23-5639

No:

In the
Supreme Court of the United States

DAMASO RIVERA-FONSECA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Damaso Rivera-Fonseca
Register Number 06407-104
USP McCreary
P.O. Box 3000
Pine Knot, KY 42635

QUESTIONS PRESENTED FOR REVIEW

In light of the facts of this case, was the defense counsel ineffective in light of this court's precedent in *Strickland v. Washington,* 466 U.S. 668 (1984)?

Did the Eleventh Circuit Court of Appeals err in not granting a certificate of appealability as required by 28 U.S.C. §§ 2253(c)(1)(B) and Fed.R.App.P. 22(b)(1)?

In light of this court's decision in *Rehaif v. United States*, 2019 U.S. Lexis 4199 (2019) is the indictment for firearm possession by a convicted felon under 18 U.S.C. § 922(g), as well as the subsequent conviction for the same offense, both constitutionally flawed?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the h Circuit and the United States District Court for the Southern District of Florida.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continuation)

TABLE OF AUTHORITIES
(continuation)

TABLE OF AUTHORITIES
(continuation)

Statutes

Other Authorities

No:

In the
Supreme Court of the United States

DAMASO RIVERA-FONSECA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Damaso Rivera-Fonseca, Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, was entered on May 25, 2023, an unpublished decision in *Fonseca v. United States,* No. 22-12541-A, 2023 U.S. App. LEXIS 13572 (11th Cir. June 1, 2023) is reprinted in the separate Appendix A to this Petition.

The opinion of the Southern District of Florida, whose judgment is herein sought to be reviewed, was entered on June 16, 2022, an unpublished decision in *Rivera-Fonseca v. United States,* No. 1:19-cv-25329-GAYLES/VALLE, 2022 U.S. Dist. LEXIS 107832 (S.D. Fla. June 15, 2022) is reprinted in the separate Appendix B to this Petition.

The opinion of the Southern District of Florida, whose judgment is herein sought to be reviewed, was entered on July 21, 2021, an unpublished decision in *Rivera-Fonseca v. United States,* No. 19-CV-25329-GAYLES/VALLE, 2021 U.S. Dist. LEXIS 136268 (S.D. Fla. July 21, 2021) is reprinted in the separate Appendix C to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on June 1, 2023. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. Fifth Amendment.

STATEMENT OF THE CASE

The grand jury in the Southern District of Florida indicted Fonseca on three counts. The first count alleged that he, being a felon, was in possession of both a firearm and ammunition, contrary to 18 U.S.C. § 922(g)(1). The second count charged him with the intent to distribute a controlled substance, under 21 U.S.C. § 841(a)(1). The third count accused him of having a firearm to further drug trafficking activities, a violation of 18 U.S.C. § 924(c)(1)(A). (Doc. 6). Following a multi-day trial, the jury found Fonseca guilty on all the charges. (Doc. 73).

On August 2, 2016, the trial court handed down a sentence of 235 months to Fonseca. This was broken down as 115 months for Counts 1 and 2, and an additional 120 months for Count 3, to be served consecutively. (Doc. 88). Fonseca subsequently appealed this decision. However, on September 10, 2018, the Eleventh Circuit upheld both the conviction and the sentence. *United States v. Fonseca*, 2018 U.S. App. LEXIS 25638 (11th Cir. Sep. 10, 2018). A writ of certiorari was turned down on January 7, 2019. *See Fonseca v. United States,* 139 S. Ct. 846 (2019). Fonseca then filed a Title 28 U.S.C. § 2255 alleging several instances of ineffective assistance of counsel that was denied as well. See,

Rivera-Fonseca v. United States, No. 1:19-cv-25329-GAYLES/VALLE, 2022 U.S. Dist. LEXIS 107832 (S.D. Fla. June 15, 2022). A subsequent request for certificate of appealability was also denied. *Fonseca v. United States,* No. 22-12541-A, 2023 U.S. App. LEXIS 13572 (11th Cir. June 1, 2023).

