COMMENT

PROBLEMATIC PRESUMPTIONS:
WHY THE CURRENT STATE OF FELON-IN-POSSESSION LAW RISKS PUNISHING THE INNOCENT

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Over ten percent of all federal criminal charges involve possession of a firearm by a prohibited individual, with the vast majority of these charges involving convicted felons. In 2019, the Supreme Court in Rehaif v. United States fundamentally altered the legal landscape by imposing a new mens rea requirement onto the statute requiring knowledge of status. Given the significant use of this statute in federal prosecutions, Rehaif called into question numerous convictions, leading to a wave of appeals and habeas petitions. The question of how to consider an element far from the mind of judges, prosecutors, and even defense counsel in pre-Rehaif prosecutions vexed district and circuit courts alike, leading to widely uneven results.

In an attempt to clarify and simplify the application of its Rehaif ruling in felon-in-possession cases, the Supreme Court in United States v. Greer proclaimed that none of these appeals should be overly difficult to rule on, because “[c]onvicted felons typically know they’re convicted felons.”

In this Comment, I argue that it is not so simple. Greer undermines the promise of Rehaif—that a defendant should have to possess the requisite guilty mind before being convicted of a crime—by issuing a presumption that all felons know they’re felons. This assumption is misguided, evidenced by the numerous situations in which it does not hold true. Accordingly, this Comment proposes a standardized set of factors

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that provide a framework for analyzing a defendant’s mens rea and adequately account for the wide divergence in felony dispositions in the United States. Without this fact-based inquiry, courts deny defendants an honest examination of whether an element of the crime exists, thus risking punishing the innocent.

INTRODUCTION

Not all felons know they’re felons. To the average person—and to seven members of the Supreme Court—that may seem counterintuitive. Yet, the stories of real convicted felons show why it’s not. Just ask Miguel Games-Perez, who in the summer of 2009 stood before a Colorado state court judge in a Denver courtroom ready to plead guilty to a felony charge of attempted robbery.¹ The judge praised the plea agreement: she called it “such a really good offer” and said that it would result in Games-Perez not becoming a

¹ Opening Brief for the Appellant at 4, United States v. Games-Perez, 667 F.3d 1136 (10th Cir. 2012) (No. 11-1011) [hereinafter Opening Brief for Appellant in Games-Perez].
convicted felon unless he breached its terms. Indeed, the judge repeated that Games-Perez’s plea would not result in a felony conviction five times. Despite her assurances, she was wrong—when she accepted his guilty plea, Games-Perez instantly became a convicted felon. Less than one year later, when Games-Perez was arrested with a gun in his possession, he was charged with and convicted of being a felon-in-possession. At the time of his conviction, the felon-in-possession statute did not require the government to prove knowledge of status, so Games-Perez’s argument that his plea colloquy with the state court judge led him to reasonably believe he was not a convicted felon was fruitless.

Games-Perez’s experience is not the only one of its kind. On any given day, if you walk into one of the hundreds of federal district courthouses around the United States, there is a good chance that you can stumble upon a proceeding—be it an indictment, plea hearing, trial, or sentencing—relating to a violation of 18 U.S.C. § 922(g). The statute prohibits the possession of firearms by people falling into one or more of nine statutory categories, ranging from convicted felons to those in the United States unlawfully. It is known as a “workhorse” for federal prosecutors, allowing them to “use the provision to seek stiff penalties against dangerous offenders, often where state laws [regulating firearm possession] are relatively lax.” The stakes are high for defendants: a conviction under § 922(g), even standing alone, subjects the offender to up to ten years in prison. When combined with the characteristic

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2 Games-Perez, 667 F.3d at 1138.
3 Opening Brief for Appellant in Games-Perez, supra note 1, at 4-5.
4 Games-Perez, 667 F.3d at 1139-40.
5 Id.
6 See 18 U.S.C. § 922(g)(1)-(9). The full list of categories is as follows:
   (1) convicted felons;
   (2) fugitives;
   (3) users of illegalized controlled substances;
   (4) mentally ill individuals;
   (5) non-citizen individuals in the United States illegally or those in the country on nonimmigrant visas;
   (6) individuals dishonorably discharged from the U.S. Armed Forces;
   (7) previous United States citizens who have renounced their citizenship;
   (8) individuals under court-imposed, domestic violence-related restrictions; and
   (9) individuals convicted of domestic violence misdemeanor offenses.

The Supreme Court’s decision in New York State Rifle & Pistol Ass’n. v. Bruen has spurred a fresh wave of attacks on § 922(g)’s constitutionality under the Second Amendment. 142 S. Ct. 2111 (2022); see, e.g., Range v. Att’y Gen., 53 F.4th 262, 266 (3d Cir. 2022) (presenting a constitutional challenge to § 922(g) based on the “text and history of the Second Amendment”), vacated & reh’g en banc granted, 56 F.4th 992 (3d Cir. 2023); id. at 268 n.6 (collecting eighteen district court cases addressing similar challenges post-Bruen). Discussion of such challenges is beyond the scope of this Comment.

that made the defendant’s gun possession criminal, a conviction could mean weighy career offender enhancements9 or automatic deportation.10

The charge is ubiquitous. According to data compiled by the federal judiciary, of the 67,686 defendants charged with federal offenses in 2021, 6,987—nearly 11%—involved violations of § 922(g).11 The charge also disproportionately affects Black individuals: 56% of the § 922(g) charges in 2020 were levied against Black offenders,12 compared with the 38% of the overall federal prison population,13 and the 12.4% of the overall national population, that is Black.14

Given its sheer prevalence, one might have expected the analysis and application of the statute to be well settled. But in 2019, the statute underwent a major overhaul at the hands of the Supreme Court in Rehaif v. United States, a case that reinterpreted the mens rea required to prove a violation.15 Prior to Rehaif, and since the modern-day statute’s passage in 1961,16 courts nearly uniformly concluded that the government had to prove only that individuals knowingly possessed a firearm, not that they had knowledge of the other two elements of the offense: the prohibited status and that the weapon traveled in interstate commerce.17 The Rehaif decision extended the knowledge

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9 See Armed Career Criminal Act, 18 U.S.C. § 924(e)(2) (providing for enhanced sentences for defendants who violate § 922(g) after having been convicted of three or more violent felony or serious drug offenses).


15 139 S. Ct. 2191 (2019) (“We hold that the word ‘knowingly’ applies both to the defendant’s conduct and to the defendant’s status.”).


17 See United States v. Rehaif, 888 F.3d 1138, 1142, 1147 (11th Cir. 2018) (describing the government’s argument that § 922(g) “only requires that the defendant knowingly possessed a
requirement to status, thus making an individual’s knowing possession of a firearm illegal only if the government could prove beyond a reasonable doubt that the defendant knew he belonged to one of the nine enumerated categories at the time of the possession.\textsuperscript{18}

As I discuss in this Comment, such a change fit into the steady shift away from not always requiring proof of mens rea, or a blameworthy mind, for serious crimes, and towards an approach that infers such a requirement even absent clear direction from the statutory text. However, less than two years later, just as quickly as the Court made that meaningful change to the judiciary’s interpretation of § 922(g), it effectively wiped out its own alteration. While \textit{Rehaif} sought to zero in on individuals actually guilty of the crime, \textit{Greer} re-expanded the scope of individuals who could be found guilty of being felons-in-possession by suggesting—extraordinarily—that a judge or jury could bypass a finding of a guilty mind and instead simply use a defendant’s past conviction to presume he had knowledge of his status.\textsuperscript{19} This presumption is far too broad and does not account for real, previously demonstrated difficulties defendants might face in understanding their felon status, ultimately risking punishing defendants for a crime of which they may actually be innocent. Instead of jumping to such a brash conclusion, courts should look to the uniform set of factors I put forth in this Comment to accurately assess whether a defendant knew of his felon status at the time of possession.

This Comment proceeds in four parts. Part I introduces the statute and provides a brief introduction to mens rea and strict liability, including the trend towards courts reading mens rea requirements into otherwise ambiguous statutes, especially those with stiff penalties. Part I also discusses how defendants may seek to negate mens rea on the basis of mistaken interpretations of the facts and law relating to their crimes.

Part II proceeds by discussing the landmark \textit{Rehaif} decision, what it has meant for § 922(g) charges and the analysis of mistakes of fact and law that bear on criminal culpability, as well as the crucial questions the decision left open. Then, turning specifically to § 922(g)(1) (felon-in-possession) contexts, I survey the schisms those open questions created among lower courts.

Part III explores the crucial \textit{Greer} decision, its attempted solutions to post-\textit{Rehaif} problems, and how lower courts are using its holding to adjudicate
Rehaif-based appeals. I argue that Greer failed to fully recognize the potential nuances of § 922(g)(1)-based mens rea analyses and lacks sufficient direction for lower courts to adjudicate challenges to § 922(g) convictions. I also contend that its assertion that convicted felons know they’re felons foists upon judges and juries an impermissible presumption of knowledge of felon status.

Finally, in Part IV, considering the ubiquity and importance of the felon-in-possession charge, I argue for a clear, uniform set of factors that courts can employ to assess knowledge of felon status in the context of § 922(g)(1) charges.

I. STATUTORY INTERPRETATION AND MENS REA ON THE ROAD TO REHAIF

The doctrinal questions that led to and dominated Rehaif occupy salient roles in criminal law: statutory interpretation and mens rea. In this Part, I examine the intersection of those two features of criminal law, while also providing important background on the characteristics of the § 922(g) statute itself and situating the statute within prevailing trends relating to mens rea and strict liability. I also lay out the building blocks to my argument as to why a presumption regarding knowledge of felon status is so concerning; namely, I assert that the confusing nature of the statute itself, combined with the severe punishment that a conviction under it carries, results in a dangerous trap for defendants who may truly not be guilty of the crime as it exists today.

A. The Statute

The law responsible for such a vast number of criminal prosecutions lies deep within two subsections of a long and complex statutory scheme that houses a large proportion of the federal firearms laws.\footnote{20 See Rehaif, 139 S. Ct. at 2203 (Alito, J., dissenting) (describing §§ 922(g)’s and 924(a)(2)’s integration as a “garbled conglomeration”). For further discussion of Justice Alito’s dissent, see infra Section II.B.} The conduct it regulates runs the gamut from firearms and ammunition manufacturing, importation, and dealing,\footnote{21 18 U.S.C. § 922(a)–(c), (l).} to transportation of firearms and ammunition on common carriers,\footnote{22 18 U.S.C. § 922(e)–(f).} to gun possession in school zones,\footnote{23 18 U.S.C. § 922(q). This section, also known as the Gun Free School Zones Act of 1990, was the basis for the landmark case that held that the ban on possession of guns in school zones fell outside Congress’s power to regulate interstate commerce. See United States v. Lopez, 514 U.S. 549, 551 (1995).} to background check requirements,\footnote{24 18 U.S.C. § 922(s).} and finally to prohibiting possession based on status.\footnote{25 18 U.S.C. § 922(g).}
Section 922(g) itself, however, has no mens rea term. Rather, another statute, 18 U.S.C. § 924(a)(2), criminalizes the conduct set forth in § 922(g), provides for a possible fifteen-year prison sentence, and, critical here, supplies the knowledge requirement that *Rehaif* extended to status.\(^{26}\) So in order to read in any specific mens rea term for § 922(g), one needs to look past the section itself, jump two sections forward in Title 18 of the United States Code, and import the knowledge term from § 924(a)(2). The ambiguity causing so many issue lies in the elements to which that knowledge term does and does not apply. That issue teed up *Rehaif* and led to the surprising overhaul of the statute’s long-solidified interpretation.

