No. _____

IN THE

Supreme Court of the United States

MARCO ANTONIO PEREZ,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

18 U.S.C. § 3147 provides in relevant part: "A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to a term of imprisonment of not more than ten years if the offense is a felony. A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment."

The questions are:

1. Does an enhanced sentence pursuant to 18 USC § 3147 authorize a punishment exceeding the statutory maximum sentence for the underlying offense committed while on release as held by four circuits, or is it properly interpreted by the Guidelines and its commentary to prohibit a sentence in excess of the statutory maximum as held by five circuits?

2. In cases where a punishment for an offense is enhanced beyond the statutory maximum by judicial application of 18 U.S.C. § 3147, and where there was no formal pretrial notice of the intention to apply the enhancement, was not submitted to a grand jury, and was not submitted for consideration to the jury, does such an error rise to the level of being structural, or is it subject to harmless error analysis?

RELATED PROCEEDINGS

United States v. Perez, No. 21-cr-00005, (S.D. Ala. Jan. 10, 2022)

United States v. Perez, No. 22-10267, (11th Cir. Nov. 14, 2023)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(cont'd)

Page(s)

TABLE OF AUTHORITIES
(cont'd)

Page(s)

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Statutes

Rules

Guidelines

PETITION FOR WRIT OF CERTIORARI

Petitioner Marco Antonio Perez respectfully petitions for a writ of certiorari be issued to review the United States District Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The November 14, 2023, Opinion of the Court for the Eleventh Circuit Court of Appeals is reproduced in the Appendix ("Pet. App. A2) and is reported at 86 F.4th 1311.

BASIS FOR THE JURISDICTION OF THIS COURT

The United States Court of Appeals for the Eleventh Circuit entered judgment on November 14, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment 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… nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an impartial jury…and to be informed of the nature and cause of the accusation…" U.S. Const. amend. VI.

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3147 provides:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—
>
> (1) a term of imprisonment of not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

RELEVANT FEDERAL SENTENCING GUIDELINES AND COMMENTARY

USSG § 3C1.3. Commission of Offense While on Release provides:

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels.

Commentary

Application Notes:

1. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (i.e., the sentence for the offense committed while on release plus the statutory sentencing enhancement under 18 U.S.C. §3147) is in accord with the guideline range for the offense committed while on release, including, as in any other case in which a Chapter Three adjustment applies (see §1B1.1 (Application Instructions)), the adjustment provided by the enhancement in this section. For example, if the applicable adjusted guideline range is 30–37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. §

> 3147 would satisfy this requirement. Similarly, if the applicable adjusted guideline range is 30–37 months and the court determines a "total punishment" of 30 months is appropriate, a sentence of 24 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

INTRODUCTION

This case presents critical questions of statutory construction with necessarily attached critical constitutional implications. These issues directly implicate the 5th Amendment's right to a grand jury and the 6th Amendment rights to notice, trial by jury, and proof beyond a reasonable doubt. While the factual circumstances are relatively straightforward, the historical judicial constructions of the statute in question have not been.

A plain reading of 18 U.S.C. § 3147 (committing a crime while on supervised release) seemingly dictates that an additional sentence (not to exceed ten years) be imposed in addition to the punishment for the underlying offense.

But whether that additional sentence can result in a punishment exceeding the statutory maximum sentence for the underlying offense is a question that has resulted in a deep split amongst the circuits. The answer to this question is necessary to definitively direct the courts in the proper application of the section to give clarity, consistency in application, and most importantly, to avoid constitutionally

questionable procedures and results, as has happened in this case.

Five circuits treat § 3147 strictly as a sentencing factor which can only drive the base-offense level of the underlying offense by an additional three points. This interpretation is what the Guidelines themselves direct and does not permit a sentence exceeding the statutory maximum. Four of the circuits (including the court below) have held that § 3147 is a sentence enhancement statute that permits sentences to exceed the statutory maximum for the underlying offense. These courts have acknowledged the inherent application of *Apprendi* under such circumstances, but only two circuits have squarely faced the issue.

Of the courts which found § 3147 to be exclusively a Guidelines factor, one of them left open the question if the plain language of the statute actually creates a separate substantive offense. Confusion of this sort is not unknown in the districts and circuits.

Of particular consequence in this case, the alleged violation of § 3147 was not contained in the indictment, was not noticed prior to the trial, nor was it submitted to the jury. The government's intention to apply this section was not made manifest until weeks after the jury returned their verdict, but prior to the sentencing hearing.

Objections to the application of § 3147 were made at the sentencing hearing based on it being a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court overruled the objections and sentenced Mr. Perez to an additional ten-year sentence beyond

the statutory maximum for the underlying offenses. Pet. App. A57.

In their opinion, the Eleventh Circuit ignored the directives of the Guidelines and found that the "plain language" of the statute relegated § 3147 to the category of a "sentencing enhancement" statute. Pet. App. A10. Finding *Apprendi* was violated, they nonetheless affirmed the sentence by utilizing a harmless error analysis of unprecedented breadth. Pet. App. A17. In so doing, the Eleventh Circuit vastly expanded the reach of the harmless error doctrine to the point where an unnoticed, uncharged, and unproven allegation can result in what is essentially a directed verdict of enormous penal consequences to a criminal defendant after a trial on the merits for an entirely different and unconnected offense (or enhancement) with multiple elements.

