 2019). Or the Government may leverage the severity of the underlying offense. For example, an individual previously convicted of murder, "a crime that even the most legally ignorant would know is subject to substantial penalties well beyond a year of imprisonment," would have no plausible basis for relief. *Williams*, 946 F.3d at 974. This case, however,

featured no evidence of that sort. "The misconduct that made Santiago a felon," taking his mother's purse, his sister's video games, and a parking attendant's handheld radio, "was remarkable only for its triviality." Pet.App.25a (Wood, J., dissenting). The court accordingly erred in denying Petitioner relief.

B. The Seventh Circuit relied upon three flawed justifications in its ruling:

1. First, the court disregarded highly probative case law from other Courts of Appeals arising in the plain error context, rather than collateral review. The court concluded that this case law was not relevant because a prisoner typically must "clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 12a (majority opinion). Although generally true, the court's reasoning fails to appreciate the precise legal standard that applies to Petitioner's claim and its close connection to plain error analysis.

To demonstrate plain error, a defendant must show, among other things, that the error affected the defendant's substantial rights and that the error "seriously affects the fairness, integrity[,] or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1901 (2018). This Court itself has analogized this final prong of the analysis to a "miscarriage of justice," the same showing a habeas petitioner must make under § 2255(e)'s savings clause. *See United States v. Frady*, 456 U.S. 152, 172 (1982). Following this Court's lead, the Courts of Appeals have drawn the same comparison. *See, e.g.*, *United States v. Pulliam*, 973 F.3d 775, 781 (7th Cir. 2020); *Tan Lam v. City of Los*

Banos, 976 F.3d 986, 1006 (9th Cir. 2020); *United States v. Boykin*, 669 F.3d 467, 470 (4th Cir. 2012); *United States v. Gonzalez-Huerta*, 403 F.3d 727, 736 (10th Cir. 2005); *Jones v. Thompson*, 974 F.2d 86, 88 (8th Cir. 1992). For that reason, district courts have correctly relied upon plain error case law to decide postconviction *Rehaif* motions. *See, e.g.*, *Hellems v. Werlich*, No. 19-CV-1013, 2020 WL 5816743, at *5 (S.D. Ill. Sept. 30, 2020) ("While *Maez*, *Pulliam*, and *Welch* involved direct appeals from jury verdicts for plain error, the courts' reasoning is applicable in the context of a collateral attack."). The Seventh Circuit thus erred in casting aside highly relevant case law as simply "not persuasive." Pet.App.12a.

2. Second, the Seventh Circuit found that Petitioner had the requisite knowledge because, in *Greer v. United States*, the Supreme Court observed that a person who is a felon "ordinarily knows he is a felon." *Id.* at 15a (quoting *Greer*, 141 S. Ct. at 2097). But this observation, itself dicta, has no relevance to Petitioner's case.

In *Greer,* the Court held that forfeited *Rehaif* claims on direct review must be analyzed under the ordinary test for plain error. 141 S. Ct. at 2096. In doing so, the Court refused to (1) find a "futility" exception to plain error, (2) deem all *Rehaif* errors necessarily "structural," or (3) limit review to the trial court record. *Id.* at 2098–2100. Petitioner, however, made none of these arguments below, each of which was already foreclosed by Seventh Circuit precedent. *See, e.g.*, *United States v. Maez*, 960 F.3d 949, 958 (7th Cir. 2020) (rejecting structural error argument); *Williams*, 946 F.3d at 971–74 (applying ordinary plain

error test to *Rehaif* claim and considering information outside of the trial record).

The Supreme Court also found that neither Gary nor Greer, the two defendants, had demonstrated that the *Rehaif* error in their cases affected their substantial rights. The Court noted that "absent a reason to conclude otherwise, a jury will usually find that a defendant *knew* he was a felon based on the fact that he *was* a felon." *Greer*, 141 S. Ct. at 2097. Gary and Greer presented no reason to conclude otherwise because neither of them "argued or made a representation" that they "did not in fact know they were felons when they possessed firearms." *Id.* at 2098. In fact, the Court expressly recognized that there may be cases in which "a felon can make an adequate showing on appeal that he would have [absent the *Rehaif* error] presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms." *Id.* at 2097.

In this case, unlike in *Greer*, Petitioner has consistently argued that he did not know he was a felon at the time he possessed a firearm and Petitioner has pointed to evidence in the record below supporting his claim, including his brief custodial stay. Pet.App.11a–12a. In addition, Petitioner represented on appeal that he was prepared to submit an affidavit to the trial court stating his lack of knowledge of felon status—and he remains prepared to do so now. *Id.* at 20a. This is the very testimony Petitioner would have offered at a trial conducted in accord with *Rehaif*. *See Greer*, 141 S. Ct. at 2100 ("In felon-in-possession cases, a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would

have presented evidence at trial that he did not in fact know he was a felon."). The Seventh Circuit therefore erred by invoking *Greer*'s dicta in a context where it did not apply.

3. Finally, the Seventh Circuit relied upon the fact that Petitioner's "two felon-in-possession counts were based on his conduct in carrying out three armed robberies" to deny relief. Pet.App.15a. But the relevant question is not what occurred when Petitioner possessed a firearm, or whether that conduct itself constitutes a felony, but instead what Petitioner knew regarding the felony status of his predicate offenses. Petitioner received a different conviction altogether for *what he did* with the firearm and so the Seventh Circuit's reasoning essentially punished Petitioner twice for the same underlying conduct. *See* 18 U.S.C. § 924(c)(1) (prohibiting possession of a firearm in furtherance of a crime of violence); *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization.").

