No. 19-6320

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2019

NALEN PIERRE WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The United States filed its opposition memorandum on December 20, 2019. In reply, the petitioner respectfully states as follows:

A. <u>The Mere Fact That The Ninth Circuit Denied Nalen Williams' Petition For Rehearing With Suggestion For Rehearing En Banc Should Not Serve To Undermine The Supreme Court's Authority To Ensure That The Lower Courts Adhere To Its Decision In *Rehaif v. United States*, 139 S. Ct. 2191 (2019).</u>

Respondent, the United States of America, urges the Supreme Court not to grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further proceedings (GVR) to consider whether Nalen Williams' conviction for possessing a firearm as a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), is infirm in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *See* Respondent's Memorandum, p. 1. In *Rehaif*, the Supreme Court held that the mens rea of knowledge for that crime applies "both to the defendant's conduct and to the defendant's status." *Id.* at 2194. The respondent argues that a GVR order is unwarranted merely because the Ninth Circuit declined to grant Williams' petition for rehearing with suggestion for rehearing en banc. *See* Respondent's Memorandum, pp. 2-3. Respondent's position lacks merit because it seeks to constrain the Supreme Court's authority to grant a writ of certiorari to ensure that its holdings are properly reviewed and enforced by the lower courts.

Seeking to impose its restrictive analysis concerning granting GVR orders, the government misplaces reliance on *Lords Landing Vill. Condo. Council v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997). *See* Respondent's Memorandum, p. 2. Indeed, this Court in *Lords Landing* granted a GVR order. *Id.* at 894. Unlike the case at bar, in which the petition for a writ of certiorari is based on an intervening United States Supreme Court decision, this Court in *Lords Landin*g granted a GVR order even though the intervening law was merely a decision of a

state supreme court. *Id.* at 895. In effect, respondent in the case at bar is asserting that the United States Supreme Court should ignore its own precedent.

In *Lords Landing*, this Court provided:

> Where intervening developments, or recent developments that *we have reason to believe the court below did not fully consider*, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is ... potentially appropriate."

Lords Landing, 520 U.S. at 896 (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)) (emphasis added). Respondent opines that the Ninth Circuit considered and rejected the merits of Williams' *Rehaif* claim because of the "centrality" of *Rehaif* to the petition for rehearing.[1] *See* Respondent's Memorandum, pp. 3-4. Significantly, the Ninth Circuit's terse order denying rehearing makes no reference to the merits of Williams' *Rehaif* claim. Pet. App. 1a. In stark contrast, the Eleventh Circuit's order denying the request to recall the mandate in *Lords Landing* referenced the claim's merits in providing that "the said petition and motions are without merit." *Id.* at 895. Yet, the Supreme Court granted a GVR order. The Supreme Court concluded that the Eleventh Circuit's statement that the petition and motions are "without merit," was "ambiguous" in nature, and "does not establish that it actually considered and rejected petitioner's *Sheets* argument." *Id.* at 896-97. This Court noted that the Eleventh Circuit may have denied the petitioner's motion on procedural grounds. *Id.* at 897. Likewise, in Williams' case, the Ninth Circuit may have denied the rehearing petition on procedural grounds as Williams first raised the *Rehaif* claim in seeking a petition for rehearing with suggestion for rehearing en banc.

[1] In asserting the "centrality" of *Rehaif* to Williams' petition for rehearing, the government ignores that Williams also asserted a separate claim concerning the Ninth Circuit panel's misapprehension of the record. Pet. App. 14a-22a.

Because Williams first raised his *Rehaif* claim in his rehearing petition, the Ninth Circuit could have denied review on procedural grounds rather than after "fully" considering the claim's merits. Williams recognized in his petition that as a general rule, the Ninth Circuit will not consider issues that a party raises for the first time in a petition for rehearing. Pet. App. 12a (citing *Varney v. Sec'y of Health & Human Servs.*, 859 F.2d 1396, 1397 (9th Cir.1988)). Williams further recognized that the Ninth Circuit allows for exceptions to this general rule only in "extraordinary circumstances." Pet. App. 12a (citing *United States v. Mageno*, 786 F.3d 768, 775 (9th Cir. 2015)).