Such outcomes are repugnant to the 5th and 6th Amendments. They pass a boundary which is the very definition of structural error. It is imperative that this Court establish a consistent interpretation for the proper use of § 3147 in keeping with the directives of the Guidelines. Should this Court find that the Guidelines and their commentary should not apply, then it is time for this Court to protect defendants against the misuse of § 3147 by requiring pretrial notice and submission to a jury for determination of the additional factual elements associated with § 3147. But under the circumstances of this case, the doctrine of structural error must be permitted to make a rare appearance to safeguard the fundamental protections of notice, indictment, and

trial by jury guaranteed by the 5th and 6th Amendments.

STATEMENT OF THE CASE

A. Relevant factual background

In late 2018, petitioner Marco Antonio Perez was placed on supervised release after being indicted for possessing a stolen firearm in violation of 18 U.S.C. § 922(j).

Shortly after his release, Mr. Perez faked his own kidnapping, and after numerous failed efforts to recapture Mr. Perez, an off-duty Mobile Police Department officer obtained information on Mr. Perez's whereabouts and attempted to recapture him. When the officer arrived, he jumped out of his personal vehicle and pointed a gun at Mr. Perez and ran towards him. A scuffle ensued which tragically ended with the loss of the officer's loss when Mr. Perez shot him three times with a newly acquired stolen firearm he pulled from his waistband. Arriving shortly after the encounter, Mr. Perez was almost immediately taken into custody by other officers.

B. Proceedings below

1. Approximately two years later, Mr. Perez was indicted with four additional charges of receiving a firearm while under indictment in violation of 18 U.S.C. § 922(n), possessing a stolen firearm in violation of 18 U.S.C. § 922(j), obstruction of justice by killing a witness in violation of 18 U.S.C. § 1512(a)(1)(C), and carrying, using, and discharging a firearm during a crime of violence in violation of 18

U.S.C. § 924(c)(1)(A)(iii). Pet. App. A22. The penalty page of the indictment noted a five-year maximum sentence for Count 1 and a ten-year maximum sentence for Count 2. Pet. App. A28.

The case proceeded to trial in late 2021, and the jury convicted him of the two § 922 firearm charges and acquitted him of the § 1512 and § 924 charges involving the death of the officer. Pet. App. A18.

After the trial, but before the sentencing, the government filed a formal notice of their intention to seek a ten-year enhancement of the sentence for the two firearms crimes with which Mr. Perez had been convicted pursuant to 18 U.S.C. § 3147. Up until this point, there had been no such notice of the government's intent to seek application of the enhancement. Pet. App. A5.

At sentencing, Mr. Perez objected to the imposition of any additional consecutive term of imprisonment pursuant to § 3147 as being a violation of *Apprendi*. The district court judge overruled the objections and sentenced Mr. Perez to maximum consecutive terms for the § 922 offenses (five and ten years) and stacked an additional ten-year term pursuant to § 3147. Pet. App. A55-57.

2. Mr. Perez timely appealed, and a panel of the Eleventh Circuit affirmed. Although finding *Apprendi* error had occurred, the panel also found that such error was harmless and not structural error (citing *Washington v. Recuenco*, 548 U.S. 212, 222 (2006)). Pet. App. A15.

Applying their own precedent, the court held that *Apprendi* error is harmless "when there is 'uncontroverted evidence' supporting a statutory fact that alters the range of possible sentences a defendant may receive." See *United States v. Payne*, 763 F.3d 1301, 1304 (11th Cir. 2014). And that "no reasonable jury could have convicted Mr. Perez of the § 922(n) offense without also finding that he committed this crime while on pretrial release".

REASONS FOR GRANTING THE WRIT

There is a grave split in opinion amongst the courts of appeals in how to treat alleged violations of 18 U.S.C. § 3147. Some treat it as a guidelines sentencing factor that can never raise the maximum sentence for the underlying offense. Some treat it as sentencing enhancement that can inflate the maximum sentence for the underlying offense up to ten years. And one circuit questions whether it defines a separate criminal offense in and of itself.

The answer to the first question raised carries grave implications for consistency in sentencing and of a constitutional dimension. If § 3147 is treated as a Chapter Three base offense enhancement as the Commentary to USSG § 3C1.3 commands, then sentences cannot exceed the statutory maximum for the underlying offense. There would be no constitutional issues that would invite an *Apprendi* analysis. *Apprendi* issues would be effectively mooted (see *United States v. Randall*, 287 F.3d 27, 30 (1st Cir. 2002)).

On the other hand, if § 3147 is treated as allowing for a sentence exceeding the statutory maximum, then the second question moves front and center. Constitutional issues of formal notice, presentment to grand jury, a petit jury, and proof beyond a reasonable doubt are firmly in play and take on significant dimension. A paramount source for concern is that § 3147 is a statute that can apply an enhancement to all crimes committed while on supervised release, not just those that are rationally tailored to the unique commission of the underlying offense itself (such as

enhancements for drug amounts and firearms use). In the absence of grand jury consideration, formal notice, and a jury determination beyond a reasonable doubt pursuant to the 5th and 6th Amendments, the doctrine of harmless error would have no place in the analysis, and such application results in structural error requiring resentencing without the enhancement.