STATEMENT OF THE FACTS

On October 5, 2015, Bridgette Newman entered a Walgreens in Aventura, Florida. She informed the overnight manager that her boyfriend, who was later identified as Rivera-Fonseca, was outside in a blue van, armed with a firearm. Newman expressed her fear that Rivera-Fonseca might enter the store with the intention of causing harm to everyone inside. In response to this threat, the store manager promptly dialed 911, leading to the dispatch of Aventura police officers to the location.

Officer James Martin was the first to arrive in response to the emergency call. Upon his arrival, he observed Rivera-Fonseca seated in the back of the van, holding what looked like a rifle. Officer Martin commanded Rivera-Fonseca to exit the van and subsequently detained him. Moreover, Officer Martin noticed the butt of an AR-15 rifle, partially

obscured by clothes, in the same spot where Rivera-Fonseca had been seated. Another officer, Officer Ricardo Moreno, also arrived at the scene. Officer Moreno corroborated the identification of Rivera-Fonseca and confirmed the presence of the AR-15 rifle in the van.

A subsequent inventory search of the van resulted in the seizure of (i) an AR-15 rifle with a live round in the chamber; (ii) a 29-round magazine inserted in the rifle; (iii) an additional 28 rounds of ammunition; (iv) multiple cell phones; (v) a rifle case; (vi) approximately $800 in cash; (vii) marijuana; (viii) large and small baggies; and (ix) a sugar container modified to conceal additional baggies. While Rivera-Fonseca was being transported from the Aventura Police Department to the Federal Detention Center in Miami, Rivera-Fonseca supposedly voluntarily made several post-Miranda statements to ATF Special Agent Katherine Brady. *Id.* at 225-28. During the drive, Rivera-Fonseca allegedly admitted to Agent Brady that the narcotics and the firearm found in the blue van belonged to him (not Newman). Rivera-Fonseca also told Agent Brady that he needed a gun for protection from enemies and that he would rather be caught with a gun than be caught without one and be dead. Relevant to the 2255, Rivera-Fonseca told Agent Brady that he knew he

was a felon and was not allowed to possess a firearm. Rivera denies making such statements.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with 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 power of supervision.
>
> (b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal

question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

IN LIGHT OF THE FACTS OF THIS CASE, WAS THE DEFENSE COUNSEL INEFFECTIVE IN LIGHT OF THIS COURT'S PRECEDENT IN *STRICKLAND V. WASHINGTON,* 466 U.S. 668 (1984)?

Rivera-Fonseca requested a certificate of appealability from the Eleventh Circuit Court of Appeals in line with 28 U.S.C. § 2253(c)(1)(B) and Fed. R. App. P. 22(b)(1). This is because the District Courts' decision regarding the claim of ineffective counsel is arguably "debatable" among rational jurists. See, *Buck v. Davis*, 137 S.Ct. 759 (2017), which re-emphasizes the standard for granting a COA. See, *Tennard v. Dretke*, 542 U.S. 274 (2004); *MillerEl v. Cockrell*, 537 U.S. 322 (2003); and *Slack v. McDaniel*, 529 U.S. 473 (2000). *Sorto v. Davis,* 672 F. App'x 342 (5th Cir. 2016) suggests that a defendant needs to show that the issues at hand are "worthy of further exploration." Additionally, *Rosales v. Dretke*, 133 F. App'x 135 (5th Cir. 2005) and *Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997), emphasize that any uncertainty about granting a COA should lean in favor of the petitioner. *Booker v. United States*, 2014 U.S. Dist. LEXIS

176778 (W.D.N.C. Dec. 22, 2014) (any doubts about issuing a COA should be resolved to benefit the petitioner.)

