No. 21-_____

In The

Supreme Court of the United States

TARRESSE LEONARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL HURSEY
MICHAEL HURSEY, P.A.
Attorney for Petitioner
5220 S. University Dr.
Ft. Lauderdale, FL 33328
(954) 252-7458
MHPALaw@bellsouth.net

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the erroneous denial of a timely raised motion to dismiss an indictment omitting an essential element is structural error requiring dismissal or is instead subject to harmless-error review.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption.

RELATED PROCEEDINGS

United States v. Leonard, No. 1:18-cr-20743-RAR (S.D. Fla.)

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PETITION FOR A WRIT OF CERTIORARI

Tarresse Leonard respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. Tarresse Leonard*, 4 F. 4th 1134 (11th Cir. 2021) on July 8, 2021.

OPINIONS BELOW

The opinion of the Eleventh U.S. Circuit Court of Appeals is published at 4 F.4th 1134. A copy of the decision is contained in the Appendix (A-1).

JURISDICTION

The decision of the Eleventh U.S. Circuit Court of Appeals was entered on July 8, 2021. The Eleventh Circuit denied a petition for panel rehearing on November 3, 2021, and the mandate issued on November 15, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides: "No person shall be . . . subject for the same offence 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."

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT

In May of 2019, a federal grand jury returned a six-count superseding indictment against several defendants. The indictment charged Mr. Leonard with possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1); possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D) (Count 5); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count 6). (DE 70).

Count 4 alleged that Mr. Leonard "possessed a firearm and ammunition in and affecting interstate and foreign commerce, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, and did so knowingly, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1)."

Two months after the superseding indictment was returned, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), on June 21, 2019. Mr. Leonard's jury trial opened on June 24, 2019 (DE 120), and ahead of trial, he adopted his co-defendant's motion to dismiss Count 4 of the superseding indictment based on the just-published *Rehaif* decision. (DE 112). The trial court denied the motion to dismiss. When the three-day trial ended, the jury found Mr. Leonard guilty as to Count 4 and not guilty on Counts 5 and 6. App. 26. Ahead of sentencing, Mr. Leonard filed a renewed motion to dismiss, citing the placement of the word "knowingly" at the end of the charge—modifying only his possession of a firearm and not his felon status, and therefore omitting a required *mens rea* requirement. He also pointed out that, contrary to this Court's own precedents, the indictment contained no reference to 18 U.S.C. § 924(a) and accordingly did not incorporate the statutory *mens rea* requirement, making it insufficient under *Rehaif*. (DE 177).

The district court denied the renewed motion to dismiss. App. 34. On October 10, 2019, it sentenced Mr. Leonard to 240 months' imprisonment followed by five years of supervised release on Count 4. App. 26. Mr. Leonard appealed.

Reviewing for harmless error, the Eleventh Circuit affirmed. App. 1. The panel acknowledged that Mr. Leonard's indictment did not "clearly set out" the knowledge-of-status element as *Rehaif* now requires. App. 1. But it reasoned that the record showed that Mr. Leonard was a felon. App. 11. Reviewing for harmless

error, the panel therefore found that Mr. Leonard could not meet his burden of proving reversal was required. App. 14-15.

The panel reviewed for harmless error based on the Eleventh Circuit's earlier decision in *United States v. Sanchez*, 269 F.3d at 1250, 1273 (11th Cir. 2001)—a case that involved an omission of an *Apprendi* element, not an omission of an essential element of the offense. The panel decision contained no mention of the Eleventh Circuit's more recent and more on-point decision in *United States v. Martinez*, 800 F.3d 1293, 1294-1295 (11th Cir. 2015), where the court had applied *de novo* review and dismissed an indictment that omitted an essential offense element.

The Eleventh Circuit denied Mr. Leonard's petition for panel rehearing, Mr. Leonard filed a timely notice of appeal to this Court. App. 37.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari. There is an entrenched Circuit split regarding the appropriate standard of review to apply to an elementally defective indictment where the challenge is timely raised. There has been a split on this question for over a decade. The question presented arises frequently and is likely to continue arising frequently, and this case is a good vehicle for this Court to answer this question.

I. The decision below contributes to a long-standing Circuit split.

The federal courts of appeals have long disagreed about the appropriate standard of review to apply to an elementally defective indictment when the challenge is timely raised. This Court previously granted certiorari to resolve this split, but then decided the case on other grounds. *See United States v. Resendiz-Ponce*, 127 S. Ct. 782 (2007). In *Resendiz-Ponce*, Justice Scalia, the lone dissenter, was the only Justice who needed reach the question that had divided the Circuits—and he clarified that he would find an elementally defective indictment to be structural error. *See id*. at 117 ("I would find the error to be structural.") (Scalia, J., dissenting). This Court should grant certiorari to finally answer the question it kicked down the road in *Resendiz-Ponce*. *See* Wayne LaFave, Jerold Israel, Nancy King, and Orin Kerr, 5 Crim Procedure, § 19.3(b) (4th ed. 2021) ("the conflict among the circuits remains").