Mr. Perez's case presents these issues as a sound vehicle for the Court's consideration. The facts, although tragic, are not complicated. The error was clearly preserved, and the analysis of the court below did not question that *Apprendi* error had occurred. Additionally, the sentencing of Mr. Perez to a term of 25 years for the illegal possession of one handgun was the most extreme available to the district court.

I. 18 U.S.C. § 3147 Does Not Authorize a Punishment Exceeding the Statutory Maximum Sentence for the Underlying Offense.

A. There is an entrenched split on the question presented.

The courts of appeals are clearly divided on the question if § 3147 can pass the outer boundaries of sentencing for an underlying offense, one committed while on supervised release. These circuits have also decided this question in the context of the potential application of *Apprendi*.

1. The First Circuit was the first to reach this question in *United States v. Randall*, 287 F.3d 27 (1st Cir. 2002). There, while Randall was on supervised release for an obstruction charge, he committed a drug conspiracy offense. After pleading guilty, he was sentenced to 35 months for the underlying offenses, which was followed by a consecutive six-month consecutive sentence "because of § 3147." *Id.* at 29. An *Apprendi* objection was lodged and overruled.

In their analysis, the court noted that the "directives of § 3147 have been assimilated in the Sentencing Guidelines through U.S.S.G. §2J1.7[1]" and that *Apprendi* does not apply to "guideline findings". *Id.* at 28. Furthermore, they quoted with approval Application Note 2, which directs the sentencing court to "divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement with a view toward ensuring that the "total punishment" is consistent with the guideline range for the underlying offenses of conviction." *Id.* at 30.

It is by utilizing this methodology that the court found the assimilation of § 3147 "effectively moots any

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[1] In November 2006 § 2J1.7 was deleted from the Guidelines and § 3C1.3 was added. See USSG App. C, Amend. 684. Like the former § 2J1.7, § 3C1.3 provides for a 3-level increase in the offense level if a statutory sentencing enhancement under 18 U.S.C. § 3147 applies to the defendant's case. USSG § 3C1.3. Amendment 684 to the Sentencing Guidelines explains that the enhancement provision was moved from Chapter Two to Chapter Three in order to ensure that the "enhancement is not overlooked and is consistent with other enhancements in Chapter Three, all of which apply to a broad range of offenses." USSG App. C, Amend. 684 comment. (backg'd.).

Apprendi challenge" because it requires sentencing judges to impose a sentence "below the applicable conviction count maximum." *Id.* at 30.

The D.C. Circuit faced a similar circumstance and argument in *United States v. Samuel*, 296 F.3d 1169 (D.C. Cir. 2002). After being sentenced to a 108-month term for a substantive drug offense, the defendant in *Samuel* was given an additional 43-month enhancement under § 3147, which was followed up with an *Apprendi* objection.

While Samuel argued that § 3147 exposed him to a potential sentence exceeding the maximum, the court and the government disagreed, finding that the "Sentencing Guidelines decree that the maximum term to which he may be sentenced is the maximum authorized for the underlying offense." *Id.* at 1175.

After citing *Randall* with approval, the court, with complete clarity, stated "(A)pplication of § 2J1.7 can neither increase a defendant's sentence above the statutory maximum for the offense of conviction, nor expose him to the possibility of such an increase." *Id.* at 1175.

More recently, in *United States v. Johnson*, 593 F. App'x 186 (4th Cir. 2014), the court likewise faced *Apprendi* and *Alleyne* (citations omitted) objections in the context of a sentencing hearing involving application of § 3147. The analysis was functionally identical to the previous two cases discussed and noted the distinctive language from *Randall* "holding that § 3147 and implementing Guidelines enhancement did not violate *Apprendi* where defendant received sentence below statutory

maximum for offense of conviction, and suggesting that structure for implementing enhancement 'effectively moots any *Apprendi* challenge to the application of § 3147' because it requires imposition of apportioned within-Guidelines sentence." *United States v. Johnson*, 593 F. App'x 186, 188 (4th Cir. 2014).

And in 2019, in an unpublished opinion, *United States v. Horner*, 769 F. App'x 528, 536–37 (10th Cir. 2019) (unpublished), the court cited *Randall*, followed an identical analysis, and reached an identical conclusion.

The 5th Circuit, in *United States v. Dison*, 573 F.3d 204 (5th Cir. 2009) was very direct and to the point about this issue, finding *Apprendi* was inapplicable and "regardless of the fact that § 3147 calls for punishment 'in addition to the sentence prescribed' for the underlying offense, the § 3147 enhancement can never result in a sentence in excess of the statutory maximum prescribed for the offense committed while on release…" *Id.* at 209 (emphasis added).

2. Notwithstanding the precedent in the other circuits, the 2nd Circuit took a contrary view in *United States v. Confredo*, 528 F.3d 143 (2d Cir. 2008). Noting first that the court applies *Apprendi* when an enhancement exposes a defendant to a mere risk of an enhanced sentence beyond the statutory maximum, the court acknowledged the condition precedent of interpreting § 3147 and 2J1.7 was not necessarily a straightforward exercise. *Id.* at 153.

