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## Mass Incarceration, Deprivation of Rights, and Racial Subordination: *U.S. v. Gary*, the American Gun Control Narrative, and the Ugly Truth Behind 18 U.S.C. 922(g)

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MASS INCARCERATION, DEPRIVATION OF RIGHTS,  
AND RACIAL SUBORDINATION: *U.S. V. GARY*, THE  
AMERICAN GUN CONTROL NARRATIVE, AND UGLY  
TRUTH BEHIND 18 U.S.C. 922(G)

ANDREW J. ARDEN\*

*“Any unarmed people are slaves or are subject to slavery at any given moment. . . There is a world of difference between thirty million unarmed, submissive Black people and thirty million Black people armed with freedom and defense guns and the strategic methods of liberation.”<sup>1</sup>  
- Huey P. Newton, Co-Founder and Minister of Defense, Black Panther Party for Self Defense*

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\* J.D. Candidate, University of North Carolina School of Law, 2022. I want to thank the many people without whom the publication of this piece would not have been possible. To the Vol. 1 and Vol. 2 Editorial Boards, thank you for your helpful guidance and tireless hours of work on this incredible journal. To the entire staff of the North Carolina Civil Rights Law Review, I am beyond grateful for your hard work editing and cite checking this piece. To my partner Hannah, thank you for your unconditional love, support, and belief in me.

<sup>1</sup> Huey P. Newton, *In Defense of Self-Defense*, BLACK PANTHER, June 20, 1967, at A4.

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## INTRODUCTION

America’s history of white supremacy has influenced every facet of our legal system—gun control legislation is no different. Regulation of the right to bear arms has been highly racialized since the days of chattel slavery, when slaveowners sought to disarm and dominate Black Americans to prevent insurrection.<sup>2</sup> After the ratification of the Thirteenth Amendment, facially racist Black Codes were justified with openly racist rhetoric.<sup>3</sup> Following the passage of the Civil Rights Act of 1866 and the ratification of the Fourteenth Amendment, Black Codes openly denying Black Americans their Second Amendment rights gave way to more facially neutral policies,<sup>4</sup> but the intent to disarm and dominate Black Americans remained the same. In the past half century, the criminalization of gun ownership has disproportionately affected poor and Black Americans. As this paper demonstrates, although the methods of domination and oppression have changed, from chattel slavery to mass incarceration, the effect, oppression and maintenance of white supremacy through disarmament of Black Americans, remains unchanged. In many federal court districts, 18 U.S.C. §

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<sup>2</sup> Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67, 68–70 (1991).

<sup>3</sup> See generally *Black Codes*, HISTORY, <https://www.history.com/topics/black-history/black-codes> (last visited July 28, 2021).

<sup>4</sup> See, e.g., National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5849).

922(g) contributes more to the incarceration of disproportionately poor and Black Americans than any other federal statute.<sup>5</sup>

This recent development explores *United States v. Gary*, a recent Fourth Circuit case interpreting § 922(g),<sup>6</sup> and places it squarely in the context of this racialized history. Section 922(g) criminalizes possession or attempt to possess a firearm by a number of classes of individuals, including felons,<sup>7</sup> those addicted to a controlled substance, those convicted of a misdemeanor domestic violence offense, and those with an active domestic violence protective order against them.<sup>8</sup> The vast majority of defendants charged under § 922(g) are charged under § 922(g)(1), for their status as a felon.<sup>9</sup> In *Gary*, the Fourth Circuit Court of Appeals held that when a court fails to confirm that a defendant is aware of their relevant status, that court has committed a structural error that isn't amenable to plain error review, and the case must automatically be remanded.<sup>10</sup> This decision contradicts the nine other circuit courts to address the issue, which have held that a court's failure to confirm a defendant's awareness of their qualifying status is not a structural error.<sup>11</sup> A motion for the court's *en banc* review was denied.<sup>12</sup> In a concurrence with the denial of an *en banc* hearing, Judge Wilkinson suggested that the panel's decision was "so incorrect and on an issue of such importance that I think the Supreme Court should consider it promptly. Any

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<sup>5</sup> See generally, U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon\\_In\\_Possession\\_FY20.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf).

<sup>6</sup> 954 F.3d 194 (4th Cir. 2020).

<sup>7</sup> This recent development uses the term "felon" to refer to people convicted of a felony. While people-first language is generally preferred, felon is used here because this term refers to the legal status of these individuals. Individuals convicted of a felony are referenced this way in practice and statute, and the thesis of this recent development highlights how § 922(g)(1) reduces people convicted of a felony to their status.

<sup>8</sup> 18 U.S.C. § 922(g)(1)-(9).

<sup>9</sup> See U.S.SENT'G COMM'N, *supra* note 5.

<sup>10</sup> 954 F.3d at 198.

<sup>11</sup> See *United States v. Burghardt*, 939 F.3d 397, 403–05 (1st Cir. 2019); *United States v. Balde*, 943 F.3d 73, 97 (2d Cir. 2019); *United States v. Denson*, 774 F. App'x 184, 185 (5th Cir. 2019); *United States v. Hobbs*, 953 F.3d 853, 857–58 (6th Cir. 2020); *United States v. Williams*, 946 F.3d 968, 973–75 (7th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410, 415–16 (8th Cir. 2019); *United States v. Fisher*, 796 F. App'x 504, 510–11 (10th Cir. 2019); *United States v. McLellan*, 958 F.3d 1110, 1118–20 (11th Cir. 2020).

<sup>12</sup> *United States v. Gary*, 963 F.3d 420, 421 (4th Cir. 2020) (Wilkinson, J., concurring).

*en banc* proceedings would only be a detour.”<sup>13</sup> A petition was filed with the Supreme Court, which heard the case in April, 2021, consolidated in *Greer v. United States*.<sup>14</sup> The Supreme Court ultimately sided almost unanimously with Wilkinson – save for a partial concurrence and partial dissent by Justice Sotomayor – overturning the Fourth Circuit panel decision.