To secure a COA, one doesn't need to provide definitive proof of an error. Quite the opposite. As articulated in *Miller-El*, even if every rational jurist might concur that the petitioner won't succeed after a full review, the claim can still be considered "debatable" (537 U.S. at 338). Succinctly, § 2253(c) sets a relatively low bar for the issuance of a COA, as highlighted in *Buck v. Davis*, 137 S.Ct. at 773–75. The court emphasized: "At the COA stage, the appellate court should primarily focus on a preliminary examination of the claim's underlying merit, questioning merely whether the District Court's ruling was open to debate." *Id.* at 774, *Miller-El*, 537 U.S. at 327, 348. Fonesca provides that it does.

A. Demonstrating a Significant Indication of a Constitutional Right Violation - The § 2255 Motion Adequately Presented Constitutional Allegations.

1. The defense attorney was compromised by a conflict of interest, given that his legal compensation was provided by Newman. Notably, Newman was named as a witness for the prosecution during the trial, and her testimony was pivotal for the defense's case.

"To prevail on a claim of ineffective assistance due to a conflict of interest, Rivera-Fonseca is tasked with pinpointing specific instances in the record that indicate an actual conflict of interest that detrimentally impacted his attorney's actions." *Caderno v. United States,* 256 F.3d 1213, 1218, the precedent set in both *Cuyler v. Sullivan*, 446 U.S. 335, 348, and *United States v. Marrera*, 768 F.2d 201, 208, is clear. Merely suggesting a potential conflict does not suffice to challenge a criminal verdict, as articulated in *Cuyler*, 446 U.S. at 350 and reiterated *in Otano v. United States*, 2019 U.S. Dist. LEXIS 9898, at *22. This claim was appropriately raised and merited consideration. The Supreme Court has refined the criteria for ineffective counsel claims stemming from conflicts of interest. In *Cuyler v. Sullivan*, 446 U.S. 335, 350, the Court determined that to prove a violation of the Sixth Amendment under such conditions, the petitioner must demonstrate that "an actual conflict of interest

adversely affected his lawyer's performance." This standard from *Sullivan* was further elucidated in *Mickens v. Taylor*, 535 U.S. 162, in the following manner:

> [T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.

Id. Mickens, 535 U.S. at 172 n.5.

To substantiate a constitutional violation under the *Sullivan* framework, a defendant in a criminal case must provide evidence that his legal representative had a genuine conflict, which entails: (1) the presence of a conflict of interest and (2) this conflict detrimentally influencing the attorney's conduct. This interpretation is supported by *Herring v. Secretary, Dept. of Corrections*, 397 F.3d 1338, 1357, which acknowledges the *Mickens* Supreme Court decision's slight rewording, emphasizing the necessity of an "actual conflict" for a defendant to validate a Sixth Amendment breach under the *Cuyler* precedent. This perspective is further echoed in *Ochoa-Vasquez v. United States*, 2016 U.S. Dist. LEXIS 172172.

The conflict in the counsel's position was evident. A conflict of interest arises when a legal representative grapples with "divergent interests," as highlighted in *Aguilar-Garcia v. United States*, 517 Fed. Appx. 880, 882. This assessment is "context-dependent," and the conflict must be tangible and not merely a potential, conjectural, or theoretical scenario, as outlined in *McCorkle v. United States*, 325 Fed. Appx. 804, 808. Mere general claims of a conflict of interest are insufficient. Instead, a petitioner must furnish evidence of "distinct instances of conflicting interests or explicit detriment to the petitioner's interests," as seen in *Jean v. United States*, No. 2011 U.S. Dist. LEXIS 140271.

To establish an adverse effect, the petitioner must satisfy three criteria: (1) the possibility of a plausible alternative strategy by his attorney, (2) the reasonableness of this alternative, and (3) the attorney's avoidance of this alternative due to conflicting external loyalties. *Aguilar-Garcia*, 517 Fed. Appx. at 882. This differs from the *Strickland* standard, which mandates evidence of tangible prejudice. Under the conflict of interest framework, a defendant who can prove that such a conflict compromised the quality of his legal representation is not

obligated to further demonstrate prejudice to secure relief. *Sullivan*, 446 U.S. at 349-50.