The court found the error did violate *Apprendi*, but such error was harmless because all constitutional requirements had been met. *Id*. at 156.

The 3rd Circuit faced a completely different factual circumstance in *United States v. Lewis*, 660 F.3d 189 (3d Cir. 2011). The defendant in *Lewis* had actually been indicted for a violation of § 3147 as a substantive offense count of the indictment.

Since the *Apprendi* issues were raised for the first time on appeal, they were subjected to the plain error standard. *Lewis* at 192. As with *Confredo*, the *Lewis* court first needed to answer the "real issue" of whether § 3147 "can increase the statutory maximum sentence by ten years" to the underlying offense committed while on release. *Id.* at 192.

Unlike *Confredo*, the *Lewis* court made short work of that issue. Finding the language of § 3147 to be "clear and unambiguous" and that "Congress would not have written 'in addition to the sentence prescribed'… if it really meant that the § 3147 enhancement should instead be imposed as a portion of the sentence of the underlying crime." *Lewis* at 192.

More recently, in *United States v. Hogue*, 998 F.3d 745 (7th Cir. 2021), the 7th Circuit considered this same question and likewise concluded that the enhancement could raise the maximum potential sentence for the underlying offense, although the analysis was cursory and did not rely on any precedent.

In siding with the minority, the 11th Circuit relied heavily on the *Lewis* and *Confredo* opinions and

relegated the conclusions of *Samuel* and *Dison* as being nothing more than dicta and wholly ignored *Randall* and its progeny. Additionally, they ignored the importance of cases which held clear precedential value previously decided by the 11th Circuit. This incorrect analysis of the 11th Circuit will be more fully explored in the next section.

3. The effects of the split run deeply. Not only are the legitimate questions of notice, grand jury indictment, submission to a jury, and sentencing consequences inevitably leading to discontinuity and inconsistency amongst the districts, there remains misapprehension and confusion as to whether § 3147 creates an indictable substantive offense in and of itself.

The flexibility derived from § 3147's ambiguity and resulting inconsistent interpretations has created a disconcerting effect which should not be ignored. Implicitly inviting redefinition of the effects of § 3147 has resulted in outcomes, not necessarily driven by what the statute says, but by an expedient interpretation that appears to be outcome determinative.

B. The decision of the Eleventh Circuit was wrong.

1. Several decisions of the 11th Circuit preceded the opinion in question. While all these outcomes resulted in the ultimate affirmation of the sentences imposed, the underlying interpretations of how § 3147

operates demonstrate inconsistency that cannot be logically synthesized.

In *United States v. Bozza*, 132 F.3d 659 (11th Cir. 1998) the question arose in the context of a plea where § 3147 was applied at sentencing. The sole issue was one of sufficient notice of the statute's applicability and lack of notice pursuant to Rule 11.

The court's analysis made no mention of plain language statutory construction, but instead went straight to the guidelines. "When § 3147 is applicable, §2J1.7 requires the court 'add three levels…'". They followed this up with a citation to the commentary which "indicates that the court or the government must give the defendant 'sufficient notice' before the court may enhance the defendant's sentence. *Bozza* at 661.

The court went on to hold that the only notice that was necessary was presentencing notice which would be sufficient to allow for an objection to the enhancement. And with respect to Rule 11 notice, the court found the argument to be "without merit", citing the advisory committee notes of Fed.R.Crim.P. 11(c)(1) "(s)ince it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of a presentence report and resolution of disputed facts". *Id.* at 661-662.

This holding demonstrates not only a clear reliance on the primacy of the guidelines' interpretation of § 3147 enhancements, but also showed a clear indication that it was considered only to be an enhancement that effected the relevant base-

offense level for the underlying offense. *Bozza* cannot be squared with their current opinion.

In *United States v. Tyndale*, 209 F.3d 1292 (11th Cir. 2000), the court dealt with a similar issue regarding Rule 11. Tyndale complained that he was not made aware (prior to the entry of his plea) that his underlying offenses would be subject to the enhancement provision of § 3147 and (former) Rule 11(c)(1)'s clear directive to "inform the defendant of, and determine that the defendant understands, … the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law."

Regarding § 2J1.7 of the Sentencing Guidelines, the district court confirmed during the plea colloquy that Tyndale knew that the Sentencing Guidelines existed and would affect his sentence. By so doing, the district court discharged its responsibility under Rule 11(c) with respect to the effect of the Guidelines on Tyndale's sentencing range.

The Court rejected Tyndale's claim because any concern that the mandatory minimum sentence might be impacted would be "de minimus" under the statute. The mandatory enhancement would be satisfied by adding "one day or less" to Tyndale's sentence. This did not amount to plain error in Tyndale's case. *Tyndale* at 1296.

But what else do we learn from *Tyndale*? By clear implication we learn something very significant. If there was even a risk that application of § 3147 would have enhanced Tyndale's sentence above the maximum allowable sentence, the Court would have had no choice but to address it. By the Court's own

analysis, if such an interpretation § 3147 was contemplated, they would have had to find a Rule 11 violation. But there was clearly no risk of this outcome occurring because alteration of the minimum and maximum range of the underlying sentence was never contemplated by the application of § 3147.