This recent development argues that the Fourth Circuit panel was right in determining that failure to confirm relevant status is a structural error, particularly given the racialized context of § 922(g) and the racialized history of U.S. gun control legislation generally. Part I of the piece provides background by exploring the racialized history of gun control legislation in America, as well as the racialized narrative that has repeatedly been used to justify gun control legislation. Part II discusses how modern gun control legislation, particularly 922(g)(1), contributes to the mass incarceration of Black and indigent defendants. Part III then examines the Fourth Circuit’s holding in *Gary* and the circuit split that case created on structural error in § 922(g) cases. Part IV next considers *Gary* in light of a history of racially motivated gun control legislation to demonstrate why the Fourth Circuit panel was correct in identifying Gary’s guilty plea as a structural error. It posits that, more broadly, the Supreme Court’s denial of plain error review in cases where a defendant does not know about their § 922(g) status will disproportionately harm Black and indigent defendants. A failure to recognize this error as a structural one only compounds the disproportionate impact of § 922(g) on Black and indigent defendants’ Second Amendment rights.

### I. THE RACIALIZED HISTORY OF GUN CONTROL LEGISLATION

Gun control in the United States has long been a tool of racial oppression. Throughout American history, firearm legislation has been used to disarm and criminalize Black and Hispanic Americans for the purpose of repressing social movements, forcing economic subserviency, and reinforcing White supremacy.<sup>15</sup> Acknowledgement of this context is

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<sup>13</sup> *Id.*

<sup>14</sup> 141 S. Ct. 2090 (2021).

<sup>15</sup> Tahmassebi, *supra* note 2, at 68–69.

paramount to understanding the implications of § 922(g) and *U.S. v. Gary* for the criminal justice system's disproportionately poor defendants of color.<sup>16</sup>

Throughout our country's history, gun control legislation has served as much as an experiment in racial control as it has served to protect Americans. The development of chattel slavery in the American colonies was accompanied by the enactment of laws restricting the right to bear arms on the basis of race.<sup>17</sup> In 1640, Virginia passed the first of these restrictive laws, which excluded Black people from the classes of people permitted to own a firearm.<sup>18</sup> Fear of slave uprisings in the later Seventeenth and early Eighteenth Centuries prompted further legislation restricting Black firearm ownership, including a 1712 law from South Carolina titled "An Act for the Better Ordering and Governing of Negroes and Slaves,"<sup>19</sup> and Virginia's "An Act for Preventing Negroes Insurrections," both of which instituted complete, race-based bans on firearm ownership by enslaved and freed Black Americans.<sup>20</sup>

Racial control through gun legislation continued even after the formal abolition of slavery following the American Civil War. Southern states adopted "Black Codes," or sets of regulations that denied newly freed Black citizens many of the rights that white citizens were constitutionally guaranteed.<sup>21</sup> These Black Codes frequently forbade freed Black Americans from bearing arms, rendering these newly-freed men and women defenseless against a litany of racially motivated assaults.<sup>22</sup> The overwhelming majority of these Black Codes remained in place until the passage of the Civil Rights Act in 1866.<sup>23</sup>

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<sup>16</sup> This essay does not attempt to argue the public safety merits of some forms of gun control legislation. Rather, it focuses on the implications when some forms of gun control are racially motivated in their creation or administration.

<sup>17</sup> Tahmassebi, *supra* note 8, at 69.

<sup>18</sup> *Id.*

<sup>19</sup> 7 Stat. 346 (S.C. 1690), *reprinted in* 1 THE STATUTES AT LARGE OF SOUTH CAROLINA 346 (D.J. McCord ed., 1840).

<sup>20</sup> 2 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS FROM VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 481 (W.W. Henning ed., 1823).

<sup>21</sup> *See generally Black Codes, supra* note 3.

<sup>22</sup> Tahmassebi, *supra* note 2, at 71.

<sup>23</sup> 78 U.S.C. § 241.

The Civil Rights Act, and the Fourteenth Amendment to the U.S. Constitution which gave Congress the power to pass it, required States to pass laws that were racially neutral—at least on their face.<sup>24</sup> Lawmakers had little difficulty pivoting to facially neutral laws intended to disarm Blacks. Some states such as Tennessee and Arkansas responded by banning cheap handguns, the only firearms that newly freed Black people could usually afford, through “Saturday Night Special” laws which criminalized distribution of small, low quality, and easily concealable handguns.<sup>25</sup> Other states, including Alabama, Texas, and Virginia, chose instead to price Blacks and poor whites out of gun ownership through the imposition of exorbitant business and transaction taxes on handguns.<sup>26</sup> In 1902 South Carolina banned all pistol sales except to sheriffs and their special deputies, a group which often included numerous members of the Ku Klux Klan.<sup>27</sup> In 1911, New York, fueled by racial stereotypes about Black Americans and immigrants, and in an effort to disarm union organizers, enacted the Sullivan Law, which made handgun ownership illegal for anyone without a police-issued permit.<sup>28</sup> These permits were then systematically denied to the very groups the Sullivan Law intended to disarm.<sup>29</sup> Similar police permit systems followed in Arkansas, Hawaii, Michigan, Missouri, New Jersey, North Carolina, and Oregon.<sup>30</sup> As a result of these restrictive gun policies, Black Americans were left without firearm protection as violent white supremacists, including members of the Klan, once again became a major force of racialized violence,

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<sup>24</sup> *Id.*

<sup>25</sup> Tahmassebi, *supra* note 2 at 73. *See generally* STEVE EKWALL, THE RACIST ORIGINS OF US GUN CONTROL: LAWS DESIGNED TO DISARM SLAVES, FREEDMEN, AND AFRICAN-AMERICANS, <https://www.sedgwickcounty.org/media/29093/the-racist-origins-of-us-gun-control.pdf> (providing a timeline of racially disparate gun control legislation in America from 1640–1995).

<sup>26</sup> Tahmassebi, *supra* note 2, at 74–75.

<sup>27</sup> *See id.* at 76; Timothy Winkle, *When Watchmen Were Klansmen*, NAT’L MUSEUM AM. HIST., BEHRING CTR. (Apr. 28, 2020), <https://americanhistory.si.edu/blog/watchmen>; *see also, e.g., Klan Chief Is Deputy Sheriff*, N.Y. TIMES (Sept. 28, 1968).

<sup>28</sup> Tahmassebi, *supra* note 2, at 77.

<sup>29</sup> *Id.* at 77–79.