Upon his initial court appearance, Rivera-Fonseca was appointed representation by Ian McDonald from the Public Defender's office. In a swift turn of events, DeCoste entered a notice of appearance, taking over the case's representation. This change was initiated when Newman, the government's pivotal witness who instigated the entire investigation, engaged DeCoste's services for Rivera-Fonseca, bearing the full brunt of his legal fees. The assertions, corroborated by Rivera-Fonseca's affidavit, necessitated a judicial hearing. DeCoste's financial ties, specifically the revelation that his legal fees were sourced from Newman, influenced the decision not to summon Newman to testify in defense of Fonseca. This action contravened the three criteria delineated in *Aguilar-Garcia*, 517 Fed. Appx. at 882: (1) the potential for the attorney to adopt a viable alternative strategy, (2) the reasonableness of this alternative, and (3) the attorney's decision against this strategy due to conflicting external commitments. Specifically, (1) Newman was available and prepared to testify that she was the firearm's possessor, not Rivera-Fonseca. (2) DeCoste diverged from the pre-agreed strategy, primarily because

revealing Newman as his fee source would be necessary. (3) DeCoste's "external loyalty" to Newman, stemming from her financial contributions, clashed with Fonseca's trial defense strategy.

This purported conflict, grounded in well-established law, mandated a hearing. The financial transactions between Newman and DeCoste remain absent from this case's official record. Similarly, the agreement terms between DeCoste and Newman concerning Rivera-Fonseca's representation are not documented. All strategic discussions involving Rivera-Fonseca, DeCoste, and Newman transpired off-record and thus are not encapsulated within the "records and files of the case," as referenced in *Shaw*, at 1043 and *Blaylock*, at 1465. Given that Rivera-Fonseca's affidavit stood unchallenged, the court was obligated to convene an evidentiary hearing and address the undisputed facts. Consequently, the issuance of a COA was imperative as to this claim

B. Demonstrating a Significant Indication of a Constitutional Right Violation - The § 2255 Motion Adequately Presents Constitutional Allegations.

1. Counsel rendered ineffective assistance when he failed to explain to Fonseca the application of the guidelines, the strength of the government's case, and how the guidelines, along with the possibility of an upward variance, would play such an integral part in his final sentence, thus rendering his decision to proceed to trial unknowingly.

Rivera-Fonseca is entitled to competent representation during the pivotal phases of the criminal proceedings, as established in *Caruso v. Zelinsky*, 689 F.2d 435 (3rd Cir. 1982). Furthermore, he possesses the right to make an informed decision on whether to accept a plea deal or advance to trial, as articulated in *United States v. Day*, 969 F.2d 39, 43 (3rd Cir.1992), referencing *Hill v. Lockhart*, 474 U.S. 52, 56-57. This holds true even if the plea in question is a direct plea to the charges accompanied by an acceptance of responsibility. DeCoste's omission in providing counsel compromised Rivera-Fonseca's Sixth Amendment right to effective legal representation. This is because Rivera-Fonseca was not adequately informed about the potential consequences of opting for a trial as opposed to entering a guilty plea and seeking to lessen the

charges. This principle is underscored in *McMann v. Richardson*, 397 U.S. 759, 771.

In this instance, following the denial of the motion to suppress (which was the linchpin of the defense), Rivera-Fonseca was left uninformed about the robustness of the government's case. He was not apprised of the potential benefits of entering a guilty plea, which could have mitigated the case's severity without the need for a trial. The intricate details and nuances of this case were no mystery to the counsel from the outset. The subsequent dialogue between the involved parties, as they readied for trial, reinforces this stance, especially when the government delineated its roster of witnesses:

> We have at minimum eight witnesses that we must call because there have been no stipulations as to DNA, as to drugs, etcetera, so I anticipate that some of the witnesses will be quite lengthy. In addition, we will be putting on 911 calls, video, transcripts. There is a lot of evidence in this case. There are over 40 exhibits, 42 and based on what defense counsel set forth this morning. It seems like their case will have at least one. I know that they are not going to provide the exact number of witnesses at this time. They can't, but last week during the suppression hearing they also referenced additional evidence that they will attempt to put on in their case in chief that will potentially create a situation where we then put on a bit of rebuttal case.