Turning to the substance of § 922(g), the text describing the nine prohibited classes is written in what could charitably be described as “legalese.”\(^{27}\) So, reading the statute does little to help the majority of individuals trying to ascertain whether or not it would be legal for them to possess a firearm. For example, § 922(g)(1), the felon-in-possession subsection, makes no mention of “felons” at all. Instead, it bans possession by a person “who has been convicted in any court of[...a] crime punishable by imprisonment for a term exceeding one year.”\(^{28}\) To discover that such a classification is interchangeable with being “a felon,” a person would need to turn to an entirely different statute that says that “the term ‘felony’ means an offense punishable by a maximum term of imprisonment of more than one year.”\(^{29}\) And that is only the federal definition of felony. If an individual was convicted in state court of a crime punishable by more than two years\(^{30}\) in prison (a slight difference codified in yet another statute), it doesn’t matter whether the state classifies such an offense as a felony or misdemeanor; if that person possessed a gun while knowing his status, he would be guilty of

\(^{26}\) See 18 U.S.C. § 924(a)(2). In June 2022, § 924(a) was amended such that previous portions of § 924(a)(2) are now contained in § 924(a)(8). Congress also increased the maximum prison sentence for a conviction of § 922(g) from ten to fifteen years. Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1329 (2022). For clarity—and since the relevant cases refer to the statutory scheme by its prior construction—this Comment will use § 924(a)(2) to refer to the statute in which the mens rea term and penalty for § 922(g) are set forth.

\(^{27}\) *Legalese*, BLACK’S LAW DICTIONARY (11th ed. 2019) ("The peculiar language of lawyers; [especially] the speech and writing of lawyers at their communicative worst, characterized by antique jargon, pomposity, affected displays of precision, ponderous abstractions, and hocus-pocus incantations.").

\(^{28}\) 18 U.S.C. § 922(g)(1).

\(^{29}\) 18 U.S.C. § 3156(a)(3).

\(^{30}\) Recognizing that many state misdemeanors are punishable by more than one year in prison, Congress created a carveout for these offenses: it excluded those individuals convicted of offenses "classified by the laws of a State as a misdemeanor and punishable by a term of imprisonment of two years or less" from § 922(g)’s grasp. See Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1216 (codified as amended at 18 U.S.C. § 921(a)(20)(B)).
§ 922(g)(1) all the same. Given the well-documented confusion many defendants profess after going through criminal proceedings, it is no wonder that some defendants may have trouble understanding whether they fall into a class prohibited from possessing guns. Such confusion amply demonstrates the paramount role mens rea plays in our criminal justice system generally, and post-Rehaif, in § 922(g) prosecutions specifically.

B. Mens Rea and Strict Liability

The centering of mens rea in our criminal system is for good reason: we typically care about punishing guilty minds, not just guilty acts. In other words, the accused must have a “vicious will,” and our criminal system treats that mental state as “crucial to the description of the conduct we want to make criminal.”

Not all areas of criminal law lean on mens rea so heavily, however. Throughout history, one class of crimes—regulatory (or public welfare) offenses—has consistently utilized strict liability as a mode of sweeping up guilty actors irrespective of a culpable mind. These offenses seek to regulate a broad swath of activity mainly relating to commerce by establishing objective standards for crimes such as illegal labeling, unsafe food or drug production, or traffic violations. Importantly, the vast majority of these regulatory crimes are relatively minor in degree or punishment. For example, the regulatory statute at issue in the important case of United States v. Dotterweich, which holds strictly liable any person who misbrands drugs, is a misdemeanor offense with a statutory maximum fine of $1,000 or one year in prison. These regulatory crimes tend to completely disregard defenses of mistake or ignorance; even a completely honest and reasonable claim that an

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31 See, e.g., Range v. Att’y Gen., 53 F.4th 262, 266-67 (3d Cir. 2022) (“As the maximum punishment for Range’s [misdemeanor welfare fraud] offense was five years’ imprisonment, his conviction subjected him to § 922(g)(1).”), vacated & reh’g en banc granted, 56 F.4th 992 (3d Cir. 2023).
32 See, e.g., Rachel Swaner, Cassandra Ramdath, Andrew Martinez, Josephine Hahn & Sienna Walker, What Do Defendants Really Think?: Procedural Justice and Legitimacy in the Criminal Justice System, CTR. FOR CT. INNOVATION 34 (2018) [hereinafter Swaner et al., What Do Defendants Really Think?] (“Some interviewees cited difficulty understanding the complex terminology and language used by court personnel . . . . In some cases, difficulty understanding court language even appeared to have implications for defendants’ outcomes.”).
34 See Michael Serota, Strict Liability Abolition, 98 N.Y.U. L. REV. 112, 123 (2023) [hereinafter Serota, Strict Liability Abolition] (“The most common variety of strict liability . . . . was the ‘public welfare offense.’”).
35 See id. (“Merely engaging in the conduct prohibited by statute was sufficient to support a criminal conviction.” (footnote omitted)).
individual does not know she is violating the law fails to absolve her of liability.\textsuperscript{37} This is acceptable largely because running afoul of these regulations does not subject violators to draconian punishment. Instead, substantial public benefit can be achieved while doling out mere slaps on the wrist.

Yet some strict liability offenses buck this trend, namely those that grade otherwise legal or more minor criminal behavior into major crimes carrying significant consequences. One example is the statute that criminalizes assaulting federal officers performing their official duties.\textsuperscript{38} Offenders are held strictly liable for the crime regardless of whether they knew their victim was a federal officer, even if that officer happened to be in plainclothes during the assault.\textsuperscript{39} By sole virtue of the victim’s occupation, an otherwise minor assault charge\textsuperscript{40} instantly morphs into a serious felony carrying up to eight years in prison.\textsuperscript{41}

Before \textit{Rehaif}, § 922(g) operated similarly. As long as one did not have prohibited status and complied with the various local, state, and federal firearms regulations, possession of a firearm was completely legal. But if an individual had a prohibited status—regardless of whether he knew about it—he was held strictly liable for violating § 922(g) and an otherwise legal gun possession subjected him to up to ten years in prison.\textsuperscript{42}

Courts have approached the imposition of strict liability for these more serious crimes unevenly. In \textit{United States v. Feola}, for example, the Supreme Court analyzed 18 U.S.C. § 111, the statute prohibiting assault of federal officers discussed above, in the context of 18 U.S.C. § 371, which illegalizes conspiracy to commit any federal offense.\textsuperscript{43} Prior to \textit{Feola}, courts had held that a conviction for conspiracy—a statute with no mens rea term—required knowledge as to all elements of the underlying offense.\textsuperscript{44} This would have required proving that the alleged co-conspirators knowingly assaulted

\textsuperscript{37} See Serota, \textit{Strict Liability Abolition, supra} note 34, at 123 (“[T]his class of offenses relieved the government of its burden to prove a guilty mind, thereby making reasonable mistakes and unavoidable accidents legally irrelevant.” (footnote omitted)).

\textsuperscript{38} See 18 U.S.C. § 111.

\textsuperscript{39} See United States v. Feola, 420 U.S. 671, 684 (1975) (holding, “in order to effectuate the congressional purpose of according maximum protection to federal officers,” that an assailant charged under § 111 need not know that the victim was a federal officer).

\textsuperscript{40} See 18 U.S.C. § 113(a)(5) (setting forth the penalty of up to one year’s imprisonment for the federal offense of simple assault).

\textsuperscript{41} See 18 U.S.C. § 111(a)(2) (setting forth the penalty of a fine or not more than eight years in prison, or both).

\textsuperscript{42} See 18 U.S.C. § 924(a)(2) (setting forth the punishment for a violation of § 922(g), including a fine or not more than 10 years in prison, or both). Though the current maximum sentence for a violation of § 922(g) is fifteen years, prior to 2022, the maximum sentence was ten years. See supra note 26 (discussing the statute’s modification).

\textsuperscript{43} \textit{Feola}, 420 U.S. at 687.

\textsuperscript{44} \textit{Id.} at 675-76.
individuals who they knew were (a) federal officers or employees; and (b) were, at the time of the assault, in the performance of their official duties.\textsuperscript{45} \textit{Feola} overruled that precedent: the Court held that § 111, the substantive offense, did not require knowledge of the officer’s status or duties.\textsuperscript{46} Its decision rested on both the “congressional purpose of according maximum protection to federal officers”\textsuperscript{47} and the assertion that not requiring knowledge “pose[d] no risk of unfairness to defendants,” as such a charge would be “no snare for the unsuspecting[.]” because any person committing an assault, whether or not the victim is a federal officer, “nonetheless knows from the very outset that his planned course of conduct is wrongful.”\textsuperscript{48}

In several other cases, however, the Supreme Court’s approach to statutes with no or ambiguous mens rea terms evolved to disfavor strict liability.\textsuperscript{49} The case of \textit{Staples v. United States} represents one of these crossroads in the Court’s willingness to tolerate strict liability, particularly for crimes that carry serious penalties. At issue in that case was a statute requiring registration for all “firearms,” defined essentially as any weapon that could fire automatically.\textsuperscript{50} The defendant was charged with possessing an unregistered machine gun, but he claimed that he did not know that the gun was capable of firing automatically.\textsuperscript{51} Even though the text of the statute contained no knowledge—or scienter—requirement, the Court inferred one based both on “the background rule of the common law favoring \textit{mens rea}” and the belief that “the penalty attached to [the statute] suggest[ed] that Congress did not intend to eliminate a \textit{mens rea} requirement.”\textsuperscript{52} These two factors—the “background common law rule” and congressional intent—now act as lodestars for analyzing statutes with an ambiguous or absent mens rea term. Indeed, \textit{Rehaif} continued this line of thinking, leaning heavily on both points in its holding.\textsuperscript{53}

\textsuperscript{45} Id. at 675.
\textsuperscript{46} Id. at 686.
\textsuperscript{47} Id. at 684.
\textsuperscript{48} Id. at 685.
\textsuperscript{49} See, e.g., \textit{Liparota v. United States}, 471 U.S. 419, 433 (1985) (requiring that a defendant know her fraudulent use of food stamps was illegal); \textit{Staples v. United States}, 511 U.S. 600, 619 (1994) (requiring knowledge that a gun falls within the statutory definition of firearm to obtain a conviction for failure to register it); \textit{United States v. X-Citement Video, Inc.}, 513 U.S. 64, 78 (1994) (requiring knowledge that a participant was a minor in child pornography prosecutions).
\textsuperscript{50} \textit{Staples}, 511 U.S. at 602; see also 26 U.S.C. §§ 5801–5872 (listing the statutory registration requirements at issue).
\textsuperscript{51} \textit{Staples}, 511 U.S. at 603.
\textsuperscript{52} Id. at 619.
\textsuperscript{53} See \textit{Rehaif v. United States}, 139 S. Ct. 2191, 2195-97 (2019) (beginning its analysis of § 922(g) with congressional intent). The majority’s reasoning is discussed further in Section II.B, \textit{infra}. 
C. Mistakes of Fact & Law

The contours of mens rea are not limited to the binary question of whether or not there is a term present that must be proven beyond a reasonable doubt. Once it is concluded that the statute does include a mens rea term, either by the text or a court’s inference, a defendant has at her disposal several options to choose from when she attempts to sow doubt on the government’s efforts to prove that mental state.