<sup>30</sup> *Id.*

perpetrating beatings, lynchings, and murders against unarmed Black Americans throughout the early twentieth century.<sup>31</sup>

Racialized gun control laws were also enacted at the federal level. Lawmakers passed the first federal gun control legislation of the twentieth century, the National Firearms Act (NFA), in 1934.<sup>32</sup> The law was supported by the NRA and imposed steep tax and registration requirements on so-called “gangster” guns, machine guns, and sawed-off shotguns.<sup>33</sup> These restrictions disproportionately disarmed Black Americans and other poor minorities, who were largely priced out of the firearms market en masse.<sup>34</sup> A larger and more racially-motivated step in federal gun control legislation came thirty years later, with the Gun Control Act of 1968.<sup>35</sup> Here, history is unequivocal: the Gun Control Act was a racially motivated reaction to the violence of the Civil Rights Movement and the growing agency of Black Americans that was afforded in part by their utilization of firearms.<sup>36</sup> Robert Sherrill, former correspondent for *The Nation* and gun control advocate, argued in his book *The Saturday Night Special* that “The Gun Control Act of 1968 was passed not to control guns but to control blacks, and inasmuch as a majority of Congress did not want to do the former but were ashamed to show that their goal was the latter.”<sup>37</sup>

The racist intent of the Gun Control Act is illustrated by lawmakers’ reactions to the Black Panther Party. In the face of police violence against Black Americans, the Black Panther Party had begun openly carrying

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<sup>31</sup> *Id.* at 78; see also David Schenk, *Freedmen with Firearms: White Terrorism and Black Disarmament During Reconstruction*, 4 GETTYSBURG COLL. J. CIV. WAR ERA 9 (2014) (detailing the history of Black disarmament in the reconstruction and post reconstruction south and KKK targeting of unarmed Blacks).

<sup>32</sup> National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 5849).

<sup>33</sup> Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/>.

<sup>34</sup> J. Baxter Stegall, *The Curse of Ham: Disarmament Through Discrimination - the Necessity of Applying Strict Scrutiny to Second Amendment Issues in Order To Prevent Racial Discrimination by States and Localities Through Gun Control Laws*, 11 LIB. U. L. REV. 272, 299–300 (2016).

<sup>35</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-31).

<sup>36</sup> Winkler, *supra* note 31.

<sup>37</sup> ROBERT SHERILL, *THE SATURDAY NIGHT SPECIAL* 280 (1973).

handguns and assault rifles by 1967.<sup>38</sup> Members of the party engaged in “copwatching,” openly carrying at protests and in the streets to police the police and protect Black Americans from police violence.<sup>39</sup> On May 2, 1967, 30 fully-armed Black Panthers demonstrated at the California State Capitol in protest of government infringement on their right to bear arms – particularly Republican Assemblyman Don Mulford’s bill to repeal open carry in California.<sup>40</sup> This demonstration further stoked white establishment fear of Black armament, and the aforementioned bill was quickly passed, with the Mulford Act being signed into law by then-California Governor Ronald Reagan on July 28, 1967.<sup>41</sup> Federally, the attitude of the white establishment mirrored that of California, as the Mulford Act was closely followed nationally by the passage of the Gun Control Act of 1968, with support of unlikely allies such as the NRA.<sup>42</sup> The Gun Control Act imposed a number of restrictions on the sale and transfer of firearms, including restricting the importation of cheap military surplus weapons popular with the Black Panther Party and the Black community.<sup>43</sup> The law also prohibited certain people from owning guns, including people who had been convicted of a felony.<sup>44</sup> That section of the law is now codified at 18 U.S.C. § 922(g).

Racially motivated gun control did not end with the Gun Control Act of 1968. As part of a national movement towards “tough on crime” policy, the Chicago Housing Authority (CHA) and the Chicago Police Department enacted and enforced Operation Clean Sweep, an official policy which applied to all housing units owned and operated by the CHA, in 1988.<sup>45</sup> The program confiscated firearms from public housing tenants through

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<sup>38</sup> See Winkler, *supra* note 33.

<sup>39</sup> See John Metta, *Racism and the Black Hole of Gun Control in the US*, AL JAZEERA (Nov. 23, 2019), <https://www.aljazeera.com/features/2019/11/23/racism-and-the-black-hole-of-gun-control-in-the-us>.

<sup>40</sup> Thad Morgan, *The NRA Supported Gun Control When Black Panthers Had Weapons*, HISTORY (Aug. 30, 2018), <https://www.history.com/news/black-panthers-gun-control-nra-support-mulford-act>.

<sup>41</sup> *Id.*

<sup>42</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-31); see Morgan, *supra* note 40.

<sup>43</sup> See Winkler, *supra* note 33.

<sup>44</sup> 18 U.S.C. § 922.

<sup>45</sup> Ekwall, *supra* note 25, at 11.

warrantless searches.<sup>46</sup> The constitutionality of operation clean sweep was repeatedly challenged, and eventually in 1994 it was struck down for violating of the Fourth Amendment by a federal District Court for the Northern District of Illinois, Eastern Division.<sup>47</sup> Then-President Clinton responded by ordering his attorney general to help Chicago develop an alternative search policy, adding “[w]e must not allow criminals to find shelter in the public housing community they terrorize,”<sup>48</sup> scapegoating and villainizing Black felons in the process of justifying sweep policies. In a similar case, in 1990, the U.S. District Court for the Eastern District of Virginia upheld a ban imposed by the Richmond Housing Authority on the possession of all firearms, whether operable or not, in public housing projects.<sup>49</sup> The Clinton Administration tried and failed to enact a similar ban in federal public housing in 1994.<sup>50</sup>

As this history demonstrates, America’s long experiment with gun control legislation is the product of, and reinforces, a pervasive and racist narrative and political order. This narrative takes the shape of a dichotomy familiar in politics—that of the protective, heroic white homeowner who owns a firearm to hunt or protect his family, and the Black criminal “thug” who the white firearm owner needs protection from. This narrative has been constructed and deployed throughout American history to justify gun control policy that disarms and criminalizes Black Americans while affirming the right of white people to arm themselves at home, in public, and even in political spaces.<sup>51</sup> “Throughout the history of this country, the rhetoric of gun

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<sup>46</sup> *Id.*

<sup>47</sup> Pratt v. Chi. Hous. Auth., 848 F. Supp. 792, 796–97 (N.D. Ill. 1994).