The court below did not follow its own precedent and reversed course from their previous consistent treatment of § 3147 as a nothing more than a Chapter Three Guideline base offense level enhancement.[2]

2. In the opinion below, the court sought to distance itself from these other opinions by making distinctions that are somewhat misleading. While the court ultimately found that *Apprendi* error had occurred, and thusly § 3147 required submission to a jury, they hung their hat on an incorrect finding of the notice required for utilization of § 3147 to enhance a sentence beyond the statutory maximum.

Bozza correctly held that the presentence notice filed by the government and contained in the PSR satisfied the requirements for purposes of a Guidelines enhancement. The court also noted that "Mr. Perez had the same notice as… (the defendant in) *Bozza*. His pretrial release form contained the language from § 3147…" *United States v. Perez*, 86 F.4th 1311, 1318 (11th Cir. 2023). Pet. App. A12.

Strangely, the court first acknowledged that Mr. Perez was "not in the same position as the defendant

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[2] Two unpublished opinions reached similar conclusions, *United States v. Diveroli*, 512 F. App'x 896, 900 (11th Cir. 2013) and *United States v. Mollica*, 655 F. App'x 726, 728 (11th Cir. 2016).

in *Bozza* with respect to notice" because he "did not plead guilty", but then they go on to list the ways in which Mr. Perez had exactly the same notice as the defendant in *Bozza* to support the claim that notice was sufficient' *Id.* at 1318. Pet. App. 12. But as we shall see, this is the crux of the matter. The constitutional requirements of notice under the 6th Amendment require pretrial notice to avoid *Apprendi* issues. Not presentence notice.

Regardless, instead of following their precedent which had previously defaulted to the Guidelines interpretation, the court started out with familiar statutory construction, "we normally interpret a statute in accord with the ordinary public meaning of its terms at the time of its enactment". *Perez* at 1316 (quoting *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020)).

This method requires application of settled principles of statutory construction under which it must first be determined whether the statutory text is plain and unambiguous. If it is, then the statute is applied according to its terms. *See Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

While ostensibly following this course, the *Perez* court missed an important source of ambiguity contained in § 3147. The full text of the statute reads as follows:

> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to

> (1) a term of imprisonment of not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

18 U.S.C. § 3147 (emphasis added).

However, in the opening sentence of their opinion, the court stated that the statute provides "in relevant part" that "if a person commits a felony offense while on pretrial release…". *Perez* at 1314, Pet. App. A3, (emphasis added). This is not what the plain words of the statute say, nor what they mean.[3]

By its plain words, application of the statute is not triggered upon a person until that "person is convicted". If the statute only required "commission" of a felony, then that ambiguity would be removed. Resolution of this ambiguity has implications for the application of the statute and does not create a distinction without a difference.

Unlike other statutes that define the term "convicted" or "conviction", § 3147 does not. The definitions of these terms utilized by Congress have been wide-ranging. Depending on the intended reach

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[3] "(C)ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253–254 (1992).

of the statutes, some have defined the term narrowly to only contemplate final judgments[4], while most have defined the term more broadly, to include the finding of guilt.[5] Accepted general definitions have also demonstrated ambiguity[6].

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[4] See 29 U.S.C. § 504 (c)(1) "A person shall be deemed to have been "convicted" and under the disability of 'conviction' from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal". The dissent in *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983) makes note of this distinction as well: "Congress used a more narrow definition in two sections of the Narcotic Addict Rehabilitation Act of 1966, providing that '[c]onviction' and 'convicted' mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory. 18 U.S.C. § 4251(e) (1976); 28 U.S.C. § 2901(f) (1976). Finally, in the Federal Youth Corrections Act, Congress has provided that the term 'conviction' means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.' 18 U.S.C. § 5006(g) (1976)." *Id*. at 123-24.

[5] See 18 U.S. Code § 3559(e)(2)(C), 8 U.S.C. 1101(a)(48)(A), 41 U.S.C. 8101(a)(3), 42 U.S.C.A. § 1320a-7(i), 18 U.S.C. § 921 (a)(20)(B), (a)(33)(B), and (a)(33)(C).

[6] See West's Encyclopedia of American Law (2d ed. 2008) (defining "conviction" as "[t]he outcome of a criminal prosecution which concludes in a judgment that the defendant is guilty of the crime charged.... The terms conviction and convicted refer to the final judgment on a verdict of guilty, a plea of guilty, or a plea of nolo contendere. *But* see: (a) conviction is "1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime." Black's Law Dictionary (11th ed. 2019).

For purposes of § 3147, if a person is deemed to "be convicted" of an offense only after sentence has been imposed, then the only possible construction that would give effect to the statute would be to treat it as a separate offense. An offense which could only be indicted after the sentencing for the underlying offense. Under this interpretation, it could not support utilization as a sentence enhancement affecting the statutory ranges of the underlying offense. Mitigating against this interpretation, however, is the titling of § 3147 being identified as "penalty" for an offense committed while on release.

On the other hand, if a person is deemed to "be convicted" of an offense after a guilty plea or a finding of guilt, then § 3147 would appear to be more in line with it being a sentencing enhancement. But if the enhancement changes the statutory ranges of the underlying offense, then it begs the question: how then could it be pled in an indictment when the element of "convicted" had not yet occurred?