On one side of the split are the D.C. Circuit and the Ninth Circuit, which both dismiss indictments that omit essential elements of the offense, provided the issue is timely raised. *See United States v. Du Bo*, 186 F.3d 1177, 1179-1181 (9th Cir. 1999) (en banc); *United States v. Verrusio*, 762 F.3d 1, 11 (D.C. Cir. 2014).

In *Du Bo*, the Ninth Circuit held that "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to

harmless error analysis, but a fatal flaw requiring dismissal of the indictment." 186 F.3d at 1179. The court in *Du Bo* reasoned that "applying harmless error to a timely challenge would make a pretrial motion charging the insufficiency of the indictment self-defeating," *id*. at 1180 n.3 (cleaned up), and also that imposing a harmless-error standard "would allow a court to guess as to what was in the minds of the grand jury at the time they returned the indictment." *Id*. at 1179.

In *Verrusio*, the D.C. Circuit applied *de novo* review to an indictment that allegedly omitted an essential offense element, but ultimately concluded that the indictment there was not defective. *See* 762 F.3d at 13.

On the other side of the split are the Third, Fifth, and Sixth Circuits, which have held that indictments missing an essential element of the offense should be reviewed for harmless error, even when the objection is timely raised. *See United States v. Stevenson*, 832 F.3d 412, 427 (3d Cir. 2016); *United States v. Dentler*, 492 F.3d 306 (5th Cir. 2007); *United States v. Rankin*, 929 F.3d 399, 404 (6th Cir. 2019). The decision below tentatively adds the Eleventh Circuit to this category—but also creates an intra-Circuit split given the court's earlier decision in *Martinez*. *See* Part III, *infra*. *See also Martinez*, 800 F.3d at 1294-1295 (dismissing elementally defective indictment without conducting harmless-error analysis).

A third category of courts reviews elementally defective indictments for harmless error or plain error when the issue is raised for the first time on appeal.

These courts have not spoken on the appropriate standard when an issue is raised pretrial. The First and Tenth Circuits are in this category. *See United States v. Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001) (reviewing for harmless error where omission of essential element raised on appeal, after guilty plea); *United States v. Sinks*, 473 F.3d 1315, 1321 (10th Cir. 2007) (reviewing forfeited claim for plain error). And if they spoke on that question, the result might be different—the D.C. Circuit also applies a harmless-error standard when the omission is first raised on appeal, *see United States v. Jabr*, 4 F.4th 97, 103 (D.C. Cir. 2021), and the Ninth Circuit has said that "untimely challenges of an indictment are reviewed under a more liberal standard." *Du Bo*, 186 F.3d at 1180 n.3.

This Court should grant certiorari on the question that has split the D.C. and Ninth Circuits from the Third, Fifth, Sixth, and now Eleventh Circuits: the appropriate standard of review for elementally defective indictments when the objection is timely raised.

A. The decision below also creates a Circuit split regarding whether *Rehaif*-defective indictments should be subject to the same standard of review as *Apprendi*-defective indictments.

The decision below creates another split on whether *Rehaif*-defective indictments have the same standard of review as *Apprendi*-defective indictments.

Until the decision below, the Ninth Circuit was the only federal circuit to address a *Rehaif* error raised before trial, and it found that such errors are structural. The Ninth Circuit so held, even while recognizing that *Du Bo*—its en banc decision that first established the automatic dismissal rule—may not sweep as broadly as it once did.

In *United States v. Qazi*, 975 F.3d 989 (9th Cir. 2020), the Ninth Circuit found that a *Rehaif* error in an indictment triggered *Du Bo*'s automatic-dismissal rule. This is significant because the Ninth Circuit had previously limited *Du Bo*'s reach by reviewing for harmless error an indictment that omitted an *Apprendi*[1] element, reasoning that *Du Bo*'s logical underpinnings did not carry over to the sentencing context. *See United States v. Salazar-Lopez*, 506 F.3d 748 (9th Cir. 2007) (also declining to apply *Du Bo*'s automatic dismissal rule because *Apprendi* claim was raised post-trial rather than pre-trial and defendant was only seeking sentencing relief).

The Ninth Circuit is not the only Circuit to hold that a different standard applies when an indictment is defective under *Apprendi*. The D.C. Circuit has also stated an affirmative view that an indictment that omits an essential offense element need not be subject to the same standard of review as an indictment that omits a sentencing factor under this Court's decision

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[1] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (any fact that increases the maximum penalty must be charged in an indictment).

in *Apprendi*. *See United States v. Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004).