<sup>48</sup> William J. Clinton, *Statement on the District Court Decision on Chicago's "Operation Clean Sweep"*, AM. PRESIDENCY PROJECT (Apr. 7, 1994), <https://www.presidency.ucsb.edu/documents/statement-the-district-court-decision-chicagos-operation-clean-sweep>. Though many felons are barred from public housing, some felons can qualify for § 8 HUD public housing programs, depending on how their state administers these programs and the specific felony of which they were convicted.

<sup>49</sup> Ekwall, *supra* note 25, at 12. See Richmond Tenants Org. v. Richmond Dev. & Hous. Auth., No. C.A. 3:90CV00576 (E.D.Va. Dec. 3, 1990).

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., *Coronavirus: Armed protesters enter Michigan statehouse*, BBC (May 1, 2020), <https://www.bbc.com/news/world-us-canada-52496514>; Abigail Censky, *Heavily Armed Protesters Gather Again At Michigan Capitol To Decry Stay-At-Home Order*, NPR (May 14, 2020), <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters->

rights has been selectively manipulated and utilized to inflame white racial anxiety, and to frame Blackness as an inherent threat.”<sup>52</sup> From Slave Codes motivated by the fear of insurrection, to the war on drugs and “law and order” rhetoric of the 1970s and 1980s,<sup>53</sup> racial subordination has remained a carefully (and not so carefully) couched motivator of American gun control legislation. In the past fifty years, such legislation has contributed extensively to the mass incarceration of Black and poor Americans.

## II. THE IMPACT OF §922(G) AND OTHER MODERN GUN CONTROL STATUTES ON MASS INCARCERATION OF BLACK AND INDIGENT DEFENDANTS

Gun control discourse in America is not only racist; it also continues to center criminalization as a solution to gun violence. Section 922(g) is among the laws that criminalizes firearm possession, and, as a result, has contributed significantly to the mass incarceration of Black and poor Americans. In 2019, 76,538 cases charging unlawful possession of a firearm by a felon were reported to the U.S. Sentencing Commission.<sup>54</sup> Of these, 7,647 involved convictions under § 922(g), accounting for over 85% of federal firearm-related convictions.<sup>55</sup> Nearly 98% of the people convicted were men, and over 55% were Black.<sup>56</sup> In the Middle District of North Carolina, § 922(g) cases accounted for over one third of total criminal convictions in 2019.<sup>57</sup> Over 97% of the people convicted of federal felonies for unlawful firearm possession were given active prison sentences averaging 64 months.<sup>58</sup> Of those sentenced to prison, 15.6% were convicted of violating

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gather-again-at-michigans-capitol-denouncing-home-order; Associated Press, White bystanders armed with rifles watch Floyd protesters march in Indiana, POLITICO (June 5, 2020), <https://www.politico.com/news/2020/06/05/george-floyd-protests-armed-white-bystanders-indiana-303143>.

<sup>52</sup> Ines Santos, *Do Black Americans Have the Right To Bear Arms?*, ACLU (July 16, 2021), <https://www.aclu.org/news/civil-liberties/do-black-people-have-the-right-to-bear-arms/>.

<sup>53</sup> MICHELLE ALEXANDER, *MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, 45–58 (2012) (discussing President Nixon’s use of “law and order” rhetoric to villainize Black Americans).

<sup>54</sup> U.S.SENT’G COMM’N, *supra* note 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

one or more statutes that carry a mandatory minimum sentence.<sup>59</sup> The draconian mandatory minimums for firearm-related offenses arise from 18 U.S.C. § 924(c), which establishes a series of mandatory minimum sentences ranging from five years to life for people who possess, brandish, or use a firearm during a crime involving drugs or violence—even if the gun was legally acquired or sitting at home unloaded during the commission of the offense.<sup>60</sup>

As with the war on drugs and other “tough on crime” policies, the war on guns has created a number of negative outcomes for communities which further increase incarceration including aggressive policing on city streets, like “stop-and-frisk” policies.<sup>61</sup> Police stop-and-frisk policies are often criticized for targeting people of color for drug possession and open warrants en masse.<sup>62</sup> While these criticisms are correct, stop-and-frisk has also been successfully weaponized to target and incarcerate gun owners of color.<sup>63</sup>

The impact of gun legislation on prison populations has been astounding. A 2014 report from the Bureau of Justice Statistics estimates that fifty-one thousand people were locked up in state custody for public-order offenses involving a weapon—“carrying, exhibiting, firing, possessing, or selling a weapon.”<sup>64</sup> That’s nearly four percent of the total prison population in the states.<sup>65</sup> In the federal system, 30,500 people were incarcerated on weapons offenses as of the end of September 2014, or 15.8 percent of the total federal prison population.<sup>66</sup> These numbers likely underrepresent the true incarcerated population that has been convicted of firearm offenses or had their sentences increased by a firearm charge, because the Bureau of Justice Statistics only classifies offenders by their most serious offense.<sup>67</sup> Nearly a quarter of the 94,678 federal prisoners classified as drug offenders in 2012

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<sup>59</sup> *Id.*

<sup>60</sup> 18 U.S.C. § 924(c).

<sup>61</sup> Daniel Denvir, *A Better Gun Control*, JACOBIN (Sept. 5, 2016), <https://www.jacobinmag.com/2016/09/gun-control-mass-incarceration-drug-war-nra-shooters>.

<sup>62</sup> *Id.*

<sup>63</sup> *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

<sup>64</sup> E. ANN CARSON, PH.D., U.S. DEPT. OF JUST., PRISONERS IN 2014, 16 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 30.