If nothing else, the Court's analysis serves as "a backward propensity argument." Pet.App.32a (Wood, J., dissenting). "Santiago's course of conduct leading to the section 922(g) conviction included carrying a gun during bank robberies, and so . . . he must have realized that the incidents for which he received a slap on the wrist in the past were serious enough to make him a felon." *Id.* Rule 404 prohibits the introduction of such propensity evidence at trial and the Court of Appeals should not be permitted to rely upon analogous reasoning upon appeal. Fed. R. Evid.

404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

III. THIS ISSUE IS RECURRING AND IMPORTANT.

The unresolved conflict presented here has dramatic consequences, flowing directly from the groundbreaking nature of this Court's decision in *Rehaif* and the prevalence of § 922(g) convictions.

Prior to *Rehaif*, "every single Court of Appeals to address the question," determined that 18 U.S.C. § 922(g) *did not* require the Government to prove that an individual knew of his felon status and the Government accordingly did not typically make this showing. 139 S. Ct. at 2201 (Alito, J., dissenting). Indeed, 10 Courts of Appeals had reached that exact conclusion. *See id.* at 2210 n.6 (collecting cases).

18 U.S.C. § 922(g) is also "no minor provision." *Id.* at 2201. "It probably does more to combat gun violence than any other federal law." *Id.* In 2021, there were 7,454 convictions involving 18 U.S.C. § 922(g), comprising around 13 percent of all federal convictions. United States Sentencing Commission, *Quick Facts: Felon in Possession of a Firearm*, *supra.* Currently, over 31,000 of people in federal custody are serving sentences related to weapons offenses, over 21 percent of all individuals in federal custody. Federal Bureau of Prisons, *Inmate Statistics: Offenses*, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last visited Oct. 25, 2022). And Section § 922(g)(1) convictions typically compromise about two-thirds of those weapons-related convictions. *See* TracReports, *Federal Weapons*

Prosecutions Continue to Climb in 2019 (June 5, 2019), https://trac.syr.edu/tracreports/crim/560/ (reporting that a section 922(g)(1) charge was the lead charge in over 67 percent of weapons matters prosecuted in fiscal year 2019).

The takeaway, Judge Wood recognized, was that "tens of thousands of Americans are presently behind bars for having violated section 922(g)(1)" without the Government having proven they knew they were felons. Pet.App.40a (Wood, J., dissenting). These individuals may seek postconviction relief but because "few had any reason to contest their knowledge of their felon status at the time of possession," the records of their convictions are simply silent on the matter. *Id.* In the face of such silence, the length of time an individual spends in custody becomes the most salient fact readily available to the parties and the simplest measure by which to ensure the petitions are resolved in a consistent and uniform manner. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

Lower courts are just beginning to resolve the many habeas petitions that have been filed in the wake of *Rehaif*. To help ensure that lower courts resolve these petitions efficiently and fairly, the Court should clarify what significance courts should attach to the fact that a petitioner spent less than a year in custody. Otherwise, courts will remain mired in confusion, with hundreds of habeas petitioners being treated differently only as a result of their reviewing court. Liberty should not be left to fortune.

IV. At a Minimum, The Supreme Court Should Hold This Petition for the Resolution of *Jones v. Hendrix.*

At a minimum, the Court should hold this petition for the Court's resolution of *Jones v. Hendrix*, No. 21-857 (U.S.). In that case, the Court will resolve: "[W]hether federal inmates who did not—because established circuit precedent stood firmly against them—challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under 28 U.S.C § 2241 after th[e] [Supreme] Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction." Pet. for a Writ of Cert. at I, *Jones v. Hendrix*, No. 21-857 (U.S. Dec. 7, 2021).

The Seventh Circuit currently allows courts to entertain such challenges, including Petitioner's claim. But it also imposes an exceedingly high bar for them to clear. The petitioner must demonstrate error that is "grave enough . . . to be deemed a miscarriage of justice . . . such as one resulting in 'a conviction for a crime of which he [i]s innocent.'" *Camacho v. English*, 872 F.3d 811, 813 (7th Cir. 2017). That, again, in turn requires the petitioner to show "that 'more likely than not any reasonable juror would have reasonable doubt' that he was guilty." *Davis v. Cross*, 863 F.3d 962, 964 (7th Cir. 2017).

As Judge Wood cogently explained, this test is lifted from the Supreme Court's resolution of actual innocence claims in *Sawyer v. Whitley*, 505 U.S. 333 (1992), *Schlup v. Delo*, 513 U.S. 298 (1995), and *House*

v. Bell, 547 U.S. 518 (2006). But "[a]ll three cases dealt with the function of the jury, not with questions of law that are the court's responsibility to resolve." Pet.App.35a (Wood, J., dissenting). The Supreme Court has explained that finality considerations are "at their weakest" when "the conviction or sentence in fact is not authorized by substantive law." *Welch v. United States*, 578 U.S. 120 (2016). "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part). A more forgiving standard is therefore more appropriate—such as the "substantial and injurious effect" test used for harmless error in the habeas context. *See Brecht*, 507 U.S. at 623.

Should the Court resolve *Jones v. Hendrix* in the habeas petitioner's favor, the Court will likely also determine what showing the petitioner must make below in order to obtain relief. In doing so, the Court may determine that the Seventh Circuit's test is too demanding. If so, Santiago would be entitled to a grant, vacatur, and remand for application of the proper legal standard by the Seventh Circuit. *See, e.g.*, *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome

of the litigation, a GVR order is, we believe, potentially appropriate.").

On the other hand, should the Court in *Jones v. Hendrix* determine that habeas relief under 28 U.S.C. § 2241 is categorically unavailable in these circumstances, it can simply deny this petition at that time. At the very least, then, the Court should hold this petition for resolution of *Jones v. Hendrix*.

CONCLUSION

The petition for a writ of certiorari should be granted or, at a minimum, held for the resolution of *Jones v. Hendrix*.

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Respectfully submitted,

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