To this effect, five Circuits have reviewed *Apprendi*-defective indictments for harmless error without considering whether the same standard would apply to an indictment that omits an essential element of the crime. *See United States v. Higgs*, 353 F.3d 281, 304-307 (4th Cir. 2003); *United States v. Allen*, 406 F.3d 940, 943-945 (8th Cir. 2005); *United States v. Robinson*, 367 F.3d 278, 285-286 (5th Cir. 2004); *United States v. Trennell*, 290 F.3d 881, 889-890 (7th Cir. 2002); *United States v. Lee*, 833 F.3d 56, 70 (2nd Cir. 2016). And some judges have lumped these cases into the same category as those dealing with indictments that omit essential elements, without ever considering there could be a difference. *See, e.g.*, *United States v. Omer*, 429 F.3d 835, 841-842 (9th Cir. 2005) (Graber, J., dissenting from denial of en banc). Until the decision below, the Eleventh Circuit was in this category. *See United States v. Sanchez*, 269 F.3d at 1250, 1273 (11th Cir. 2001). This confusion among the Circuits further illustrates the need for this Court to grant certiorari.

The decision below contained no discussion of the difference between "indictments defective for the omission of *Apprendi* factors" and those defective for the omission "of essential elements." *Pickett*, 353 F.3d at 68. It contained no analysis regarding the difference between *Rehaif* errors raised pre-trial and those raised post-trial, and no analysis regarding the difference between the sentencing context and the indictment context.

II. The decision below is wrong.

This Court should grant certiorari because the Eleventh Circuit's decision is wrong. The Grand Jury Clause of the Fifth Amendment mandates that every offense element be charged in a federal indictment. *Hamling v. United States*, 418 U.S. 87, 117 (1974). The Eleventh Circuit's opinion acknowledged that Mr. Leonard's indictment did "not clearly set out" a required element. App. 1. The decision below erred, however, by applying a harmless-error standard instead of treating the indictment's omission of an essential element as structural error. This case presents a good vehicle for the Court to establish that an indictment's omission of an essential offense element is structural error.

In this Court, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). And that is eminently the case here: "[T]he question of whether a grand jury might have indicted on an additional element [is] not amenable to harmless error review." *Salazar-Lopez*, 506 F.3d at 753. Applying harmless-error review in these circumstances "would allow a court to 'guess as to what was in the minds of the grand jury at the time they returned the indictment.'" *Du Bo*, 186 F.3d at 1179 (citing *Russell v. United States*, 369 U.S. 749, 770 (1962)).

This guessing would "deprive the defendant of a basic protection that the grand jury was designed to secure," *Russell*, 369 U.S. at 770, resulting in "fundamental unfairness"—another indication of structural

error. *See Weaver v. Massachusetts*, 137 S. Ct. at 1908 (errors are structural if they result in fundamental unfairness, but "can count as structural even if the error does not lead to fundamental unfairness in every case").

In determining whether an error is structural, this Court has "divided constitutional errors into two classes." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). The first is "trial error, because the *errors occurred during presentation of the case to the jury* and their effect may be qualitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id*. (emphasis added) (internal quotation marks and citation omitted). And then there are "structural defects," which "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds." *Id*. (internal quotation marks and citation omitted).

Unlike errors deemed subject to harmless-error review, an elementally defective indictment does not concern an error that occurred "during the presentation of the case to the jury," and could therefore be subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991). *Cf. Neder v. United States*, 527 U.S. 1 (1999) (jury instructions); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (sentencing stage of capital case); *Satterwhite v. Texas*, 486 U.S. 259 (1988) (sentencing stage of capital case); *Carella v. California*, 491 U.S. 263 (1989) (jury instruction); *Pope v. Illinois*, 481 U.S. 497 (1987) (jury instruction); *Crane v. Kentucky*,

476 U.S. 683 (1986) (erroneous exclusion of defendant's testimony); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (restriction on defendant's right to cross-examine witness); *United States v. Hasting*, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial); *Rushen v. Spain*, 464 U.S. 114 (1983) (defendant's right to be present at trial); *Moore v. Illinois*, 434 U.S. 220 (1977) (admission of evidence); *Brown v. United States*, 411 U.S. 223 (1973) (admission of out-of-court statement); *United States v. Davila*, 569 U.S. 597 (2013) (plea discussions).

Given this line of cases, not surprisingly this Court found in *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) that *Rehaif* errors that occur in jury instructions or at plea colloquies are not structural error. To rule otherwise would have contravened its decision in *Neder*, 527 U.S. at 710 (concerning failure to submit an element to the jury). But that case presented a materially different question than the one presented here, given the line this Court has drawn between "trial errors" and "structural defects." *See Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

The Eleventh Circuit therefore erred in assuming that the Court's decision last year in *Greer* answers the question presented by this case. The decision below reasoned that "The Supreme Court has made clear that a *Rehaif* omission . . . need not be structural." App. 13. Yet all this Court clarified in *Greer* was that a *Rehaif* error that occurs *during the trial or plea process* is not structural. That holding followed this Court's structural-error precedents. But holding that *Rehaif*

error in an indictment is not structural error contradicts the same precedents.