Significantly, a defendant can claim she was mistaken. Broadly, these defenses to mens rea are divided into mistakes of fact, which are “mistake[s] about a fact that [are] material to a transaction,” and mistakes of law, which are “mistake[s] about the legal effect of a known fact or situation.” Figuring out which type of mistake was made is key because it determines how the defendant’s supposed mistake will be analyzed. Sometimes, the mistake need only be honest in order to succeed as a defense, while other times, it needs to be honest and reasonable, and finally in some situations, the mistake may be no defense at all.

Trickier still is differentiating among the varieties of mistakes of law. Normally, the biblical command of “ignorance of the law is no excuse” holds true. However, there are narrow exceptions to this rule, such as when a defendant claims he did not know his behavior violated, say, a penal tax law (which criminalizes the violation itself), and truly believed the conduct was legal, or when a defendant makes an error of some relevant but nonpenal law, such as family law, the violation of which in turn makes his conduct criminal under some other law. Figuring out which type of mistake of law—penal or nonpenal—a person has committed is crucial. When evaluating a penal mistake of law defense, a judge or jury will usually undertake an analysis of the allegedly violated law itself to ascertain the likelihood of someone not knowing her conduct violated it, whereas in mistakes of nonpenal law, in

54 Mistake of Fact, BLACK’S LAW DICTIONARY (11th ed. 2019).
56 See Leviticus 5:17 (“If anyone sins and does what is forbidden in any of the Lord’s commands, even though they do not know it, they are guilty and will be held responsible.”).
57 See, e.g., Cheek v. United States, 498 U.S. 192, 195-96 (1991) (describing a defendant’s defense that he was not liable for violations of federal tax law because he “sincerely believed that the tax laws were being unconstitutionally enforced”).
58 A mistake of nonpenal law is also referred to as a mistake of nongoverning law. Basically, the claimed mistake has to do with an area of law distinct from the one that criminalizes the conduct for which the defendant was charged.
59 See, e.g., Long v. State, 44 Del. 262, 282-83 (1949) (holding a mistake as to matrimonial law as a valid defense to a criminal charge of bigamy).
60 See Cheek, 498 U.S. at 205 (holding the defendant’s mistake defense as meritorious due to the “complex tax system” in which “uncertainty often arises even among taxpayers who earnestly wish to follow the law”).
some jurisdictions, a defense of an honest mistake of that nonpenal law will be meritorious, regardless of reasonableness.  

Status elements present a thorny question under mistake analysis. In some cases, it is easy to figure out what type of mistake a status element presents; for example, in Staples, the defendant’s assertion he did not know his gun was capable of firing automatically was squarely a claimed mistake of fact. However, in § 922(g) contexts, a defendant’s claim of mistake blurs the line between fact and law. If an individual says he did not know his prohibited status, he is really claiming two things: first, he is claiming that when he picked up the gun, he did not know that his conduct violated § 922(g). Precedent directs judges and juries to consider this purported mistake in light of the nature of the statute itself, and the defense may or may not be successful. Second, he might also be claiming a mistake of nonpenal law, such as his felon status, because he is really claiming a mistake regarding the legal nature of a previous crime. Such a mistake, if honest, would be a complete defense to a post-Rehaif § 922(g) charge. Accordingly, whether the mistake is categorized as one type versus the other has serious implications for a defendant, and these intricate analyses play a key role—as they did in Rehaif—in analyzing a claim of a lack of mens rea.

II. THE CASE OF REHAIF

Rehaif was a watershed moment for a vast number of criminal prosecutions. In an instant, what had previously been as simple as a defendant stipulating to a prior felony, or failing that, a prosecutor simply entering onto the record clear and unmistakable evidence of a previous felony, was transformed into a vexing task. In run-of-the-mill § 922(g) prosecutions, the government must now prove that the defendant knew he belonged to the prohibited class that outlaws his gun possession. This Part delves into the facts of the case, as well as the reasoning of the majority and dissent. It then surveys the ambiguity left in the decision’s wake, which ultimately required clarification in Greer, thus leading to the current, worrisome state of felon-in-possession law.

In many ways, the circumstances of Rehaif did not seem ripe for a reexamination of § 922(g): Rehaif’s behavior was downright suspicious, and

61 See MODEL PENAL CODE § 2.04 (AM. L. INST. 1962) ("Ignorance or mistake as to a matter of fact or law is a defense if . . . the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or . . . the law provides that the state of mind established by such ignorance or mistake constitutes a defense.").

62 See Cheek, 498 U.S. at 205 (assessing Cheek’s belief that the income tax law was unconstitutional as applied to him with the understanding that the tax system is uncertain and complex, but ultimately concluding that Cheek’s belief was not an innocent mistake).

there is solid evidence that suggests he knew he was in the country illegally. Indeed, the circumstances of his arrest illustrate how easily his prosecution and subsequent appeal could have been an open-and-shut case.

On a hotel manager’s tip, police arrested Rehaif in December of 2015 and a grand jury subsequently charged him with violating § 922(g)(5)(A), which prohibits possession of a firearm by those without legal status in the United States. The manager had reported to police that Rehaif’s behavior was worrisome: he had been a guest at the Melbourne, Florida Hilton for over fifty days, but his stay had been noncontinuous; he checked out of the hotel every morning, and then in again every evening. He paid exclusively in cash, and always requested a room with an eagle’s nest view of the nearby Melbourne airport.

After local police conducted a preliminary investigation, they summoned the Department of Homeland Security’s Immigration and Customs Enforcement (ICE) division. In an interview with ICE, Rehaif stated that he had originally possessed legal status by virtue of a nonimmigrant student visa, but had been dismissed from the university he had been attending and thus was no longer legally in the country. He admitted to the agents that he had subsequently used guns he had purchased at a firing range. Based on this information, he was arrested for illegal possession of the firearms.

A. The Proceedings Below

During trial, Rehaif asked the judge to instruct the jury that, in order to return a conviction, the government had to prove Rehaif knew he was unlawfully in the country when he visited the firing range. The judge refused, Rehaif was convicted, and he appealed, in part based on the jury instructions. The Eleventh Circuit affirmed his conviction, resting its decision on two main pillars. First, the court pointed to the statutory construction of §§ 922(g) and 924(a)(2), holding that the ambiguity of the placement of “knowingly” did not give a clear answer as to whether § 922(g) required knowledge of status, and thus “other tools of interpretation must be...

65 Id. at 1276-77.
66 Id. at 1277.
67 Id.
68 Id. at 1278.
69 Id.
70 Id. at 1276.
71 See United States v. Rehaif, 888 F.3d 1138, 1141 (11th Cir. 2018) (“Rehaif . . . argu[ed] that the United States had to prove both that he had knowingly possessed a firearm and that he had known of his prohibited status . . . .”).
72 United States v. Rehaif, 868 F.3d 907, 910 (11th Cir. 2017).
employed" to determine whether the mens rea attached to the status element.\(^\text{73}\) Second, and relatedly, the court pointed to the litany of prior cases\(^\text{74}\) that held that knowledge of status was not required to prove a violation of § 922(g), as well as Congress’s failure “to alter [the law] after it had been judicially construed.”\(^\text{75}\)

Rehaif then appealed to the Supreme Court, which granted certiorari.\(^\text{76}\) This was remarkable for a few reasons. First, the Court had previously denied certiorari on essentially the same question time and time again.\(^\text{77}\) While Rehaif argued that it was not the same question because his case involved immigration status and those prior cases implicated felon status, the statute at issue was the same. Sections 922(g)(1) and 922(g)(5)(a) are subsections of the same statute, and § 924(a)(2), which supplies the mens rea of knowledge to both, is a completely different and independent statute. So the question of statutory interpretation was identical to those earlier cases.

Nor were the circumstances giving rise to Rehaif’s appeal particularly convincing. As the district court noted in a statement of facts, Rehaif admitted that his presence in the United States was not legal.\(^\text{78}\) Later in the appeals process, Rehaif argued that his immigration status should not have been considered illegal until “U.S. Citizenship and Immigration Services (‘USCIS’) or an immigration judge ha[d] declared him unlawfully present” as opposed to it becoming unlawful at the moment he was dismissed from the university that sponsored his visa.\(^\text{79}\) The appeals court roundly rejected that

\(^{73}\) Id. at 912.

\(^{74}\) Indeed, the circuit courts were in nearly unanimous agreement regarding whether any mens rea term applied to the status element. See, e.g., United States v. Dancy, 866 F.2d 77, 81 (5th Cir. 1988) (“[T]he defendant’s knowledge of . . . his felon status [is] irrelevant.”); United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997) (“[I]t does not appear that the district court erred in giving the instruction that it was not necessary that [the defendant] knew that he had been convicted of a felony.”); United States v. Miller, 105 F.3d 552, 555 (9th Cir. 1997) (“[T]he § 924(a) knowledge requirement applies only to the possession element of § 922(g)(1), not . . . to felon status.”); United States v. Olender, 338 F.3d 629, 637 (6th Cir. 2003) (“[T]he government does not have to prove that the defendant knew he was a felon, only that he knowingly possessed the ammunition.”); United States v. Games-Perez, 667 F.3d 1136, 1140 (10th Cir. 2012) (“[T]he only knowledge required for a § 922(g) conviction is knowledge that the instrument possessed is a firearm.” (quoting United States v. Capps, 77 F.3d 350, 352 (10th Cir. 1996))).

\(^{75}\) Rehaif, 868 F.3d at 913 (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940)).

\(^{76}\) Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (“We granted certiorari to consider whether, in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm.”).

\(^{77}\) See, e.g., Miller, 105 F.3d 552, cert. denied, 552 U.S. 871 (1997) (addressing the § 924(a) knowledge requirement); Games-Perez, 667 F.3d 1136, cert. denied, 571 U.S. 830 (2013) (“The question presented in this case . . . has been whether the ‘knowingly’ requirement should extend to the element of the statute regarding felony status . . . .”).