Id. (CR-Doc. 98 at 10).

Despite the government's comprehensive briefing on its witnesses, the 911 calls, videos, and transcripts, Rivera-Fonseca remained uninformed about the intricacies and breadth of the case against him. This lack of clarity deprived him of the opportunity to consider avoiding a trial and seeking a more favorable resolution for his situation. (CV-Doc. No. 1-1). The potential for settling the matter without resorting to a trial was overlooked, primarily because of this communication gap. A writ of certiorari should be granted on this claim.

2. Given Rivera-Fonseca's learning disability, it was imperative that he receive a thorough and clear explanation of the potential avenues for resolving the case outside of a trial setting.

DeCoste had knowledge of Rivera-Fonseca's learning disability, a fact evident from Rivera-Fonseca's previous arrest records in the State of Florida.[1] These records indicate that, following a competency hearing, it was established that Rivera-Fonseca possessed significant learning disabilities. Multiple competency hearings were convened in these instances to assess Rivera-Fonseca's capacity to comprehend the legal proceedings and to discern the implications of choosing between a guilty

[1] *State v. Fonseca,* F04-34972 and F05-009412.

plea and a trial. A review of the State of Florida's criminal docket would have revealed Rivera-Fonseca's learning disability warranted special care in explaining the case, its strength, and the possibilities of resolving the case without a trial. Had a thorough explanation been made, Rivera-Fonseca would not have proceeded to trial. All Rivera-Fonseca had to show was that there was a *"reasonable probability"* that the results of his decision to proceed to trial would have been different, *Id. Williams v. Taylor,* 529 U.S. 362, 386, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), and based on the difference in sentencing guideline ranges, there could be no doubt that a different outcome is evident. This allegation required a hearing and the failure to grant a hearing requires a COA.

C. "Substantial Showing of Denial of a Constitutional Right" – The § 2255 Motion Sufficiently Alleges Constitutional Claims

1. Appellate counsel was ineffective for failing to raise on appeal that the District Court abused its discretion when it sentenced Rivera-Fonseca 60 months above the Presentence Investigation Report's recommendation and the government's recommendation at sentencing.

"In instances where a petitioner in a habeas proceeding contends that their representation was deficient due to the omission of an issue on appeal, the court is tasked with examining the substantive merits of the

unraised issue. This principle is well-established in *United States v. Cook,* 45 F.3d 388 (10th Cir. 1995) and *United States v. Dixon,* 1 F.3d 1080 (10th Cir. 1993). Notably, the mere omission of a meritless issue does not equate to a violation of the constitutional right to effective counsel. *Id.* at 1083 n.5. The Sixth Amendment does not impose an obligation on attorneys to present every issue that isn't patently frivolous on appeal, as articulated in *Jones v. Barnes*, 463 U.S. 745, 751 (1983). It is a common and strategic practice for counsel to sift through and prioritize stronger claims over weaker ones to enhance the efficacy of their arguments. This sentiment is echoed in *Smith v. Murray*, 477 U.S. 527, 536 (1986) and *Tapia v. Tansy*, 926 F.2d 1554, 1564 (10th Cir. 1991). Nevertheless, it is crucial to recognize that an appellate attorney's performance can be deemed deficient, to the detriment of the defendant, if they neglect to raise an overwhelmingly compelling issue, even if other strong but ultimately unsuccessful arguments were presented. This was emphasized in *Cook*, 45 F.3d 388, 1995 WL 24338, at *6; *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989).