<sup>67</sup> *Id.*

(sentenced since 1998) received a sentence involving weapons.<sup>68</sup> Roughly three quarters of federal drug offenders are also Black or Hispanic.<sup>69</sup>

### III. U.S. v. GARY AND THE CIRCUIT SPLIT ON STRUCTURAL ERROR

#### A. *U.S. v. Gary*

The case of Michael Andrew Gary is just one example of how formerly incarcerated people of color become reinvolved in the criminal justice system as a result of § 922(g).<sup>70</sup> Gary was arrested on January 17, 2017, in Columbia, South Carolina, following a traffic stop for driving on a suspended license.<sup>71</sup> Gary's cousin, Denzel Dixon, was a passenger in the vehicle.<sup>72</sup> Officers searched Gary's vehicle and recovered a loaded firearm and a small plastic bag containing nine grams of marijuana.<sup>73</sup> Gary admitted to possessing both the gun and marijuana and was charged with the misdemeanor for violating South Carolina's open carry ban.<sup>74</sup>

Five months later, on June 16, 2017, Gary and Dixon were again approached by police while parked in a motel parking lot.<sup>75</sup> The officers reportedly smelled marijuana and decided to approach the vehicle.<sup>76</sup> When the officers confronted Gary and Dixon, they found Dixon holding a joint.<sup>77</sup> Gary and Dixon consented to a search of their persons, in which officers found large amounts of cash on both men and a digital scale in Dixon's

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<sup>68</sup> SAM TAXY, JULIE SAMUELS & WILLIAM ADAMS, U.S. DEPT. OF JUST., DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS 1 (2015), <https://www.bjs.gov/content/pub/pdf/dofp12.pdf>.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> *United States v. Gary*, 954 F.3d 194, 198 (4th Cir. 2020).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 199.

<sup>74</sup> *See* S.C. CODE ANN. § 16-23-30(C) (2008). In their panel opinion, the Fourth Circuit mistakenly characterized this as a “charge[ ] under state law with possession of a firearm by a convicted felon.” Gary's brief to the Supreme Court confirms that he was first charged under § 16-23-30. *See* Brief in Opposition at 1 n.1, *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020) (No. 20-444).

<sup>75</sup> *Gary*, 954 F.3d at 198.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 199.

pocket.<sup>78</sup> Gary and Dixon then consented to a vehicle search, where the officers found a stolen firearm, ammunition, “large amounts” of marijuana in the trunk, and baggies inside a backpack.<sup>79</sup> Gary claimed possession of the firearm and said that he regularly carried a firearm for protection.<sup>80</sup> Dixon admitted to possession of the marijuana.<sup>81</sup> Gary was arrested and charged under state law with possession of a stolen handgun.<sup>82</sup> At the time of the arrest, Gary had a prior felony conviction for which he had not been pardoned.<sup>83</sup>

Soon, federal authorities got involved. A federal grand jury in the District of South Carolina indicted Gary on two counts—one for his conduct on January 17, 2017 and one for his conduct on June 16, 2017—of possessing a firearm as a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).<sup>84</sup> The state charges were subsequently dropped, and Gary plead guilty to the two federal charges without a plea agreement.<sup>85</sup> During his plea colloquy, as required by law,<sup>86</sup> the government recited facts related to each of his firearm possession charges.<sup>87</sup> The court also informed Gary of the elements the government would be required to prove if he went to trial:<sup>88</sup> (1) that Gary had “been convicted of a crime punishable by imprisonment for a term exceeding one year;” (2) that he “possessed a firearm;” (3) that the firearm “travelled in interstate or foreign commerce;” and (4) that Gary possessed the firearm “knowingly; that is that he knew the item was a firearm and his possession of it was both voluntary and intentional.”<sup>89</sup> Gary was not however informed of an additional element of his offense—that “he knew he had the relevant status

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 198–199.

<sup>85</sup> *Id.* at 199.

<sup>86</sup> *See* FED. R. CRIM. P. 11(b)(3).

<sup>87</sup> *Gary*, 954 F.3d at 199.

<sup>88</sup> *Id.* Explaining the elements of each offense to which the defendant pleads guilty ensures that the plea is “voluntary and intelligent,” and so constitutionally valid. *See* *Brady v. United States*, 397 U.S. 742, 747 (1970).

<sup>89</sup> *Gary*, 954 F.3d at 199.

when he possessed the firearm,” in this case, the status of being a convicted felon.<sup>90</sup> Under *Rehaif v. United States*, this lack of information becomes problematic.<sup>91</sup> In *Rehaif*, the Supreme Court held that a defendant must know, at the time that he possessed the firearm, that he had been convicted of a felony in order to violate § 992(g)(1).<sup>92</sup> For Gary, this burden was never met. The district court nevertheless accepted Gary’s guilty plea and sentenced him to 84 months in prison for each count, to run concurrently.<sup>93</sup>

Gary then appealed his sentence to the Court of Appeals for the Fourth Circuit.<sup>94</sup> Gary asserted that *Rehaif*, as well as the Fourth Circuit’s opinion in *Lockhart*,<sup>95</sup> require his case be vacated because he pled guilty to two violations of 18 U.S.C. § 922(g)(1) without being informed that the offenses require he know his prohibited status at the time he possessed the firearm.<sup>96</sup> The Fourth Circuit did not question whether Gary’s rights under *Rehaif* had been violated, but instead defined the question at hand as “whether a standalone *Rehaif* error required automatic vacatur of a defendant’s guilty plea, or whether the error should instead be reviewed for prejudice under *United States v. Olano*.”<sup>97</sup>

Chief Judge Gregory, writing for the panel, held that “a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant’s substantial rights.”<sup>98</sup> The panel thus held that *Gary* should be automatically remanded for structural error. The state petitioned for rehearing *en banc*, which was denied.<sup>99</sup> In his concurrence

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<sup>90</sup> *Id.* See generally *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019).

<sup>91</sup> *Rehaif*, 139 S. Ct. at 2191.

<sup>92</sup> *Gary*, 954 F.3d at 199.

<sup>93</sup> *Id.*

<sup>94</sup> Brief for Appellant, *U.S. v. Gary*, 954 F.3d 194, 198 (4th Cir. 2020) (No. 18-4578).

<sup>95</sup> *United States v. Lockhart*, 947 F.3d 187 (4th Cir. 2020). In *Lockhart*, the Fourth Circuit held that the judge’s failure to properly advise Lockhart of his sentencing exposure under the Armed Career Criminal Act, 18 U.S.C. § 924(e), along with the *Rehaif* error, “in the aggregate” were sufficient to establish prejudice for purposes of plain error review. *Id.* at 197.