This ambiguity can only be reasonably rectified by treating § 3147 as a Chapter Three guidelines base offense enhancement. Assuming "conviction" status occurs upon a finding of guilt, the violation of § 3147 becomes an aggravating factor related to the commission of the underlying crime just like any other guideline enhancement. Any constitutional issues of notice, grand jury consideration, indictment, and trial by jury are no longer implicated.

The available interpretations of the statute invite differing ways to utilize it. Two methods create unavoidable constitutional issues, while the one

advocated by the Sentencing Commission wholly avoids them. "(S)tatutes should be interpreted to avoid constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 379 (2005). "(The canon) is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious cons-titutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it." *Id*. at 381.

Furthermore, "Congress directed the Commission to develop a system of 'sentencing ranges' applicable 'for each category of offense involving each category of defendant." And, "Congress instructed the Commission that these sentencing ranges must be consistent with pertinent provisions of Title 18 of the United States Code and could not include sentences in excess of the statutory maxima." *Mistretta v. United States*, 488 U.S. 361, 374–75 (1989).

U.S.S.G. § 3C1.3 precisely accomplishes this goal by not only giving effect to § 3147, but also avoiding constitutionally questionable results. The Commentary directs "the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement." Furthermore, "to ensure the 'total punishment'… is in accord with the guideline range for the offense committed while on release, including, as in any other case in which a Chapter Three adjustment applies … the adjustment provided by the enhancement in this section. *Id.* (emphasis added).

3. After rejecting this construction of § 3147 and ultimately the Guidelines instructions, the court analyzed the *Apprendi* issue. Finding *Apprendi* had been violated, the court then determined if the error was merely harmless. The importance of this issue cannot be understated.

In their analysis, the court first relied on *Washington v. Recuenco*, 548 U.S. 212 (2006) to pull this case out of the purview of structural error, "(f)ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Id*. at 222. Then finding that the "fact at issue" (Mr. Perez's status as being on supervised release) "was uncontested" and "no reasonable jury could have rationally concluded" otherwise", the court found the error to be harmless beyond a reasonable doubt.

But the court has missed a much bigger picture. It's not just a question of whether a fact is undisputed… or even indisputable. It's a question of constitutionally required notice. The failure of the United States to meet their obligations and requirements required by the notice clause simply cannot be disregarded under these circumstances. It fully prevented Mr. Perez from lodging any kind of a defense against this allegation, because it simply didn't exist until long after the trial had concluded. It prevented Mr. Perez's trial counsel (undersigned) from accurately relaying the possible consequences of a conviction on these two counts. It invaded an otherwise sound trial strategy of minimizing objections to otherwise irrelevant facts. If counsel had known that the United States was applying § 3147,

then any stipulation to such an underlying fact at trial would have been foolish and unnecessary. Furthermore, the issue of whether Mr. Perez understood and knew that his status was one of being under "supervised release" might have become a fertile ground for factual development, a jury instruction, and argument to the jury. (see *Rehaif v. United States*, 139 S. Ct. 2191 (2019)).

A ten-year penalty under a statute which has no connection to the underlying offense, with no pretrial notice, no grand jury consideration, and no jury finding of proof beyond a reasonable doubt cannot possibly be harmless error. It is structural error, and it is functionally identical to a directed verdict of conviction. The Eleventh Circuit's opinion was wrong. The importance this constitutional issue is explored with the following question.

If § 3147 does not permit a sentencing judge to propel a sentence beyond the statutory maximum sentence, then the question is simply answered. Mr. Perez was given an illegal sentence which must be remanded back to the District Court for resentencing within statutory parameters for the underlying offense. On the other hand, if § 3147 does permit such an enhancement, then the following question is fully manifest and becomes gravely important.

II. In cases where a punishment for an offense is enhanced beyond the statutory maximum by judicial application of 18 U.S.C. § 3147, and where there was no formal pretrial notice of the intention to apply the enhancement, was not submitted to a grand jury, and was not

submitted for consideration to the jury, does such an error rise to the level of being structural, or is it subject to harmless error analysis?

If § 3147 is a sentencing enhancement statute which allows a sentence exceeding the statutory maximum, then *Apprendi* was violated. And because there was no charging instrument or pretrial notice of its application, the notice clause of the 6th Amendment, was violated to such an extent that such an error should be found to be structural and not subject to harmless error review.

The Eleventh Circuit went too far. This is not a case where a singular and rationally connected element (like drug amounts) is not specifically submitted to a jury. This is a wholly different animal. When there is not even the slightest intention to apply a *separate* punitive statute which results in an additional sentence of imprisonment, without notice, without grand jury consideration, and not submitted to a jury in clear violation of *Apprendi*, the Fifth and Sixth Amendments demand a different outcome.

This is where *Apprendi* error crosses the line into structural error.