In the instant case, the District Court's upward variance was an error. The issue of the variance was exclusively preserved at sentencing since

the sentence was above, not only the sentence requested by the defense, but also by the sentence of 175 months recommended by the government. (Dkt. 103 at 35). The government agreed, that post-trial, after all the evidence, a sentence of "175 months is sufficient but not greater than necessary in this situation." (Doc. 103 at 35). The court in imposing a sentence of 235 months violated Title 18 U.S.C. § 3553 factors. The issue was preserved for appellate review and would have most likely resulted in a remand for resentencing.

D "Substantial Showing of Denial of a Constitutional Right" – The § 2255 Motion Sufficiently Alleges Constitutional Claims

1. Given the precedent set by *Rehaif v. United States*, 2019 U.S. Lexis 4199 (2019) the indictment for firearm possession by a convicted felon under 18 U.S.C. § 922(g), as well as the subsequent conviction for the same offense, are both constitutionally flawed.

In *Rehaif v. United States*, 2019 U.S. Lexis 4199 (2019) the Supreme Court overruled precedent from the Eleventh Circuit — and every other circuit to have spoken on the issue — about the scope of the crime defined in § 922(g). Before *Rehaif*, the government secured a felon-in-possession conviction by proving merely that the defendant knowingly possessed a firearm and that a court had earlier convicted him of a felony, defined

under the statute as a crime punishable by more than one year in prison. *See, United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997). But the Supreme Court proclaimed in *Rehaif* that the government "must show that the defendant knew he possessed the firearm and also that *he knew he had the relevant status* when he possessed it." 139 S. Ct. 2191, 2194 (2019) (emphasis added). Because Rivera-Fonseca's indictment made no mention of this knowledge-of-status element and the governing statute, the conviction violates the Fifth Amendment's indictment clause. Rivera-Fonseca's jury instructions, also omitted this element, which was in error, so the conviction violates his Fifth Amendment right to due process of law and Sixth Amendment rights.

a. Lacking the crucial *mens rea* component, the indictment against Rivera-Fonseca did not properly allege a criminal offense. In light of *Rehaif*, the § 922(g) conviction based on this deficient charge necessitates vacatur.

In *Rehaif*, the Supreme Court clarified that the term "knowingly" in 18 U.S.C. § 924(a)(2) applies not only to the possession element in § 922(g), but also to that statute's status element. Without this knowledge-of-status element, then, Rivera-Fonseca's indictment failed to charge a

crime at all. After *Rehaif*, this Court must vacate Rivera-Fonseca's § 922(g) conviction and sentence.

i. The indictment and notice requirements in light of *Rehaif*.

"A criminal conviction will not be upheld if the indictment upon which it is based does not set forth the essential elements of the offense." *United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992) (en banc). The rule serves two purposes: First, "it informs the defendant of the nature and cause of the accusation as required by the Sixth Amendment."[2] Second, the rule "fulfills the Fifth Amendment's indictment requirement, ensuring that a grand jury only returns an indictment when it finds probable cause to support all the necessary elements of the crime." *Gayle*, 967 F.2d at 485. The purpose of that requirement "is to limit [a defendant's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960). Under § 922(g), nine categories of persons are prohibited from possessing a

[2] *Id.* The notice "furnish[es] the accused with such a description of the charge against him as will enable him to make his defense," and to enlist the protections of the double jeopardy clause, if necessary. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875).

firearm or ammunition. But while § 922(g)(1), for example, prohibits felons from possessing a firearm, that provision alone does not criminalize such conduct. Rather, that work is done by § 924(a)(2), which declares that a person who "knowingly violates" § 922(g) "shall be . . . imprisoned not more than... In *Rehaif*, again, the Supreme Court held that the term "knowingly" set forth in § 924(a)(2) applies to both the possession and status elements of § 922(g). *Id.* 139 S. Ct. at 2200. The Court relied upon the "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 2195. The statutory text demanded this outcome: "[T]he term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." *Id.* at 2195-2196. The Court saw "no basis to interpret 'knowingly' as applying to the second § 922(g) element [on possession] but not the first [on status]. To the contrary, we think that by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." *Rehaif*, 139 S. Ct.