\(^{78}\) United States v. Rehaif, 178 F. Supp. 3d 1275, 1278 (M.D. Fla. 2016) (“[Rehaif] stated that he was in violation of his immigration status by not being in school.”).

\(^{79}\) Rehaif, 868 F.3d at 909.
argument on the basis of a straightforward—and convincing—reading of the immigration laws,\textsuperscript{80} with which the Supreme Court did not even take issue. Moreover, several of the cases for which the Court had previously denied certiorari on the same question had much more convincing claims of lack of knowledge of status, and thus would have been far better candidates for a comprehensive and searching reinterpretation of § 922(g)'s mens rea requirement.\textsuperscript{81}

B. At the Supreme Court

Rehaif not only convinced the Court to take the issue up, but also to rule in his favor. In a 7–2 decision, the Court held that Rehaif had to know his status at the time of his visit to the firing range in order to be guilty of violating § 922(g).\textsuperscript{82} More broadly, it concluded that § 924(a)(2)'s knowledge mens rea term applied to the prohibited status portion of § 922(g), thus making firearm possession illegal only if the defendant knew he fell into one of the prohibited classes.\textsuperscript{83} The Court rested its opinion on several conclusions. First, it leaned on its decades-old inclination\textsuperscript{84} to “apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text.”\textsuperscript{85} Second, it suggested that such a presumption in this case was not strictly necessary because the knowledge term contained in § 924(a)(2) plainly applied to the status elements listed in § 922(g) as “a matter of ordinary English grammar.”\textsuperscript{86}

\textsuperscript{80} Id. at 915 (“The [Immigration and Nationality Act] states that . . . an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General . . . . As such, a student admitted under an F-1 visa is unlawfully present if he remains in the United States after he is no longer enrolled as a full-time student.” (internal quotation marks omitted)).

\textsuperscript{81} For a case in which the defendant had a facially strong argument that he did not know he was a felon, see, for example, United States v. Games-Perez, 667 F.3d 1136 (10th Cir. 2012), discussed supra Introduction. During the plea colloquy in that case, the judge messed up and told the defendant that if he pleaded guilty, he would “leave this courtroom not convicted of a felony and instead [be] granted the privilege of deferred judgment.” 667 F.3d at 1138. When he was later arrested for violating § 922(g), the defendant was surprised to find out that he was in fact a convicted felon. Id. at 1139. Nevertheless, the Supreme Court declined to take up the knowledge-of-status question in that case.

\textsuperscript{82} Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

\textsuperscript{83} Id. at 2195.

\textsuperscript{84} For further discussion of this inclination, see supra Section I.B discussing the mens rea presumption and strict liability offenses.

\textsuperscript{85} Rehaif, 139 S. Ct. at 2195 (citing Staples v. United States, 511 U.S. 600, 606 (1994)).

\textsuperscript{86} Id. at 2196 (quoting Flores-Figueroa v. United States, 556 U.S. 646, 650 (2009)). Reading a mens rea term as applying to all subsequent elements is also a standard convention of the Model Penal Code. See MODEL PENAL CODE § 2.02(4) (AM. L. INST. 1962) (“When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without
The Court also noted a few examples of cases where a § 922(g) charge may be akin to a “snare for the unsuspecting,” thus necessitating a mens rea requirement for status. First, in the immigration context, the Court contemplated a scenario in which a young child is brought unlawfully into the United States, and is therefore unaware of his unlawful status. Second, it discussed a situation in which someone is “convicted of a prior crime but sentenced only to probation, [and] does not know that the crime is ‘punishable by imprisonment for a term exceeding one year.’” Finally, and notably, the Court cited the Games-Perez case where the judge misinformed the defendant of the grade of the prior conviction and for which it declined to issue certiorari only six years earlier.

At a high level, Rehaif’s holding is a welcome one. If the offense is one that prosecutors regularly use to seek “stiff penalties” for defendants, the government should have to prove beyond a reasonable doubt that the defendant knew his conduct risked that outcome, particularly when there are fifteen years of prison on the line. The Rehaif decision fits neatly into a long line of cases that do just that. However, the majority’s opinion glossed over—or ignored entirely—some important aspects of § 922(g). A few of those shortcomings are discussed below.

First, the majority presented the statutory interpretation—which requires interposing “knowingly” from a completely different statute into the middle of § 922(g)—as run-of-the-mill. But seamlessly combining two different statutes and imputing the features of one onto the other is something that the Court has regularly rejected, even in situations where, like in § 922(g), two statutes explicitly reference one another. The Court could have discussed further why it decided to depart so drastically from decades of a well-settled interpretation of the law.

Second, the Court gave no weightier consideration to the specific characteristics of felon-in-possession cases than it did any other of the distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.”).

87 United States v. Feola, 420 U.S. 671, 685 (1975); see also supra notes 43–48.
88 Rehaif, 139 S. Ct. at 2197–98.
89 Id. (quoting 18 U.S.C. § 922(g)(1)).
90 Id. at 2197–98; see also United States v. Games-Perez, 667 F.3d 1136 (10th Cir. 2012), cert. denied, 571 U.S. 830 (2013); discussion supra Introduction (summarizing the erroneous plea colloquy).
91 Roth, Surprising Law, supra note 7, at 23.
92 See 18 U.S.C. § 924(a)(2) (providing the mens rea term for § 922(g)).
93 A notable example of this is Alexander v. Sandoval, in which the Court held that the implied private right of action to sue under Title VI of the Civil Rights Act of 1964, housed in § 601 of the statute, did not carry over to the neighboring section, § 602, despite § 602 being promulgated to “effectuate the provisions of § 601 . . . .” 532 U.S. 275, 278 (2001). But see United States v. X-Citement Video, Inc., 513 U.S. 64, 77 (1994) (reading “knowingly” to apply across multiple subsections of a child pornography statute).
prohibited classes, despite felon-in-possession charges being the most common under § 922(g). It could have considered the fact that felony dispositions are the province of the federal government and the states, as compared with an individual’s immigration status, which is solely under the authority of the federal government. As such, assessing knowledge of felony status can be much more complicated than doing so with immigration status, because multiple sovereigns with different procedures and processes must be considered. Instead, the Court simply stated that “we doubt that the obligation to prove a defendant’s knowledge of his status will be as burdensome as the Government suggests.” Such an ill-considered statement contributed to the post-Rehaif confusion in the lower courts with respect to assessing knowledge of status.

Finally, the Court discussed mistakes of fact and law, but it did not finish the job. It reasoned that Rehaif’s mistaken conclusion that he could not be convicted of the crime, but its explanation for the type of mistake he made is ambiguous. Rehaif argued that this mistake derived from the supposed intricacies of the immigration laws, and so on this basis, Rehaif claimed he did not know that it was illegal for him to pick up a gun. The Court assumed that Rehaif unambiguously made a mistake of “collateral” law, but in doing so blurred the legally significant line between a mistake of criminal law (such as those criminalizing an individual’s unlawful presence in the United States) and a mistake of noncriminal law (such as the immigration laws that determine whether an individual’s presence is lawful). The opinion does not explain how to operationalize these collateral mistakes of law, nor what a defendant would

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94 It is so common that “felon in possession of a firearm” is sometimes used, even by government agencies, as shorthand for § 922(g) as a whole. See 2020 QUICK FACTS, supra note 12 (displaying “Felon in Possession of a Firearm” as the subheading underneath “Quick Facts” for the broader § 922(g) statute). Earlier iterations of the “Quick Facts” sheets feature a footnote appended to the “Felon in Possession of a Firearm” subheading which reads “18 U.S.C. § 922(g) prohibits certain persons from . . . possessing . . . a firearm or ammunition while subject to a prohibition from doing so, most commonly because of a prior conviction for a felony offense.” U.S. SENT’G COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2015), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf [https://perma.cc/7VTB-NV87].

95 See Brief of Petitioner at 11, Rehaif, 139 S. Ct. at 2191 (No. 17-9560) (arguing that the question of Rehaif’s “immigration status” was “complex”).

96 Compare MODEL PENAL CODE § 2.02(g) (AM. L. INST. 1962) (explaining that, in interpreting a criminal statute, knowledge or belief regarding the existence or meaning of the criminal statute is not to be read into the statute as a required mental state), with MODEL PENAL CODE § 2.04(1) (AM. L. INST. 1962) (allowing for the negation of a required mens rea via the claim of a mistake of fact or law). Contra Cheek v. United States, 498 U.S. 192, 203-04 (1991) (providing an example of the rare instance in which a defendant needs to know his conduct is illegal in order to be found guilty).
have to prove in order to mount a successful collateral mistake defense. Does a defendant simply need to claim he did not know his conduct was criminal, or does he need to claim he made an honest mistake about some other, related legal fact? In sum, while the Court importantly recognized that mistakes as to another, noncriminal law can act as a defense, its explanation and conclusion regarding how to successfully claim such mistakes is lacking.

These shortcomings paved the way for a long dissent, authored by Justice Alito, which examined issues with the majority’s ruling ranging from the textual to the historical to the practical. It began by asserting that the majority provided a “bowdlerized version of the facts” before listing the notable and damning facts of Rehaif’s case that rendered his behavior suspicious. Then, Justice Alito dug deep into the text of the statutory scheme, arguing that the placement of the mens rea term is ambiguous and could be read either to be irrelevant to § 922(g) or to apply to any combination of the elements of § 922(g). Even by the standards of a “strict grammarian,” the dissent argued, this particular exercise of statutory interpretation was not as straightforward as the majority claimed. Next, Justice Alito listed several reasons why, text and grammar aside, there should be no mens rea term for the status element at all. A few of these arguments are particularly noteworthy.

First, Justice Alito importantly recognized, as discussed above, that felon-in-possession applications of § 922(g) are far and away the most common. In doing so, however, he laid the groundwork for the troubling, presumptive language that garnered a majority in Greer: the supposed ease with which a jury should find that a convicted felon knows he or she is a convicted felon. Because “[a] felony conviction is almost always followed by imprisonment, parole or its equivalent, or at least a fine,” he wrote, “[j]uries will rarely doubt that a defendant convicted of a felony has forgotten that experience, and therefore requiring the prosecution to prove that the defendant knew that he

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99 Rehaif, 139 S. Ct. at 2201-13 (Alito, J., dissenting).
100 Id. at 2201-02.
101 Id. at 2203 (“[Petitioner] ignores the extraordinarily awkward prose that [transplanting the mens rea term] produces . . . . But petitioner’s reading is guilty of the very sort of leaping that it condemns—and then some.”).
102 Compare id. at 2204 (exploring several different potential grammatical constructions of the two statutes), with id. at 2195 (majority opinion) (“The term ‘knowingly’ in § 924(a)(2) modifies the verb ‘violates’ and its direct object, which in this case is § 922(g).”) Note that the majority’s analysis of the textual construction skips over some “here-irrelevant omissions,” id., on which the dissent pounces in its own grammatical dissection. See id. at 2204 (Alito, J., dissenting).
103 See id. at 2206-11 (discussing nontextual reasons why Congress probably did not intend for the mens rea term to extend to § 922(g)’s status element).
104 See id. at 2209 (stating that possession by a convicted felon is “the most frequently invoked category”).
had a prior felony conviction will do little for defendants."\textsuperscript{105} This statement was one of the first indications of some Justices' willingness to broadly presume knowledge of felon status.