<sup>96</sup> *Gary*, 954 F.3d at 198.

<sup>97</sup> *Id.* at 200; *United States v. Olano*, 507 U.S. 725 (1993) (holding that when an issue is not preserved for appeal, an appeals court only has authority to correct plain errors affecting substantial rights).

<sup>98</sup> *Gary*, 954 F.3d at 200.

<sup>99</sup> *United States v. Gary*, 963 F.3d 420 (4th Cir. 2020).

denying the *en banc* hearing, Judge Wilkinson argued that the *Rehaif* error could not have affected Gary's substantial rights because there was "no possibility . . . that Gary would not have pled guilty had he been informed of that which the government could so easily have proven."<sup>100</sup> Similarly, Justice Kavanaugh, writing for the majority in *Greer* (with which *Gary* was consolidated), agreed, adding that mere omission of an element of an offense (the *Rehaif* element here) does not alone render a guilty plea invalid.<sup>101</sup> I disagree.

### B. *The Substantial Rights Issue*

To succeed under plain error review, a defendant must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights.<sup>102</sup> Courts will generally correct such an error only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings."<sup>103</sup>

Gary argued that the first two prongs of plain error review were established by the decision in *Rehaif* itself—that an error occurred and that it was plain.<sup>104</sup> Gary also argues that the third element, an effect on his substantial rights, is also met, because he could not have knowingly and intelligently plead guilty without notice that the government was required to prove the *Rehaif* element, thus rendering his plea constitutionally invalid.<sup>105</sup>

The first two prongs of plain error review are not contested in *Gary*. The government concedes that the district court did err in failing to inform Gary of the *Rehaif* element.<sup>106</sup> The government contends however, and Judge Wilkinson agrees, that omission of this element from the plea colloquy did not affect Gary's substantial rights, because there is overwhelming evidence that he knew of his felony status prior to possessing the firearms.<sup>107</sup> The government and Wilkinson also defer to the nine other circuits that have considered this question since *Rehaif* was decided, all of which held that there

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<sup>100</sup> *Id.* at 421 (Wilkinson, J., concurring).

<sup>101</sup> *United States v. Greer*, 141 S. Ct. 2090, 2099-2100 (2021).

<sup>102</sup> *United States v. Olano*, 507 U.S. 725, 732 (1993).

<sup>103</sup> *Id.*

<sup>104</sup> *United States v. Gary*, 954 F.3d 194, 200 (4th Cir. 2020).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 201.

<sup>107</sup> *United States v. Gary*, 963 F.3d 420, 421 (4th Cir. 2020).

is no effect on a defendant's substantial rights where the evidence shows that the defendant knew of their status as a prohibited person at the time of their gun possession.<sup>108</sup> However, Gary's case differs from the prior circuit decisions referred to by the government and Wilkinson in a significant way—those courts did not consider whether the district court's acceptance of a guilty plea without informing the defendant of every element of the offense was a *constitutional error* that rendered his guilty plea invalid.<sup>109</sup> Consequently, those circuit decisions do not directly answer the question posed in *Gary*, whether this error is a *structural error* that affects the substantial rights of the defendant.

In his concurrence denying rehearing *en banc*, Wilkinson nonetheless sided with all nine other Circuits that have weighed in on this issue, refusing to accept *Rehaif* error as a structural one. Gary then petitioned the United States Supreme Court for a writ of certiorari.<sup>110</sup> The writ was granted, and the Supreme Court heard the case, consolidated in *Greer v. United States* on April 20, 2021.<sup>111</sup> Writing for the majority, Justice Kavanaugh held that in felon-in-possession cases under § 922(g)(1), a *Rehaif* error alone is not a basis for plain-error relief.<sup>112</sup> Kavanaugh further held that plain-error relief can only be granted in *Rehaif* error cases when the defendant can demonstrate on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.<sup>113</sup>

#### IV. GARY'S GUILTY PLEA WAS CONSTITUTIONALLY INVALID, AND THUS AFFECTS HIS SUBSTANTIAL RIGHTS AS A *PER SE* MATTER.

Gary's guilty plea was "constitutionally invalid," because it was accepted without Gary being informed of the *Rehaif* element of the offense, and therefore the plea colloquy could not have been voluntarily and intelligibly entered into by Gary. Because Gary was not informed of the *Rehaif* element at his plea, what he did plead guilty to would not be a crime. The district court's error in accepting his unconstitutional guilty plea is a

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<sup>108</sup> *Id.* at 420.

<sup>109</sup> In none of the aforementioned cases was structural error considered. *See supra* note 5.

<sup>110</sup> *United States v. Gary*, 141 S.Ct. 974 (2021) (granting petition for writ of certiorari).

<sup>111</sup> *United States v. Greer*, 141 S.Ct. 2090 (2021).

<sup>112</sup> *Id.* at 2100.

<sup>113</sup> *Id.*

structural one, because it infringed upon his autonomy interest, or his interest in “mak[ing] his own choices about the proper way to protect his own liberty.”<sup>114</sup> As a structural error, it affects his substantial rights regardless of the strength of the prosecution’s evidence or whether the error affected the ultimate outcome of the proceedings.

Generally, for an error to be considered structural, it must have affected the outcome of district court proceedings.<sup>115</sup> However, the Supreme Court has recognized that where a conviction is based on a constitutionally invalid guilty plea, such as in *Gary*, even overwhelming evidence that the defendant would have pled guilty regardless does not validate the conviction.<sup>116</sup> In *Bousley v. United States*, the Supreme Court held that a guilty plea is constitutionally valid only to the extent it is “voluntary” and “intelligent.”<sup>117</sup> A plea does not qualify as intelligent unless a criminal defendant first receives “real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.”