A. The Question Presented is Critically Important

Answering the question presented is vital to protecting the Fifth Amendment rights to due process and indictment by grand jury, and the Sixth Amendment rights to notice and trial by jury. The continued unbridled expansion of the harmless error

doctrine threatens to completely undermine the holdings in *Apprendi* and its progeny. The potential effect on criminal defendants cuts to the heart of our system of justice.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, (2000). As the Eleventh Circuit held, there is no doubt *Apprendi* was violated in Mr. Perez's case, nor should there be any legitimate question concerning the preservation of that error. Pet. App. A13 The manner in which *Apprendi* errors are made, the preservation of that error, and the specific constitutional provision offended gravely effects the analysis of the reviewing court. Many of these analyses begin with the question which considers if the error is deemed to be "structural" or not.

1. "In *Chapman v. California*, 386 U.S. 18 (1967), this Court 'adopted the general rule that a constitutional error does not automatically require reversal of a conviction.'" *Arizona v. Fulminante* ,499 U.S. 279, 306 (1991) (citing *Chapman*). If the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," the Court held, then the error is deemed harmless and the defendant is not entitled to reversal. *Id.*, at 24. *See also Weaver v. Massachusetts*, 582 U.S. 286, 294 (2017).

Structural errors, on the other hand are not deemed as harmless beyond a reasonable doubt.

Chapman at 24. They are "constitutional deprivations" which affect "the framework within which the trial proceeds, rather than an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

There are three categories or "rationales" of structural error. First, if the right at issue is not designed to protect the defendant from erroneous conviction, but instead protects some other interest, second, when the effects of the error are too hard to measure, and lastly, if the error always results in fundamental unfairness. Additionally, "(t)hese categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural." See *Weaver* at 295-296.

An error which is deemed structural results in an "automatic reversal" if that error was preserved by an objection at trial and the issue is raised on direct appeal. This calculus is independent of the error's "effect on the outcome." *Neder v. United States*, 527 U.S. 1, 7 (1999).

Under circumstances where a defendant is properly indicted, but the instruction to the jury omits an element of the charge, this Court has held such an omission "does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 9 (1999), and hence, harmless error review was applicable.

And similarly, finding no distinction between "elements" and "sentencing factors", in *Washington v.*

Recuenco, 548 U.S. 212 (2006) the Court held similarly, that any error in the instruction to the jury was harmless under the circumstances. The defendant in *Recuenco* was also properly indicted for his offense of assault in second degree, he was convicted of this offense, along with a "deadly weapon" enhancement contained in the statute, but was sentenced pursuant to a firearm enhancement which was not submitted to the jury.

2. Not only is a finding of harmless error in the instant case taking things too far, but even an analysis under the harmless error standard is taking things too far. Because unlike *Neder* and *Recuenco*, this is a structural error case.

Apprendi protections implicate four separate rights under the 5th and 6th Amendments. The 6th Amendment right to notice, right to grand jury consideration, right to a trial by jury, and right to proof beyond a reasonable doubt. *Neder* and *Recuenco* clearly attach to the last two. But when all of the constitutional protections are absent, then the analysis must take on a structural error dimension.

Initially, 18 U.S.C. § 3147 has no inherent rational relationship to any of the substantive "underlying" offenses if purports to affect, unlike specifically tailored enhancements for drug amounts or firearm enhancements. As a general enhancement, § 3147 stands completely alone and apart from the statutes it might later influence.

Although it is admittedly doubtful that § 3147 was designed to create its own substantive offense, the fact remains that there is no functional difference between

"elements" and "enhancements". So, assuming, for sake of argument, that § 3147 *did create* a separate substantive offense, is there any question that imposing a sentence to an unnoticed, uncharged, and unconsidered offense would ever see the light of day at the sentencing for a completely unrelated offense?

It would be like adding a sentence to a defendant for running a red light because the "evidence at trial was overwhelming and uncontested" on the issue. And most certainly uncontested for the very reason that it appeared completely irrelevant to the defense attorney at the time it came up, and thus not worth fighting over.

So why should it be any different for a supposed violation of § 3147? It's not a mere jury instruction error for an offense which had already been indicted, or a minor omission of a single related element. The elements of § 3147 require: (1) a conviction, (2) of a federal crime, (3) committed while on supervised release, and (arguably), (4) that the defendant *knew* he was on supervised release (see *Rehaif v. United States*, 139 S. Ct. 2191 (2019)).

While it is certainly true that the fact of Mr. Perez's status on release was "uncontested" and "overwhelming" at trial, he still has long established constitutional rights to know what he's being accused of and to know what the potential consequences might be. And like the previous red-light example above, just because that fictious defendant's mother (or probation officer) warned him two years before not to run red lights does not take the place of appropriately timed notice in a constitutional sense.

In *Neder* and *Recuenco*, the government's contemplation and intention to apply either the element of materiality (*Neder*) or the enhancement of a firearm (*Recuenco*) was not in doubt. Contemplation and intention wholly absent in Mr. Perez's case.

This intention is best manifest and made clear to the world in an indictment, or some form of pretrial notice. Similarly, acquiescence and acknowledgement of the prosecution's intent by the defense at trial would certainly support the actual awareness of the potential consequences for that trial.

Is it not, at the very least, this contemplation or intention of the government to inflict a punishment that triggers the first and foremost of these constitutional safeguards, notice? Would anyone doubt the constitutional illegitimacy of sentencing a defendant for a crime that was not even considered until after the trial of some different case?

But that is exactly what happened here, and it represents the risk unmitigated expansion of harmless error poses.