This error is apparent by the fact that the test stated by the Court in *Greer* is impossible to apply at the indictment stage. The Court in *Greer* held: "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." *Id*. Presumably the same or a similar standard applies to non-forfeited claims. But such a standard would be impossible to apply at the indictment stage. Imposing that test if the *Rehaif* error occurs in the indictment, rather than in jury instructions or at plea colloquies, makes no sense.

Worse yet, imposing such a standard will discourage timely objections. In these scenarios, "subjecting timely objections to harmless error analysis would destroy any incentive on the part of a defendant to object, since objecting would indicate an awareness of the missing element and hence the harmlessness of the omission." *Salazar-Lopez*, 506 F.3d at 753-754.

This Court should grant certiorari to correct these errors and to establish a clear rule. Because it is impossible to discern what a grand jury would have done had an indictment been elementally sufficient, an elementally deficient indictment has "consequences that are necessarily unquantifiable and indeterminate," and thus "unquestionably qualifies as structural error." *Gonzalez-Lopez*, 548 U.S. at 149. A grand jury

decision to indict based on a defective indictment does not "concern the conduct of the trial at all." *Id*. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Id*.

The question presented by this case is also one left unanswered by this Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that forfeited *Apprendi* claims are to be reviewed for plain error, but "did not address the standard of review applicable when a challenge to the pleading had been timely presented in the trial court." Wayne LaFave, Jerold Israel, Nancy King, and Orin Kerr, 5 Crim Procedure, § 19.3(b) (4th ed. 2021). As commentators have observed, "[t]he application of the plain error standard to an essential-elements defect not properly raised below does not invariably require that a harmless error standard, rather than an automatic reversal standard, be applied to an essential-elements defect that was properly raised and preserved for appellate review." *Id*. And, as discussed above, "the Supreme Court in *Cotton* was dealing with an indictment defective for the omission of a sentencing factor under *Apprendi* [], not the omission of an element as in the present case." *Pickett*, 353 F.3d at 68. *See* Part I.A, *supra*.

The decision below was also at odds with the Eleventh Circuit's own decision in *United States v. Martinez*, 800 F.3d at 1294-1295, where the court, on remand from this Court, applied de novo review to an elementally defective indictment. This further highlights the need for this Court to provide clarity.

Finally, if the decision below expressed doubt as to whether the indictment was defective, that doubt was misplaced. Mr. Leonard's indictment did not list all the elements of the offense. The indictment only alleged that Mr. Leonard "possessed a firearm, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, and did so knowingly." By its plain language, the indictment did not sufficiently allege knowledge of felon status. The phrase "did so knowingly" modifies possession; it cannot be construed as also referring to knowledge of status. *See United States v. Maez*, 960 F.3d 949, 965-966 (7th Cir. 2020) (finding plain error where "knowingly" came after the fact of the prior felony conviction and a typical reader would not apply it to the earlier clause set off by commas).

Moreover, the indictment failed to cite § 924(a)(2), making it defective under *Rehaif*, 139 S. Ct. 2191. It is clear from *Rehaif* that § 924(a)(2) and § 922(g) must be read in tandem. The government's failure to reference § 924(a)(2) in Mr. Leonard's indictment indicates that the grand jury did not consider the statutory *mens rea* requirement. It also violated Mr. Leonard's Sixth Amendment right to notice, because the maximum penalty and the acts that constitute the crime are unclear. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). This is because § 922(g) is insufficient as a stand-alone charge: it has no penalty or listing of the elements to convict. *See United States v. Games-Perez*, 667 F.3d 1135, 1142-1146 (10th Cir. 2012) (Gorsuch, J., concurring) (section 922(g) doesn't send anyone to

prison for violating its terms; that job is left to § 924(a)(2)).

This Court should grant certiorari to correct these errors.

III. The Question Presented arises frequently and will continue to arise.

The time is ripe for this Court to weigh in on this question, which has divided the Circuits for over a decade. Letting this question percolate longer will not help, as everything that can be said on the matter has been said. The case law contains many blurred distinctions—between *Apprendi* errors and essential-element (*Rehaif* and related) errors; and between the difference between errors timely raised ahead of trial and those raised later in proceedings. The time for clarity is now. This question arises frequently and is likely to continue arising frequently in the wake of this Court's decisions in *Rehaif*, 139 S. Ct. 2191, and *Greer*, 141 S. Ct. at 2100.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL HURSEY
MICHAEL HURSEY, P.A.
Attorney for Petitioner
5220 S. University Dr.
Ft. Lauderdale, FL 33328
(954) 252-7458
MHPALaw@bellsouth.net