Second, the dissent recognized the practical, day-to-day implications of a decision to overturn “an interpretation that has been . . . used in thousands of cases for more than 30 years,” arguing that “[a]pplications for relief by federal prisoners sentenced under § 922(g) will swamp the lower courts.”\textsuperscript{106} The empirical numbers back up this concern: in 2019, the year \textit{Rehaif} was decided, there were 7,647 convictions under § 922(g).\textsuperscript{107} Direct review of even a small portion of those cases could easily create headaches for circuit courts. So, too, would motions to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 create an avalanche of work for the district courts and U.S. Attorneys’ Offices obligated to respond to them. It is surprising, then, that only the \textit{Rehaif} dissent gave these practical ramifications due consideration.

\textbf{C. The Legacy of Rehaif’s Shortcomings}

Whether or not Justice Alito’s statutory interpretation was correct, he hit the nail on the head in predicting that direct appeals and collateral attacks would swamp the lower courts. The appeals began rolling in almost instantly: for example, the first \textit{Rehaif}-based collateral attacks were filed less than a week after the decision was handed down.\textsuperscript{108} Indeed, over one thousand collateral attacks on § 922(g) convictions were launched between the time of the \textit{Rehaif} and \textit{Greer} decisions.\textsuperscript{109} In many ways, the lack of specific direction from the \textit{Rehaif} decision as to how to adjudicate these direct appeals and collateral attacks left the lower courts lost at sea.

1. Post-Trial Appeals

One of the most significant ways in which lower courts' approaches to § 922(g) appeals splintered post-\textit{Rehaif} related to what information they could consider on post-trial appeals with respect to knowledge of status. Could they utilize a defendant’s entire record or only information that was presented to

\begin{footnotes}
\item[105] Id.
\item[106] Id. at 2201.
\item[109] Collateral Attacks on § 922(g) Convictions, WESTLAW, www.westlaw.com (navigate to \textit{Rehaif} case page; click on “citing references” tab; filter by cases from June 21, 2019–June 14, 2021; and further filter by keyword "2255") (displaying 1,093 results).
\end{footnotes}
the jury? This distinction is crucial for judicial economy: in many cases, it can make the difference between a decision remanding a case for a completely new trial, affirming a conviction, or denying a § 2255 motion. So too did the lack of clarity on this issue in part lay the groundwork for the Supreme Court’s decision in *Greer*. Different circuits took divergent paths on this question, which turned out to be a defining issue in the adjudication of *Rehaif*-based appeals. On direct appeal, the specific question was what information a court, when reviewing for plain error, could utilize when working through the four prongs of the *Olano* test. Specifically, courts had to determine whether the *Rehaif* error “affected the outcome of the district court proceedings” and “seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings.” One path was to consider only evidence that was seen by the jury. The other path, drawing from Supreme Court precedent relating to plain-error review of guilty pleas, was to consider evidence from a defendant’s entire record, up to and including the type of detailed information contained in a presentence investigative report. Determining the knowledge of status element—or what was in a defendant’s mind—would either turn on a record that could range from a measly forty-four-word stipulation to one comprised of a thick stack of papers containing information about an offender’s history and characteristics, full prior criminal record, circumstances affecting behavior, and much more.

110 *See*, e.g., United States v. Nasir, 982 F.3d 144, 162-64 (3d Cir. 2020) (en banc) (weighing the question of whether to consider a defendant’s entire court record or only what was presented during trial); see generally 28 U.S.C. § 2255(a) (providing for collateral review of a federal conviction).

111 *See* FED. R. CRIM. P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”).

112 *See*, e.g., *Nasir*, 982 F.3d at 160 (“[The *Olano* test] requires the defendant to prove that there was (1) an actual error (2) that is plain or obvious, (3) that affected the outcome of the district court proceedings, and (4) that seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings. (internal quotation marks omitted) (citing United States v. Olano, 507 U.S. 725, 732-34 (1993)).

113 *Nasir*, 982 F.3d at 160 (internal quotation marks omitted).

114 *See id.* at 166 (holding that “due process and Sixth Amendment considerations compel” a decision that considers only evidence presented to the trier of fact on plain-error review).


116 *See*, e.g., United States v. Greer, 798 F. App’x 483, 485-86 (11th Cir. 2020) (allowing use of the entire record); United States v. Reed, 941 F.3d 1018, 1021 (11th Cir. 2019) (same); United States v. Owens, 966 F.3d 700, 706-07 (8th Cir. 2020) (same).

117 The full stipulation in *Nasir* read as follows: “Prior to December 21, 2015, the date alleged in Count Three of the Indictment, Defendant Malik Nasir was convicted of a felony crime punishable by imprisonment for a term exceeding one year, in the United States District Court for the Eastern District of Virginia.” 982 F.3d at 151 n.3.

118 *See* FED. R. CRIM. P. 32(d)(2)(A)-(G) (setting forth the subject matter contained in presentence investigative reports); see also MARC L. MILLER, RONALD F. WRIGHT, JENIA L.
Both approaches carry compelling arguments. The justifications for considering only the trial record are twofold. First, due process and Confrontation Clause considerations suggest that, when a trial did occur, only what the jury considered in reaching its verdict is fair game on appeal.\textsuperscript{119} Second, to follow blindly the rule from plea contexts that the entire record is available ignores the fact that plea colloquies and trials are fundamentally different.\textsuperscript{120} The argument for carefully distinguishing these two contexts is as follows. In plea colloquies, the defendant is the decisionmaker, and only he can make the informed decision whether to plead guilty. So, it is reasonable to charge him with remembering things that were said to him in the lead-up to that plea. In jury trials, however, the agency lies with the jury, which, by design, cannot and does not know the content of the prior proceedings during which it was not present. It arguably doesn’t make sense to try to imagine what a jury may or may not know.

In support of using the entire record, the arguments stem from the need to “relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure.”\textsuperscript{121} In other words, it is necessary—so the argument goes—to try to imagine the whole body of evidence that \textit{could} come in during the trial, which is a distinct exercise from looking retroactively at what evidence actually \textit{was} introduced during the trial.\textsuperscript{122} Courts that use the entire record also base their decision on the spirit of the fourth \textit{Olano} prong, which calls for consideration of the “fairness, integrity, or public reputation” of the defendant’s proceedings.\textsuperscript{123} In this context, the argument for going beyond the trial record is simple: when it is plainly obvious that the defendant knew of his felon status, considering information not presented to the jury does not harm the public reputation of the proceedings. Indeed, even the converse might be true: vacating a conviction

\footnotesize{\textsuperscript{119} See \textit{Nasir}, 982 F.3d at 166 (“In [the trial context], due process and Sixth Amendment considerations compel us to focus our inquiry on the information presented to the trier of fact . . . .”); see also \textit{id.} at 180 (Matey, J., concurring) (discussing the benefit of confronting witnesses owing to the ability to “sow doubt” when “[r]ecollections fade” and “witnesses flounder”).

\textsuperscript{120} See \textit{id.} at 166 (majority opinion) (“[A] guilty plea [is] a procedural posture that is completely unlike the review of a conviction following trial.”).

\textsuperscript{121} \textit{Reed}, 941 F.3d at 1021.

\textsuperscript{122} It’s possible to do so, these courts reasoned, because one can imagine what a prosecutor \textit{would} have presented—and what a defendant \textit{would not} have been able to present—to the jury had they known what the change in the law would portend. \textit{See, e.g.}, United States v. Mancillas, 789 F. App’x 549, 550 (7th Cir. 2020) (holding that, had \textit{Rehaif} been decided before trial, the defendant “could not have introduced reasonable doubt that he was aware that he had previously been convicted of a felony”).

\textsuperscript{123} See \textit{Nasir}, 982 F.3d at 160.}
on *Rehaif* grounds when someone is manifestly guilty might itself harm the public reputation, fairness, and integrity of the judiciary and its proceedings.  

At bottom, both approaches carry broader implications for the very common task of plain-error review, yet *Rehaif* provided little guidance about which method to use, even with thousands of appeals sure to be generated by the decision.

2. Appeals Following Guilty Pleas

Convictions following guilty pleas presented similar problems. Indeed, the vast majority of § 922(g) prosecutions reach their disposition via guilty plea. For example, in 2020, the first full year after *Rehaif* was decided, 5,118 defendants nationwide were convicted of § 922(g) charges. Of those defendants, only 105—or roughly two percent—were convicted after a trial. The remaining ninety-eight percent pleaded guilty.

The open question in the context of guilty pleas was what type of error a district court committed when, during a pre-*Rehaif* colloquy, it failed to advise the defendant that the government would have to prove knowledge of status at trial. Though various circuits decided this question differently, each rooted its inquiry in the third prong of *Olano*’s plain-error analysis, which probes whether the error violated a defendant’s substantial rights. Did such an error represent a constitutionally rooted “structural error” that would require vacatur of the guilty plea and resulting conviction? Or, on the other hand, did it constitute an error just like any other that could be resolved by a fact-specific, case-by-case analysis via plain-error review?

On one side of the split, courts held that the failure to properly advise a defendant who had pleaded guilty to being a felon-in-possession of the correct elements of the offense regardless of what they were at the time of the

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124 See United States v. Miller, 954 F.3d 551, 559 (2d Cir. 2020) (“Under the circumstances, we do not think that rejecting [the] argument [that plain-error analysis is restricted to the trial record] will seriously affect the fairness, integrity, or public reputation of judicial proceedings. To the contrary, we think that accepting it would have that effect.”).


126 Id.

127 Id.

128 See, e.g., United States v. Gary, 954 F.3d 194, 201 (4th Cir. 2020) (holding that the defendant was not properly informed at his plea hearing of the elements the government had to prove, requiring vacatur).

129 See, e.g., United States v. Burghardt, 939 F.3d 397, 405-06 (1st Cir. 2019) (concluding that the defendant’s challenge failed on plain-error review).
colloquy was a “structural error” that required vacatur. This approach is more abstract: it rests on the principle that, when the defendant pleaded guilty, he was misinformed of the nature of the offense, and thus the “court deprived him of his right to determine the best way to protect his liberty.” His plea therefore violated Rule 11 because it was not a “knowing and intelligent decision regarding his own defense.” The other approach centers on a fact-intensive analysis that takes into account defendants’ histories and the likelihood that they know of their felon status. Particularly in situations where a defendant has a lengthy criminal history and likely knows that he is a felon, it is entirely unlikely that the outcome of the case would have changed if the defendant had been informed of the knowledge-of-status element during his plea colloquy. Thus, vacating the conviction is not necessary.