> "Harmless-error review looks, we have said, to the basis on which 'the jury *actually rested* its verdict.' *Yates v. Evatt*, 500 U.S. 391, 404 (1991) (*emphasis added*). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter

> how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee."
>
> *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

The government exhibited no intention whatsoever to prosecute Mr. Perez under § 3147. Why then should their lack of precognition be imputed to Mr. Perez after the fact? "(T)he defendant should not-at the moment the State is put to proof of those circumstances-be deprived of protections that have, until that point, unquestionably attached." *Apprendi* at 484. The government had plenty of time and opportunity to give constitutionally valid notice of their intention to invoke the application and penalty under § 3147 but neglected (or chose) not to do so. Notice is their responsibility, certainly not Mr. Perez's. And it is not a difficult feat to accomplish.

First, they could have included it in the indictment under the substantive count(s) to which it would attach. This is not an uncommon practice when an aggravating factor might apply. Alternatively, they could have filed a pretrial information likewise informing the court and the defendant of their intent to apply the enhancement. Doing this would still give the defendant an opportunity to synthesize this important variable (possibly ten more years) into whatever risk assessment calculus they might uniquely employ. "Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict

the legally applicable penalty from the face of the indictment." *Alleyne v. United States*, 570 U.S. 99, 113–14 (2013). And, more importantly, the defense attorney would be able to adjust his strategies and potential defenses to the degree necessary, as all defense attorneys should do. "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence." *United States v. Cruikshank*, 92 U.S. 542, 557–58, (1875).

At worst, the government could request a jury instruction for a finding concerning the proposed enhancement prior to deliberations. The defendant would at least have the opportunity to agree with the proposal, stipulate to the fact, ask for a recess, seek permission to reopen their case, request appropriate jury instructions on the matter, or lodge a very legitimate objection in the strongest of terms.

But once the jury has reached a verdict it is simply too late. Every lawyer alive who has ever tried a case to a jury wishes they had done something different after receiving a negative result. And it is not unreasonable to speculate that the thought of § 3147's possible application didn't occur to the government until after they lost the two most severe counts of Mr. Perez's indictment which would have almost certainly earned him a life sentence (without any help from § 3147).

It is simply not enough that Mr. Perez was instructed approximately two years previous to the indictment on the conditions of pretrial release and the possible application of § 3147. That is not notice.

Constitutional notice of the intention to prosecute a criminal act can come only after the crime is committed. Even more basic and understandable, everyone knows it is illegal to steal. Indeed, some crimes are so universally understood that they are "written on the tablet of everyone's heart". But it does not follow that such universal knowledge mitigates in any manner the necessity of the government proffering a formal charging instrument if they are seeking prosecution of such a universally condemned act such as theft.

Here, all four of the separate constitutional safeguards were disregarded. The objection to the *Apprendi* infirmities was also clearly and timely stated and overruled. Notice, grand jury consideration, the right to jury trial, and proof beyond a reasonable doubt were all omitted for an enhancement which required proof of at least three additional elements.

This was nothing more than the complete erosion of the right to a trial by jury and a directed verdict of guilty.

> "Similarly, harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict ... regardless of how overwhelmingly the evidence may point in that direction."

> *Rose v. Clark*, 478 U.S. 570, 578 (1986) (citations omitted).

And as Justice Gorsuch shared in *United States v. Haymond*, 139 S. Ct. 2369 (2019):

> Yet like much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty. In what now seems a prescient passage, Blackstone warned that the true threat to trial by jury would come less from "open attacks," which "none will be so hardy as to make," as from subtle "machinations, which may sap and undermine i[t] by introducing new and arbitrary methods." This Court has repeatedly sought to guard the historic role of the jury against such incursions. For "however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters."
>
> *Haymond* at 2384 (2019) (citations omitted).

B. This Case is an Ideal Vehicle for Addressing the Questions Presented

1. Unlike many defendants who have not preserved *Apprendi* objections, the preservation of this error was manifold. And the lower court found there can be no arguable question that *Apprendi* was violated in this case.

Likewise, there can be no question that the effects of the *Apprendi* error were as severe as possible. Mr. Perez was given two consecutive sentences for separate violations involving the same firearm, which resulted in a total term of fifteen years. With the additional enhancement of § 3147, the sentence became twenty-five years. While the underlying facts of the case certainly do not invite favorable optics for Mr. Perez, they are nonetheless uncomplicated.

The complete failure to provide constitutionally required notice, a grand jury indictment, submission to a jury, and proof beyond a reasonable doubt, pushes this case to the outer limits of any harmless error analysis and places it squarely in the realm of structural error.

2. The issues invited by both questions are in dire need of resolution for all the circuit and district courts. The statutory construction of § 3147 has not only resulted in a deep split amongst the circuits, but also resulted in inconsistent application at the district court level. Resolution of either of these questions in favor of Mr. Perez will be outcome determinative, but not result in a retrial. Mr. Perez's remedy will simply be a resentencing where he would presumably be sentenced to a total term of fifteen years for the offenses in which he was convicted.

3. The time is right, and the issues are ripe for resolution. No further percolation in the circuit courts or district courts will improve the prospects of the need for consistent resolution of these important issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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