It is on this key point that Judge Wilkinson – and subsequently Justice Kavanaugh – misidentify the issue with Gary’s conviction. Wilkinson argues that the “*Rehaif* error could thus not have affected his substantial rights because there is no possibility, not to mention a reasonable probability, that Gary would not have pled guilty had he been informed of that which the government could so easily have proven.”<sup>118</sup> In *Greer*, Justice Kavanaugh writes similarly that because Gary had been convicted of multiple felonies, to which he admitted at his plea colloquy, there is no reasonable probability that his outcome would be any different had he been informed of the *Rehaif* element.<sup>119</sup> This analysis is at best misplaced, and at worst intentionally misleading. As in *Bousley*, the question in the case of a constitutionally invalid guilty plea is not whether there is a reasonable probability that the defendant would have pled the same if they were informed of the *Rehaif* element; the question is instead whether the defendant’s substantial rights

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<sup>114</sup> *Weaver v. Massachusetts*, 37 S. Ct. 1899, 1907–08 (2017).

<sup>115</sup> *United States v. Ramirez-Castillo*, 748 F.3d 205, 215 (4th Cir. 2014) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

<sup>116</sup> *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004).

<sup>117</sup> 523 U.S. 614 (1998).

<sup>118</sup> *United States v. Gary*, 963 F.3d 420, 421 (4th Cir. 2020) (Wilkinson, J., concurring).

<sup>119</sup> *Greer v. United States*, 141 S.Ct. 2090, 2097–98 (2021).

were violated by omission of the *Rehaif* element.<sup>120</sup> Kavanaugh asserts that neither Gary nor Greer’s substantial rights were in fact violated, because the omission of an element in a criminal proceeding, including jury instructions and plea colloquies, does not necessarily render a criminal proceeding unfair or unreliable, and is thus not a structural error that must be overturned.<sup>121</sup> In other words, Kavanaugh asserts that when a defendant enters a plea of guilty to an incomplete set of elements that, without the missing element, does not amount to a crime, this is not a structural error. Recall that Courts will generally only correct a structural error when it “seriously affects the fairness, integrity or public reputation of judicial proceedings.”<sup>122</sup> Suggesting that this – pleading guilty to an incomplete set of elements that does not constitute a crime – could amount to anything but a lack of fairness and integrity, making a mockery of our judicial system, is an absurd disregard for the Fifth and Sixth Amendment protections normally available to criminal defendants.

*A. The constitutional error in Gary is a structural error because it violates Gary’s Fifth and Sixth Amendment rights.*

Based on the *Rehaif* precedent from the Supreme Court, the Fourth Circuit panel found the district court’s error in Gary’s case to be structural, or affecting substantial rights regardless of impact on the trial.<sup>123</sup> The panel was correct here. This error is structural because it violated Gary’s right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest, and because he was deprived of his autonomy interest under the Fifth Amendment Due Process clause; the consequences of these deprivations in Gary’s case are impossible to quantify.

The Sixth Amendment contemplates that “the accused ... is the master of his own defense,” and thus certain decisions, including whether to waive the right to a jury trial and to plead guilty, are reserved for the defendant.<sup>124</sup> Gary had a constitutional right to arrive at his own informed decision on whether to exercise his right to go to trial or to submit a plea of guilty. When the district court accepted Gary’s guilty plea after misinforming him of the

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<sup>120</sup> *Bousley*, 523 U.S. at 618 (holding that a guilty plea must be “voluntary” and “intelligent” in order to be constitutionally valid).

<sup>121</sup> *Greer*, 141 S.Ct. at 2100.

<sup>122</sup> *United States v. Olano*, 507 U.S. 725, 732 (1993).

<sup>123</sup> *United States v. Gary*, 954 F.3d 194, 205 (4th Cir. 2020).

<sup>124</sup> *Id.*

elements that the state needed to prove, the court unduly prejudiced his decision about how best to protect his liberty. Contrary to Judge Wilkinson's concurrence, Gary has no burden to demonstrate prejudice resulting from the error, because harm to a defendant is irrelevant to his or her Sixth Amendment right to make an informed decision.<sup>125</sup> What Gary pled guilty to was an incomplete set of elements which, under *Rehaif*, does not constitute a crime. Because he was misinformed of the elements of the crime he thought he was pleading guilty to, he thus lacked the ability to come to an informed decision when the plea was entered.

Similarly, Gary was denied his Fifth Amendment due process clause rights. When he pled guilty, he waived his right to a trial by jury, his privilege against self-incrimination, and his right to confront his accusers. Informed by the Supreme Court holding in *United States v. Gonzalez-Lopez*, the Fourth Circuit panel finds a structural error where "the precise effect of the violation cannot be ascertained."<sup>126</sup> It is simply not possible to quantify what impact Gary's waiving of constitutional rights based on an unconstitutional plea could have had. There is no way for the court to know how Gary's counsel, but for the error, would have advised him, what evidence may have been presented in his defense, and what choice Gary would have ultimately made about accepting a plea or going to trial if he had been informed of the *Rehaif* element. With no way to gauge the intangible impact of an unconstitutional guilty plea, the panel found there was no way to determine whether the error was harmless or not.<sup>127</sup>

A defendant's status is *the* defining element of a §922(g) offense.<sup>128</sup> Whether or not a defendant knowingly meets the status element of a §922(g) offense is the difference between innocent and incarcerated. Unfortunately for Michael Andrew Gary, the district court failed to inform him of this element, and thus his decision to waive his constitutional rights was based on an error that is uncontestably unconstitutional. Gary's Sixth and Fifth Amendment rights were violated when the district court accepted his constitutionally invalid plea, depriving him of due process and his autonomy

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<sup>125</sup> *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984).

<sup>126</sup> *Gary*, 954 F.3d at 206 (quoting *Gonzalez-Lopez*, 548 U.S. 140, 149 (2006)).

<sup>127</sup> *Id.*

<sup>128</sup> *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019).

interest in making an informed and intelligent decision on how best to protect his liberty. The panel was correct in vacating his plea and remanding his trial.

*B. Like §922(g) generally, refusing structural error in these cases disproportionately harms Black and indigent defendants*

The implications of this structural error issue reach far beyond Michael Gary, compounding the racially disparate impacts of gun control legislation like The Gun Control Act of 1968. As illustrated above, Section 922(g) was passed in order to prevent the armament of Black Americans.<sup>129</sup> The law has been successful in preventing a disproportionate number of Black Americans from owning guns.<sup>130</sup> Holding that the omission of the *Rehaif* element is not a structural error would continue that racialized legacy. Such a holding would offer fewer protections to those being prosecuted under § 922(g) than other defendants in the criminal justice system, who are entitled to know what they're pleading to and cannot be convicted, even by a guilty plea, for an act that does not meet all of the elements of an offense. Because § 922(g) defendants are disproportionately Black and indigent,<sup>131</sup> the defendants who are stripped of this basic right of criminal adjudication in § 922(g) cases will also be disproportionately Black and indigent, further perpetuating race and class disparities within our criminal justice system.