Regardless of which argument for these divergent paths—both for appeals after trial and after guilty pleas—is more convincing, the plain fact is this: Rehaif left out these important pieces of the puzzle. Given the ubiquity of the charge, this silence led to continued uncertainty for tens of thousands of defendants and duplicative work for judges, prosecutors, and appointed defense counsel, many of whom are employed by already-strained defender organizations. Put simply, the Court did not consider even the more obvious ramifications of a decision transforming a far-reaching statute, and judges, defendants, and counsel suffered from uncertainty and prolonged waits for finality as a result.

### III. THE SEARCH FOR SOLUTIONS IN GREER

As illustrated above, Rehaif resulted in a series of uneven decisions nationwide, and clarifications from the Supreme Court were badly needed. Answering the call, the Court granted review of two cases, Greer and Gary, in

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130 See Gary, 954 F.3d at 201 (“[Failure to fully inform the defendant] is a structural error that requires the vacatur of [his] guilty plea and convictions.”).
131 See id. at 205-07 (explaining that errors relating to a defendant’s right to make informed plea decisions are structural).
132 See FED. CRIM. R. 11(b) (setting forth the considerations for accepting a guilty plea).
133 Gary, 954 F.3d at 207.
134 See Burghardt, 939 F.3d at 404 (reasoning that “[serving] such [prison] sentences would certainly have made clear to Burghardt the fact that his offenses were punishable by more than a year in prison” and thus squarely within the confines of prohibited possession of a firearm).
135 See id. at 404 n.4 (“[E]vidence that [the defendant] served over a year for a single charge is not necessary to support our conclusion because, as discussed, the government has ample other evidence that it could have introduced to show Burghardt’s knowledge of his status.”).
which the defendants had appealed their § 922(g)(1) convictions and requested plain-error relief on the basis of Rehaif. In Greer, the issue centered on what information an appeals court could consider on plain-error review of a trial conviction; in Gary, it was whether a Rehaif error during a guilty plea represented a structural error that required vacatur. The Court consolidated the two cases, heard oral arguments in April 2021, and handed down its decision two months later, nearly two years after the Rehaif decision.

In an opinion that was mostly unanimous, the Court upheld both convictions, holding broadly that neither defendant was entitled to plain-error relief because, typically, felons know they’re felons. Justice Sotomayor wrote separately, concurring as to the affirmance of Greer’s conviction but dissenting as to the reversal of Gary’s. The issue on which she dissented was case-specific and narrow: she agreed with the majority that automatic vacatur was inappropriate, but argued that the court should have undertaken a more fact-intensive analysis in Gary’s case to decide whether his substantial rights were violated by the guilty plea.

The Court rather swiftly resolved the central questions left open by Rehaif. Post-Greer, lower courts have significantly clearer instructions on how to review a claimed Rehaif error: in the trial context, they can consider evidence outside of the trial record; and in the plea context, a Rehaif error is not automatic grounds for vacatur. However, as this Part argues, Greer’s broad holding that felons know they’re felons does not fully account for situations in which an individual may truly not know of that status, a mistake that undercuts Rehaif’s constructive work of bringing the § 922(g) charge away from a strict liability offense.

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137 See Greer v. United States, 141 S. Ct. 2090, 2096 (2021) (“The question for this Court is whether Greer and Gary are entitled to plain-error relief for their unpreserved Rehaif claims.”).
138 Brief for Petitioner at i, Greer, 141 S. Ct. 2090 (No. 19-8709) (posing the question presented as whether, “when applying plain-error review . . . a circuit court of appeals may review material outside the trial record”).
141 Greer, 141 S. Ct. at 2097, 2101.
142 See id. at 2101-04 (Sotomayor, J., concurring in part and dissenting in part).
143 Id. at 2104.
144 See id. at 2098 (majority opinion) (“This Court has repeatedly stated that an appellate court conducting plain-error review may consider the entire record—not just the record from the particular proceeding where the error occurred.”).
145 See id. at 2100 (“[T]he omission of a single element from a plea colloquy does not deprive defendants of basic protections . . . “ (internal quotation marks omitted)).
A. Greer’s Failures

A foundational failure of the Greer decision rests on the plain fact that both Greer and Gary’s convictions were easy ones to affirm. Greer had five prior felony convictions and had spent nearly five years in prison, while Gary had a prior felony conviction for which he had spent nearly two years in prison. This is dangerous not because of the result of those individual cases; indeed, based on the factors I set forth in Part IV, infra, I believe the decision to affirm both Greer and Gary’s convictions was the right one. Rather, it is dangerous because the Court used these easy cases as a vehicle for issuing a broad holding that simply cannot be blindly imputed onto the whole universe of felon-in-possession cases, some of which may present substantially more difficult questions with respect to knowledge of status. As the Court does in so many cases, it should have limited its holding to the specific circumstances of the consolidated cases at hand.

Just as the breadth of the Court’s holding was troublesome, so too was the barebones reasoning behind it. Almost every aspect of the majority’s opinion rests on the idea that none of these appeals should be particularly challenging in the first place because “[c]onvicted felons typically know they’re convicted felons.” That statement sweeps too broadly for two reasons. First, its language has serious implications outside of the plain-error review context. Second, it represents a dangerous shortcut that district and appellate courts can and will take when reviewing appeals and petitions when they should instead be undertaking a more fact-specific analysis and giving defendants the opportunity to present arguments for why they may not have had knowledge of status. Indeed, traces of the Court’s willingness to assume all felons know they’re felons is present throughout several sections of the opinion.

First, the Court struggles to tease out the difference between a defendant having a felony record and knowing about it. In support of its holding, the majority curiously leans on the fact that neither Gary nor Greer disputed the facts of their prior convictions. But applied broadly, that logic confuses the message, and it harkens back to a pre-Rehaif state of affairs. If a defendant did not contest his prior record when the status element was one of strict liability,

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146 See United States v. Greer, 798 F. App’x 483, 485 (11th Cir. 2020) (“[Greer] served three years in prison following the revocation of his supervised release . . . [and] 20 months in prison for distributing Phencyclidine (PCP).”).


148 For an examination of the Supreme Court’s ability to confine its opinions, see generally Daniel B. Rice & Jack Boeglin, Confining Cases to Their Facts, 105 Va. L. Rev. 865 (2019).

149 Greer, 141 S. Ct. at 2098 (quoting United States v. Lavalais, 960 F.3d 180, 184 (5th Cir. 2020)).

150 See id. (“Neither defendant has ever disputed the fact of their prior convictions.”).
that would have been conclusive evidence that the element was met. However, before Rehaif, a defendant would have had no reason to dispute whether he knew of his status, as status was legally irrelevant to the charge. Moreover, assessing knowledge at the time of possession, as is now required by Rehaif, is an entirely different exercise than analyzing knowledge when a defendant is in the midst of a formal legal process. In the course of everyday life, a defendant could conceivably have a gun, and have a particular status, without being aware of his status. That is different than if, post-arrest, a defendant is presented with his prior record, and does not contest its contents then and there. A defendant’s failure to contest a felony record during legal proceedings is not dispositive of knowledge of status at the time of possession one way or the other.

To be fair, the Court did note that there may be some cases in which a defendant “who is a felon can make an adequate showing on appeal that he would have presented evidence” that he did not know of that status at the time of possession. But that abstraction—without more information or examples—does not equal the high burden that the government would have to meet at a post-Rehaif § 922(g) trial to prove knowledge of status. Simply put, the opinion could have and should have provided lower courts with some sense of what a sufficient “showing” would look like.

B. Problematic Presumptions

The Court’s nearly-conclusive language regarding felons’ knowledge of their status veers dangerously close to issuing a mandatory presumption: an evidentiary device commanding a jury to find an “elemental fact upon proof of [a] basic fact,” and which can only be overcome by a defense rebuttal. Here, a mandatory presumption would require a jury to find that a defendant has knowledge of his status—thus meeting an element of § 922(g)—solely upon a showing that the defendant is a convicted felon. In response, one might argue that Greer deals only with postconviction appeals, particularly on plain error, and thus because the defendant already has the burden to prove

151 Id. at 2097.

152 Justice Sotomayor’s opinion makes these points and seems to implicitly chide the majority for suggesting that felons almost always know their criminal history. See id. at 2103 (Sotomayor, J., concurring in part and dissenting in part) (“Today’s decision also should not be read to create a legal presumption that every individual convicted of a felony understands he is a felon. The Government must prove the knowledge-of-status element beyond a reasonable doubt, just like any other element.”).

153 See Cnty. Ct. of Ulster Cnty., N.Y. v. Allen, 442 U.S. 140, 157 (1978) (“[A mandatory presumption] tells the trier [of fact] that he or they must find the elemental fact upon proof of the basic fact . . . .”).

154 See KADISH, ET AL., CRIMINAL LAW, supra note 33, at 52-53 (describing the Supreme Court’s approach to mandatory presumptions).
the four prongs of Olano, the presumptions are not problematic. But the Court’s holding explicitly contemplates assessing knowledge of status in a jury trial context: “absent a reason to conclude otherwise,” the majority wrote, “a jury will usually find that a defendant knew he was a felon based on the fact that he was a felon.” Even in trial contexts, the Court insinuates that the burden to show why a defendant did not know he or she was a felon rests with that defendant, when it really should rest with the government.

Of course, saying that a jury will “usually” conclude something is different from saying that it must conclude something. This hedge puts the Court’s statements into friendlier territory: that of a permissive inference, which allows, but does not require, the jury to “infer [an] elemental fact from proof . . . of [a] basic one.” But then in an instant, the Court seems to backtrack and subject the element once again to a mandatory presumption: it suggests the defendant would have to make an “adequate showing [of] . . . evidence in the district court” to rebut a jury’s inclination to ascribe knowledge of status from the mere fact of status. This is irreconcilable with the intrinsic nature of a permissive inference, which “places no burden of any kind on the defendant.” Indeed, the Court’s own precedent illustrates that this presumptive language, if ever brought to bear in a trial setting, would violate a defendant’s due process rights. In several cases, the Court has struck down criminal presumptions that strip the jury of its ability to decide whether an element’s required mens rea has been proven beyond a reasonable doubt, even when such a presumption is reasonable.