Further, respondent ignores that the GVR standard set forth in *Lords Landing* is whether there is "reason to believe the court below did not *fully* consider" the intervening change in the law. *Lords Landing*, 520 U.S. at 896 (emphasis added). Respondent fails to identify any language in the Ninth Circuit's denial order (Pet. App. 1a) which unambiguously establishes that the Ninth Circuit "fully" considered the merits of the *Rehaif* claim. Certainly, the order does not unambiguously establish that the Ninth Circuit engaged in a merits analysis of Williams' *Rehaif* claim.

B. Nalen Williams' Guilty Plea To Violating 18 U.S.C. § 922(g)(1), And The Resulting Sentence, Must Be Vacated Pursuant To Supreme Court Precedent, Including *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Asserting that plain error review applies, respondent maintains that Williams' *Rehaif* claim lacks sufficient merit to warrant review. *See* Respondent's Memorandum, p. 3. Respondent contends that in light of Williams' conviction for second-degree murder resulting in a 130-month prison sentence, Williams could not show a reasonable probability of a different outcome had the proceedings incorporated the knowledge requirement established in *Rehaif*. *Id.*

The United States' position lacks merit because it is inapposite to, and seeks to limit the reach of, *Rehaif* and other Supreme Court precedent.

1. Williams' Guilty Plea Is Constitutionally Invalid Because At The Time He Entered His Plea, The Petitioner Lacked Knowledge Of All The Elements Of The § 922(g)(1) Offense.

Pursuant to *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019), the government "must show that the defendant knew he possessed the firearm and also that he knew he had the relevant status when he possessed it." Williams pleaded guilty to violating 18 U.S.C. § 922(g) long before the Supreme Court decided *Rehaif*. Unsurprisingly, no one involved in the proceedings correctly understood the elements of the offense to which Williams pled. The petitioner was never told during the plea proceedings – either in his plea agreement or at the change of plea hearing – that the crime required proof that he knew he had been convicted of a crime punishable by more than one year at the time he possessed the weapon. Pet. App. 124a-155a. Because Williams was not advised of the true nature of the charge, his guilty plea is constitutionally invalid and cannot stand.

Respondent's analysis lacks merit because, contrary to Supreme Court precedent, the government conflates the standards that may apply to a trial and evidence of guilt with the constitutional standards for establishing a knowing, intelligent and voluntary plea. The Supreme Court in *Bousley v. United States*, 523 U.S. 614, 619 (1998), addressed a situation similar to Williams' case. This Supreme Court in *Bousley* explained that in an earlier case, the Court had narrowed the scope of a federal criminal statute, and Bousley later filed a 28 U.S.C. § 2255 motion seeking to undo his guilty plea to violating the newly construed provision on the grounds that he had been misinformed of the offense's elements. *Id.* at 616-17. This Court recognized that if Bousley's allegations proved true, his plea would be constitutionally invalid. *Id.* at 619.

That recognition was grounded in the principle that when pleading guilty, a defendant must receive "real notice of the true nature of the charge against him." *Id.* at 618. This principle is "the first and most universally recognized requirement of due process." *Id.*

Similarly, in *Henderson v. Morgan*, 426 U.S. 637, 644-47 (1976), the Supreme Court specified that a guilty plea without notice of the true charges is constitutionally invalid, and that this type of error can be harmless only if there is a record proving that the defendant was made aware of the missing element through other means, or if the record otherwise contains an admission by the defendant to that element. In *Henderson*, the defendant was not advised of a mens rea element necessary to commit the charged offense, thus rendering the plea invalid despite the fact, assumed by the Court, that the "prosecutor had overwhelming evidence" of the omitted element. *Id.* at 644. The only thing that could have saved the plea was "a substitute for" the defendant's voluntary admission to the element – a stipulation to the element, evidence that the element was otherwise "explain[ed] to" the defendant, or a statement by the defendant "necessarily implying that he had [the requisite] intent." *Id*. at 646. Because no such "substitute" applies to Williams' case, his guilty plea cannot pass constitutional muster.

In addition, this Court in *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004), considering a similar but distinct issue of Rule 11 violations, provided that where a defendant's guilty plea was neither knowing nor voluntary, and thus constitutionally invalid, the conviction cannot "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." Accordingly, *Dominguez Benitez* and *Henderson* foreclose respondent's argument that in light of Williams' conviction for a second-degree murder resulting in a 130-month prison sentence, there was no reasonable probability of a different outcome had the proceedings incorporated the knowledge requirement.