In cases where § 922(g) defendants accept guilty pleas, as Gary did, these disparities are compounded further. An overwhelming 97% of criminal cases are resolved by guilty plea.<sup>132</sup> Of those cases, Black defendants are more likely than white defendants to be offered plea bargains with an active prison sentence and are less likely to be offered a charge reduction.<sup>133</sup> Indigent defendants face additional pressure to accept guilty pleas, as a lack of funding

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<sup>129</sup> See *supra* notes 34–42 and accompanying text.

<sup>130</sup> See U.S. SENT'G COMM'N, *supra* note 5.

<sup>131</sup> See *supra* notes 118–126 and accompanying text.

<sup>132</sup> *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT, <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/> (last visited April 10, 2021).

<sup>133</sup> Gene Demby, *Study Reveals Worse Outcomes for Black and Latino Defendants*, NPR (July 17, 2014),

<https://www.npr.org/sections/codeswitch/2014/07/17/332075947/study-reveals-worse-outcomes-for-black-and-latino-defendants>; Christi Metcalfe & Ted Chiricos, *Race, Plea, and Charge Reduction: An Assessment of Racial Disparities in the Plea Process*, 35:2 JUST. Q. 223, 242 (2018).

and high caseloads often lead public defenders to encourage clients to accept a plea bargain.<sup>134</sup> Additionally, the costs of litigation, as well as time in pretrial detention for those that cannot afford bail, can be coercive in nature,<sup>135</sup> further driving defendants towards guilty pleas. These impacts weigh heavily on Black defendants, who are disproportionately likely to be poor and indigent.<sup>136</sup>

In addition to being more likely to be indigent, Black defendants, particularly young Black men, represent the majority of § 922(g)(1) defendants. As noted above,<sup>137</sup> a 2020 sentencing commission report found that in fiscal year 2019, 98% of the nearly 8,000 defendants convicted of a § 922(g) offense were male, and over 55% were Black.<sup>138</sup> Their average age was 35.<sup>139</sup> Because over 90% of these defendants are pleading guilty and receiving racially disparate sentencing outcomes,<sup>140</sup> *Rehaif* error thus disproportionately impacts poor and Black defendants.

Michael Andrew Gary provides a telling example. Gary is a thirty-year-old, indigent Black male.<sup>141</sup> He was represented in his Fourth Circuit proceedings by a federal public defender.<sup>142</sup> Gary had been previously incarcerated when he was arrested for unlawful possession of a firearm in South Carolina, there had been no violence involved, and he cooperated

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<sup>134</sup> Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of the Plea Process*, 13 TENN. J. L. & POL'Y 459, 466 (2019).

<sup>135</sup> Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 CRIM. JUST. POL'Y REV. 1015, 1015 (2019) (finding that pretrial detainees plead 2.86 times faster than released defendants).

<sup>136</sup> See Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact upon Racial Minorities*, 22 HASTINGS CON. L.Q. 219, 234-35 (1994).

<sup>137</sup> See *supra* Part II.

<sup>138</sup> See generally, U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon\\_In\\_Possession\\_FY20.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf)

<sup>139</sup> *Id.*

<sup>140</sup> See Demby, *supra* note 128; see also Metcalfe & Chiricos, *supra* note 128, at 242 (2018).

<sup>141</sup> See *Kershaw County Man Pleads Guilty to Federal Gun Charges*, U.S. ATT'Y'S OFF. DIST. S.C. (2018), <https://www.justice.gov/usao-sc/pr/kershaw-county-man-pleads-guilty-federal-gun-charges>.

<sup>142</sup> Gary v. United States, 954 F.3d at 194.

willingly with the arresting officers.<sup>143</sup> He is now incarcerated again for exercising a right to bear arms that is otherwise protected by the United States Constitution for people who have not been convicted of a felony. And that incarceration was based on his plea to behavior that, without the missing *Rehaif* element, is simply not a crime.

#### CONCLUSION

Few issues in American political discourse are as divisive as gun control. America no doubt has a gun violence problem to reckon with—Americans have more firearms per capita and suffer more deaths from gun violence than any other high income, populous nation.<sup>144</sup> Thirty-nine thousand Americans die every year from gun violence, or an average of 100 per day.<sup>145</sup> Mass shootings have repeatedly shaken and devastated the country; there were over 400 in 2019.<sup>146</sup> Gun violence also disproportionately impacts communities of color. Black men make up 52% of all gun homicide victims in the United States, despite comprising less than 7% of the population.<sup>147</sup>

While these devastating statistics fuel an ongoing debate about imposing stricter gun control policies, lawmakers and gun control advocates must be careful in constructing regulations to ensure that the impact is not racially disparate, further contributing to the disarmament and mass incarceration of Black Americans. It is also critical that gun control advocates recognize the racialized narrative surrounding gun control in America and the racialized history of such statutes as they craft policy that protects Americans from gun violence through non-carceral solutions. Examination of existing gun control statutes, such as § 922(g), and the ways that these laws have been racially motivated is critical to rewriting the American gun control narrative and moving toward effective, common-sense, gun control policy that does not

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<sup>143</sup> *Id* at 198–99.

<sup>144</sup> Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-income OECD Countries, 2010*, 129 AM. J. MED. 266, 266–73 (2016).

<sup>145</sup> *Statistics*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-violence-statistics/#national-anchor> (last visited Apr. 11, 2021).

<sup>146</sup> Jason Silverson, *There Were More Mass Shootings than Days in 2019*, CBS (Jan. 2, 2020), <https://www.cbsnews.com/news/mass-shootings-2019-more-than-days-365/>.

<sup>147</sup> *Statistics*, *supra* note 145.

inflict further harm on Black Americans. Addressing structural errors when defendants charged with these statutes are deprived of their constitutional rights is a part of rewriting that narrative.