At best, the Court is playing fast and loose with these crucial evidentiary tools, which have massive ramifications for defendants and the arc of a case, including the monumental decision of whether to plead guilty or proceed to trial. At worst, it is directing the use of a “troublesome evidentiary device” that typically is acceptable if and only if “over the universe of all cases in

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155 **Greer**, 141 S. Ct. at 2097 (emphasis added).
156 **Cnty. Ct. of Ulster**, 442 U.S. at 157.
157 Compare **Greer**, 141 S. Ct. at 2097 (contemplating an “adequate showing” of evidence sufficient to rebut presumed knowledge of status), with **Cnty. Ct. of Ulster**, 442 U.S. at 157 (discussing the defendant’s only avenue of overcoming a mandatory presumption as “com[ing] forward with some evidence to rebut the presumed connection between the two facts”).
158 **Cnty. Ct. of Ulster**, 442 U.S. at 157.
159 See Francis v. Franklin, 471 U.S. 307, 311-13 (1985) (striking down a jury instruction which directed a jury to presume that “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts”); Carella v. California, 491 U.S. 263, 265 (1989) (per curiam) (“Such [presumptive jury] instructions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.”). For additional background on the constitutionality of criminal presumptions, see generally PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE §§ 5.09-5.10 (5th ed. 2018).
160 **Cnty. Ct. of Ulster**, 442 U.S. at 157 (describing mandatory presumptions).
general, the presumed relationship holds true beyond a reasonable doubt."

Real-world examples, the vast differences in the ways in which criminal cases are adjudicated, and the downright confusing nature of the criminal process show why that just cannot be so. The Court should have made clear that any presumption of knowledge of status from only a prior conviction is not mandatory, but rather could be used—sparingly—as solely a permissive inference.

Regardless of the technicalities of permissive inferences and mandatory presumptions, the Greer Court’s sojourn into the minds of would-be § 922(g) triers-of-fact undermines the promise of Rehaif. Imagine if the Court had, in a case like Staples, held that people who possess guns that can shoot automatically are aware that their gun is capable of doing so simply by virtue of having the gun. That would completely gut the Court’s measured departure away from imputing strict liability onto serious felonies. It would turn mens rea into mere window dressing, rather than an element of the offense that the government must prove beyond a reasonable doubt. Previously convicted felons who are otherwise law-abiding deserve the right to have the government prove they knew they were breaking the law when they picked up the gun.

C. Greer’s Impact

The implications of the Greer holding are far-reaching. Consider, first, the Supreme Court precedent that lower courts can turn to when assessing a defendant’s claim on a direct appeal or § 2255 motion that he did not know he was a felon when he possessed a gun. From the Rehaif decision itself, those courts have the Supreme Court’s statement that it “express[es] no view . . . about what precisely the Government must prove to establish a defendant’s knowledge of [felon] status.” And second, from Greer, those courts can consider the Court’s litany of statements that imply that convicted felons always know of that status. As the Greer court recognized, a

161 KADISH, ET AL., CRIMINAL LAW, supra note 33, at 52.

162 See, e.g., United States v. Olender, 338 F.3d 629, 631-36 (6th Cir. 2003) (describing a defendant’s confusion regarding his status after a recordkeeping error and complicated plea agreement); United States v. Games-Perez, 667 F.3d 1176, 1137-38 (10th Cir. 2012) (holding that the defendant was still guilty of violating § 922(g)(1) despite the trial court judge’s erroneous suggestions that his plea deal would not result in a felony conviction).

163 See In re Winship, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).


165 The Court uses language to this effect no fewer than five times. See Greer v. United States, 141 S. Ct. 2090, 2095 (2021) (“[I]ndividuals who are convicted felons ordinarily know that they are convicted felons.”); id. at 2097 (“If a person is a felon, he ordinarily knows he is a felon.”); id. (“[A] jury will usually find that a defendant knew he was a felon based on the fact that he was a felon.”);
defendant trying to show that he did not have knowledge of status “faces an uphill climb” in that attempt.166 That may have been the case before Greer, but afterwards, it is extraordinarily so. Indeed, with this language on the books, all signs point to summary rejections of even solid arguments that a defendant did not know his status. Not even two years out from the decision, district and appellate courts are using Greer’s “felons know they’re felons” maxim to deny Rehaif-based appeals.167 As it stands, the Court provides no direction or examples of what might be a sufficient showing for lack of knowledge, and lower courts are taking Greer’s “must have known” conclusion to the bank.

There are ample reasons why the lower courts should not be doing so, not least of which lie in examples illustrated by real cases. One example is the Games-Perez case, discussed in the Introduction, in which the defendant was affirmatively told by the judge who adjudicated his predicate felony conviction that he was not being convicted of a felony at all.168 Another example is the case of Kevin Olender, whose predicate state felony was wrongly entered into a state records system, and whose family members swore was adjudicated as a misdemeanor.169 These are real cases, not abstractions, and the Court could have used them as examples of situations that should give judges pause when they consider knowledge of status.

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id. ("[I]f a defendant was in fact a felon, it will be difficult for him to carry the burden on plain-error review of showing a ‘reasonable probability’ that, but for the Rehaif error, the outcome of the district court proceedings would have been different."); id. at 2098 (“Convicted felons typically know they’re convicted felons.” (quoting United States v. Lavalais, 960 F.3d 180, 184 (5th Cir. 2020))).

166 Greer, 141 S. Ct. at 2091.

167 See, e.g., United States v. Coats, 8 F.4th 1228, 1237-38 (11th Cir. 2021) (quoting sixteen times from Greer to justify concluding that “no reasonable juror could have found” that the defendant was unaware of his felon status); United States v. Adams, 36 F.4th 137, 152-53 (3d Cir. 2022) (“Because [Adams] never served more than 364 days in custody for any of his prior convictions, he contends that he . . . lacked ‘knowledge of status’ . . . . [But] Greer, in effect, created a presumption that the ‘knowledge-of-status’ element is satisfied whenever a § 922(g)(1) defendant is, in fact a felon . . . . The presumption of knowledge applies to Adams because . . . he had been convicted of four felonies . . . .”); United States v. Guthary, No. 19-4787, 2022 WL 3126938, at *2 (4th Cir. Aug. 5, 2022) (“[The defendant] attempts to [show he was unaware of his status] by arguing that he served only probationary sentences . . . . But as the Supreme Court explained in Greer: ‘ . . . a felon . . . ordinarily knows he is a felon.’” (quoting Greer, 141 S. Ct. at 2097)). But see United States v. Barronette, 46 F.4th 177, 200 (4th Cir. 2022) (’Greer explains that it is an ‘uphill climb’ to show a reasonable probability that the outcome would have been different in a § 922(g)(1) prosecution for people who are in fact felons . . . . [This] is a different case from Greer. As someone not convicted of a crime labeled as a felony, [the defendant] might not face the same uphill battle . . . .’). As of March 19th, 2023, a Westlaw search shows that 1,141 case documents cite Greer. Citations to Greer, WESTLAW, https://www.westlaw.com (navigate to Greer case page; then click on “citing references” tab).

168 United States v. Games-Perez, 667 F.3d 1136, 1138 (10th Cir. 2012).

169 See United States v. Olender, 338 F.3d 629, 631 (6th Cir. 2003) (“The records of the Wayne County Circuit Court [reflecting a felony conviction] . . . had been erroneously entered.”).
Relatedly, the Greer opinion assures defendants that, on appeal, if they have evidence that gives rise to the possibility that they did not know their status, all they have to do is say so. But this is a hollow promise. The Court neither commands lower courts to give defendants an opportunity to present that evidence, nor does it instruct them on how they should probe for such evidence. Should it be via supplemental briefing? An evidentiary hearing? This is relevant because there are a great number of appeals that happened after Rehaif but before Greer. In that period, defendants who challenged their convictions knew the law had changed but did not know the way to clear the nearly insurmountable bar to a successful lack-of-knowledge argument. This is aggravated by the likelihood that most of these challenges—particularly on habeas—proceed pro se. Nevertheless, at least some courts, even in the face of evidence that defendants might not have known their felony status, used Greer to deny appeals without giving defendants further post-Greer opportunities to craft arguments of their own that would comport with Greer’s demands.

Consider the following case as an example. In 2017, Daniel Ray Dace pleaded guilty to being a felon-in-possession. The predicate felony was a state court judgment of conviction that resulted in a deferred sentence; Dace did not spend a day in prison. When his original course of appeals ran out on the federal charge, his judgment of conviction became final on direct review. In October 2019, on the basis of the Rehaif decision a few months earlier, Dace filed a § 2255 motion to vacate his conviction, which the district court initially granted, and then subsequently denied on reconsideration. The Tenth Circuit, however, granted a certificate of appealability, and Dace timely appealed. While his appeal was pending, the Supreme Court decided Greer. In its opinion denying Dace’s appeal, even in light of the fact that Dace’s previous conviction resulted in no prison time, the Tenth Circuit relied on Greer to hold that “a felon’s faulty memory is usually insufficient to establish he did not know he was a felon.” Dace was not given a chance to prophylactically respond to Greer’s holding.

There is also a startling asymmetry at play here. When defendants present challenges to their § 922(g) convictions, the government and courts are, in most situations pre-Greer, and certainly post-Greer, given the opportunity to

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170 Greer, 141 S. Ct. at 2097 (“[A] defendant who is a felon can [attempt to] make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon . . . .”).
172 Id. at 1078.
173 Id. at 1077.
174 Id. at 1082.
177 Id. at *3.
use a defendant’s entire record to demonstrate why that person knew of his prohibited status. Such an opportunity has the potential to “deprive[] a defendant of a meaningful opportunity to refute the government’s evidence and present a complete defense.”\textsuperscript{178} The defendant, on the other hand, is not always given the opportunity to fully flesh out his own arguments for why he did not have knowledge of status. This is particularly true for situations when, as discussed above, a defendant knew to make a \textit{Rehaif}-based argument, but then faced a court that used \textit{Greer} to treat his knowledge of status as a presumptive fact based on a prior felony conviction alone. Returning to \textit{Dace}, the district and appeals courts were more than willing to respond sua sponte to Dace’s argument that he did not know of his felon status because he never spent time in prison. They both asserted on their own that such a lapse in memory could not have been the case, given that Colorado’s Rules of Criminal Procedure would have required the state court to inform him that he was going to be convicted of a felony upon his guilty plea to that prior felony.\textsuperscript{179} But they even admitted that they could not ascertain whether that warning was actually given.\textsuperscript{180} The courts had the luxury of making that argument when they knew all they had to do was meet \textit{Greer}’s lax “felons know they’re felons” holding, but Dace did not have the ability to respond. Given that the statute of limitations for § 2255 motions is significantly longer than for direct review, and is regularly tolled for any number of reasons, this asymmetry may impact tens of thousands of cases.

While the \textit{Greer} decision promotes expedient determinations of these appeals, the Supreme Court’s role is not to make judges’ and prosecutors’ jobs easier. Rather, it is to set forth holdings that are reliable and hold true across cases with disparate fact patterns and circumstances. Here, I believe it failed at that charge. Affirming a conviction (or denying a § 2255 motion) with a quick citation to \textit{Greer} is not the appropriate answer in all cases, and defendants who may be able to show actual innocence of the charge as it exists post-\textit{Rehaif} should be given a chance to do so on remand.