Clearly, under the standards set forth by the Supreme Court, there is no basis to render an otherwise invalid plea valid merely by surmising that the defendant must have know he fell within a class of persons who may not lawfully possess a firearm. The merits of the involuntary plea claim do not turn in any way on Williams' innocence. His claim turns on the fact that he was never informed during plea proceedings – either in the plea agreement or at the change of plea hearing – that knowledge of prohibited status was an element of the offense. Respondent does not dispute that Williams was never informed that knowledge of status was an element of the offense. Thus, relief should be granted on this ground alone.

Williams is entitled to vacation of his conviction and sentence because the plea proceedings' omission of the *Rehaif* mens rea element gave rise to a due process violation that is not harmless. The harmlessness analysis for claims asserting that a guilty plea is not knowing, intelligent and voluntary is quite different than the harmlessness analysis which applies to convictions arising from a trial. *See Henderson v. Morgan*, 426 U.S. 637 (1976). Instead of asking whether the jury could have reasonably found the missing element was not proven beyond a reasonable doubt through evidence admitted at trial,[2] the harmlessness query in guilty plea cases is not at all concerned with whether "the prosecutor had overwhelming evidence of guilt available." *Henderson*, 426 U.S. at 645. In plea cases, even if there is overwhelming evidence of guilt, the Supreme Court held that "such a plea cannot support a judgment of guilt unless . . . the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.* at 644-45 (citing *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Harmlessness in a guilty plea case, therefore, focuses on whether the defendant was in fact informed of the missing element through some other means. *Id.* at 646.

[2] *See Neder v. United States*, 527 U.S. 1, 16 (1999).

Respondent does not maintain that any aspect of the plea proceedings conveyed the requirement that the government prove knowledge of status, or that the requirement was in fact conveyed to Nalen Williams. The government's argument that Williams must have known his prior conviction was punishable by imprisonment for more than one year is based entirely on a misapprehension of the harmlessness rule in guilty plea cases. Because the constitutional violation is not harmless, Williams' conviction and sentence must be vacated. In sum, respondent's position is clearly contrary not only to *Rehaif*, but also to the Supreme Court's decisions in *Henderson v. Morgan*, 426 U.S. 637 (1976), *Bousley v. United States*, 523 U.S. 614, 619 (1998), and *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.10 (2004).

2. The Plain Error Standard Should Not Apply To Circumvent The Supreme Court's Clear Holding In *Rehaif*.

Respondent relies on the plain error standard of review to circumscribe the reach of *Rehaif*. *See* Respondent's Memorandum, pp. 2-3. Under the law, and in light of this case's unique procedural history, plain error review should not be applied or used to circumvent *Rehaif* and other Supreme Court authority. Plain error review should not impede Supreme Court review of Williams' claim asserting that the indictment is fatally flawed because pursuant to *Rehaif*, the allegations do not state a federal offense. *See* Certiorari Petition, pp. 10-11. Indeed, this Court in *Stirone v. United States*, 361 U.S. 212, 219 (1960), held that it is "fatal error" to permit an individual to be "convicted on a charge the grand jury never made against him." Further, respondent ignores that "[s]ubject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). In addition, the law and facts, as detailed in the section above, establish that even under the plain error standard, review of Williams' involuntary and unknowing plea claim based on *Rehaif* is warranted.

In light of the unique circumstances of this case, it would work an injustice to ignore the dictates of *Rehaif* by applying the plain error standard of review. Williams had no obvious reason to raise an involuntary and unknowing plea claim before the district court because when Williams entered his plea, there was a uniform wall of circuit authority providing that knowledge of status was not a required element for the felon-in-possession offense. Significantly, this Court did not decide *Rehaif* until after the Ninth Circuit panel issued its memorandum decision in Williams' case. In addition, this Court did not grant a writ of certiorari in *Rehaif* until January 11, 2019, nearly two months after Williams filed his opening brief on November 12, 2018. *See* United States v. Nalen Pierre Williams, Ninth Cir. No. 18-30089, Dkt. #12. *See also Rehaif v. United States*, 139 S. Ct. 914 (2019). It would work an absurd result to limit the reach of Supreme Court authority under these circumstances. *See Hall v. United States*, 139 S. Ct. 2771 (2019) (mem.) (granting a GVR order even though the petitioner first raised the *Rehaif* claim in counsel's letter submitted after the filing of the certiorari petition).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit, vacate the judgment below, and remand for reconsideration in light of *Rehaif*. Alternatively, the petitioner prays for such relief to which he may be justly entitled.

Respectfully submitted,

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