at 2196. Those "material elements" include not only the prohibited conduct (the firearm possession itself) but also the prohibited status that makes the possession illegal. *Id.* Through *Rehaif,* the Supreme Court clarified, that there is no prosecutable, stand-alone violation of § 922(g). Instead, a valid "prosecution" under United States law must be "under [both] 18 U.S.C. § 922(g) and § 924(a)(2)." *Id.* at 2200. The pair of statutes work in tandem to define the crime. In the absence of one, there is no federal crime.

ii. Rivera-Fonseca's indictment failed to state a federal crime.

The indictment did not allege that Rivera-Fonseca, at the time he possessed the firearm, knew that he was a convicted felon. This should be no surprise because, at the time of the indictment, the law in this circuit provided that no § 922(g) indictment needed to aver the defendant's knowledge of his prohibited status. *Jackson*, 120 F.3d at 1229 (holding that "the government need not prove that the defendant knew of his prohibited status"). But the fact remains that, after *Rehaif*, the indictment failed to describe an essential element of the offense and, indeed, it did not state an offense at all. So where does this leave us? "A criminal conviction will not be upheld if the indictment upon

which it is based does not set forth the essential elements of the offense." *Gayle,* 967 F.2d at 485. The absent knowledge-of-status language dooms the indictment. That is not the only problem with the indictment. It also failed to cite the proper statutes defining the crime. The indictment named "Section 922(g)(1)," but said nothing at all of § 924(a)(2). Yet the offense depends on both § 922(g) (which prohibits the possession of firearms and ammunition by certain persons) and § 924(a)(2) (which criminalizes the "knowingly violation" of that prohibition). In short, the grand jury both failed to charge an essential element— knowledge of status—and failed to cite the key provision naming the applicable *mens rea* and criminalizing that otherwise-innocent conduct. The government (and, by proxy, this Court) carried forward the flaw by defining the crime to Rivera-Fonseca at his trial in just the same way.

In *United States v. Martinez*, 800 F.3d 1293 (11th Cir. 2015) a panel of this Court faced the same query. There the indictment charged the defendant with, and he was later convicted of, knowingly transmitting an interstate threat in violation of 18 U.S.C. § 875(c). *Martinez*, 800 F.3d at 1294. Later, in *Elonis v. United States*, 135 U.S.

2001, 2013 (2015) the Supreme Court held that § 875(c) requires proof of the defendant's subjective intent and, in so doing, the Supreme Court abrogated the Court's precedent. *Id.* 135 U.S. 2001, 2013 (2015). Following *Elonis*, the *Martinez* panel held that the indictment was insufficient because it "fail[ed] to allege *Martinez's mens rea* or facts from which her intent can be inferred." *Martinez*, 800 F.3d at 1295. The indictment did "not meet the Fifth Amendment requirement that the grand jury find probable cause for each of the elements of a violation of § 875(c)." *Id.* The panel vacated the conviction and sentence and ordered the indictment dismissed without prejudice. *Id.*

Here, as in *Martinez,* a Supreme Court decision has abrogated the Eleventh Circuit's precedent in the very same way. The indictment here, like the one in *Martinez,* failed to charge a complete - and, therefore, any - federal crime. Without the requisite *mens rea* and statutory citations required by *Rehaif,* Rivera-Fonseca has been convicted of a non-crime. The indictment is insufficient on its face in violation of the Fifth and Sixth Amendments, so this Court should craft the same remedy as the *Martinez* panel—it should vacate Rivera-Fonseca's § 922(g) conviction and grant this writ of certiorari.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Eleventh Circuit.

Done this 25, day of August 2023.

Damaso Rivera-Fonseca
Register Number 06407-104
USP McCreary
P.O. Box 3000
Pine Knot, KY 42635