To be sure, despite changes in the law, it remains true that most felons know they are felons. But some do not. If even one percent of the roughly 7,000 annual § 922(g) charge adjudications\textsuperscript{181} are wrongly decided based on


\textsuperscript{179} See \textit{Dace}, 2021 WL 4998925, at *2 (“[T]he court also recognized that he did not dispute that he was informed under Colorado Rule of Criminal Procedure 11(b)(4) of the potential penalty he faced when he pleaded guilty to his prior felony.”); see also COLO. R. CRIM. P. 11(b)(4) (“The court shall not accept a plea of guilty . . . without first determining that the defendant . . . [U]nderstands the possible penalty or penalties . . . .”).

\textsuperscript{180} \textit{Dace}, 2021 WL 4998925, at *2 n.2 (“The court noted, however, that the record does not conclusively establish that [Dace] received the advisement.”).

\textsuperscript{181} 2021 JUDICIARY DISPOSITION DATA, supra note 11 (displaying 6,987 § 922(g) charges in 2021).
Greer’s presumption, seventy defendants will wrongly face a prison sentence of up to fifteen years. The promise of Rehaif is that defendants’ knowledge of status—the very thing that turns an otherwise legal gun possession illegal—should have to be proven to a jury beyond a reasonable doubt. Greer should not undo this in a postconviction world. A pithy, slogan presumption gives defendants short shrift when they are entitled to a more probing test. I now turn to describe the factors that should be considered in that test.

IV. ADDRESSING GREER’S SHORTCOMINGS: FACTORS FOR CONSIDERING KNOWLEDGE OF STATUS

Greer’s troublesome presumption should not be left alone: lower courts first, and then the Supreme Court, should address its shortcomings by recognizing that knowledge of felon status is more nuanced than a blanket assumption. To do this effectively, district and appeals courts should be willing to buck the trend of not giving defendants further opportunities to respond to Greer, and instead allow defendants to put forth their best arguments for why they did not know their status at the time of possession. First, courts should be flexible and allow for supplemental briefings and evidentiary hearings to fully draw out the circumstances surrounding a defendant’s prior felony adjudication. Second, courts should be willing to start promulgating specific factors, like the ones put forth in this Comment, to contemplate when assessing knowledge of status. They should then use those factors consistently to create a more uniform manner of adjudication for § 922(g) cases, which are ubiquitous and not showing any signs of a slowdown. Finally, the Supreme Court should consider what factors the lower courts are utilizing and articulate a clear test that all federal courts across the country can easily follow. This Part proposes my suggested factors and explains why each of them can guide a court’s determination of whether a defendant knew of his status at the time of possession.

182 In the years 2019 to 2022, despite the upheaval caused by Rehaif and Greer, the number of § 922(g) convictions has not meaningfully changed. Compare U.S. CTS., STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (select table number D-4 for period ending Dec. 31, 2019), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables [https://perma.cc/C6QK-4ZCH] (displaying 6,387 § 922(g) convictions in 2019), with 2020 JUDICIARY DISPOSITION DATA, supra note 124 (displaying 5,118 § 922(g) convictions in 2020), and 2021 JUDICIARY DISPOSITION DATA, supra note 11 (displaying 6,513 § 922(g) convictions in 2021), and U.S. CTS., STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (select table number D-4 for period ending Dec. 31, 2022), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables [https://perma.cc/C6QK-4ZCH] (displaying 6,665 § 922(g) convictions in 2022).
A. Nature of Prior Record

First, the nature of the defendant’s prior record is probative. Traditional criminal law doctrine divides offenses into two main categories: *mala in se* and *mala prohibita*. *Mala in se* crimes are the ones we traditionally think of, like murder, robbery, or sexual assault,\(^{183}\) whereas *mala prohibita* crimes are not necessarily evil in and of themselves, but rather because the state has regulated them as criminal.\(^{184}\) Naturally, *mala in se* crimes tend to be more severe in nature, and thus carry harsher punishment. If a defendant’s record includes a *malum in se* offense, which tend to be felonies, it suggests that he is more likely to have knowledge of his felon status. In the same vein, courts should look closely at the crimes in a defendant’s prior record to determine whether any of the crimes present could have been charged as misdemeanors. If the reason why a defendant has a prior felony on his record owes to some obscure statutory grading provision that changed a traditional misdemeanor offense to a felony, and such an adjustment was not made clear to him, it is more likely that person might not understand that he is a felon.

B. Notice of Collateral Effects

Second, courts should consider the extent to which a defendant was apprised, during the proceedings relating to the predicate felony, that such a conviction would render them a convicted felon and cause them to lose rights. Indeed, the rights one loses upon being convicted of a felony are substantial. For example, in Pennsylvania, convicted felons lose the right—just to name a few—to hold elected office,\(^{185}\) serve on a jury,\(^{186}\) and borrow student loans.\(^{187}\) In some states, a felony conviction triggers permanent disenfranchisement.\(^{188}\) So during a plea colloquy, if a defendant on the cusp of pleading guilty is reminded of his soon-to-be felon status and told what rights he is giving up, he should be tasked with remembering that he will soon be a felon, and such reminders should suggest that, even years later, a convicted felon knows he is

\(^{183}\) *Malum in Se*, BLACK’S LAW DICTIONARY (11th ed. 2019) ("A crime or an act that is inherently immoral . . . ").

\(^{184}\) *Malum Prohibitum*, BLACK’S LAW DICTIONARY (11th ed. 2019) ("An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.").

\(^{185}\) See PA. CONST. art. II, § 7 ("No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this Commonwealth."); see also 53 PA. CONS. STAT. § 5508.3(c)(3) (defining "infamous crime" as "any other violation . . . which is classified as a felony").

\(^{186}\) 42 PA. CONS. STAT. § 4502(a)(3).

\(^{187}\) 22 PA. CODE § 121.6(a)(1).

\(^{188}\) See, e.g., VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.").
such. On the other hand, if it is clear that a defendant was not explicitly told he was pleading guilty to a felony, a claim of lack of knowledge is more reasonable. Additionally, considering the confusing way in which the felon-in-possession subsection is textually presented, courts should consider as part of this factor the specific language used in the previous adjudication (i.e., “felony” versus “crime punishable by more than a year in prison”).

Relatedly, as part of considering the extent to which a defendant was properly apprised by the court of the type of his prior offense, courts should consider that counsel may likely play a role in properly informing—or misinforming—their clients. Such a proposition is supported by the experience of an attorney who regularly represents clients seeking expungements and pardons. That attorney—Taylor Pacheco—told me that clients misunderstanding their record is something that happens with regularity. Such misconceptions, she explained, can often be traced back to those clients’ previous lawyers, who fail to communicate exactly what type of crime their client was convicted of and what rights they relinquish as a result. Thus, clients do not always have a clear picture of what their previous record really contains. Though I do not extrapolate nationally from one lawyer’s experience, it does suggest that such misunderstandings exist, thus undermining an assumption that defendants represented by counsel are always properly apprised of the felony or misdemeanor classification of their charges. If defendants leave the adjudicatory process of their prior felonies misinformed, they deserve at least a chance in a supplemental briefing, if not an evidentiary hearing, to explain their confusion. So too can an attorney from the prior felony adjudication shed light in briefings or hearings on a defendant’s purported confusion.

C. Length of Prior Incarceration

The third factor is simple. If a defendant’s prior felony caused him to spend any significant time in prison, say, over one year, then that is strongly
suggestive that that person knew of his felon status. Of course, there can be exceptions, such as if a person could not pay bail on a misdemeanor and, as a result, is detained for a long period. But particularly in cases where the defendant spent more than a year in prison postconviction, the question of whether he knew he was a felon should not be a difficult one. Conversely, in cases where the defendant received a deferred sentence on the predicate felony, regardless of length, but spent no actual time in prison, courts should be wary of imputing knowledge of status onto the defendant by virtue of that deferred sentence alone.

D. Time Elapsed Between Prior Conviction & Gun Possession

Fourth, courts should consider the time elapsed between the prohibited possession of the firearm and the last potential predicate felony. Memory is fallible, and a person’s recollection of the specifics of a prior conviction may fade over time. Anecdotally, as part of my pro bono work as a law student, I screen clients who are seeking to have their nonconviction criminal records expunged or are looking to apply to have their convictions pardoned by the state. The last step in the screening process involves reviewing clients’ criminal histories with them to make sure they understand what is on their record. Each time I participate in client intakes—during which twenty to thirty clients are typically interviewed—there is at least one client who is surprised to learn of some aspect of his or her record; it might be a particular charge that he or she had forgotten about, a court date that he or she missed that resulted in a default judgment, and so forth. Many of the records in question date back to the 1950s and 60s. If a person’s last felony dates back this far, the time gap suggests that the individual’s recollection of his or her criminal history may not be complete.

Accordingly, any court reviewing a § 922(g)(1) plea or conviction should consider the following when assessing knowledge of status: (1) the nature of the prior offense(s); (2) the extent to which the defendant was apprised of felony status and its consequences during predicate proceedings; (3) prison time served; and (4) the time elapsed between gun possession and the prior predicate felony. Individual circumstances can and will likely bring other factors to the fore, and courts should consider those just the same. The factors I discuss here, however, tend to be ones that can be assessed with respect to every prior felony, and so utilizing them would help make these judgments about knowledge of status more uniform.192 It will almost certainly be the

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192 The importance of uniformity among court decisions has been exalted since time immemorial. See e.g., Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (discussing the motive behind the Supreme Court’s appellate review of state court decisions as “the importance, and even necessity of uniformity of decisions throughout the whole United States”).
case that using them leads to substantially more affirmances than reversals and remands, but courts’ adoption of these factors would help clarify the Supreme Court’s oversimplified conclusion that felons know they’re felons, and using them consistently would give defendants the benefit of a full and searching analysis of all aspects of their records.

CONCLUSION

The felon-in-possession statute impacts the lives of thousands of defendants every year, and each and every one of them deserves a fair shake. The *Rehaif* decision’s transformation of the statute’s status element from one of mere strict liability to requiring knowledge represented a welcome change in conformity with the trend of inferring mens rea requirements onto statutes, particularly for serious crimes. But the *Greer* decision runs the risk of undoing all of that. In one fell swoop, the Supreme Court issued a vastly oversimplified holding that assumes universal simplicity in situations that can be marred by complexity and confusion.

It does not need to be that way. All felons do not necessarily know they are felons, and courts should not presume they do. As this Comment has shown, the complexities of statutes and of criminal adjudicative processes more generally—at both the state and federal levels—may lead defendants to misunderstand their prior records. Post-*Rehaif*, these individuals are no longer legally guilty. Nor should our society consider them morally blameworthy: our justice system should not expend retributive or deterrent effort on an individual who, actually believing he has no felony record, merely picks up a gun on, for example, an otherwise legal hunting outing. In order to ensure punishment of only individuals truly guilty of the felon-in-possession offense as it exists today, courts should at once begin assessing knowledge of status through the lens of the factors I have put forth in this Comment. Such a change is necessary to prevent the unjust punishment of innocent individuals.