NO:

IN THE
SUPREME COURT OF THE UNITED STATES

RAKEEM DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was charged with possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g). The indictment charged possession of a single firearm and related ammunition on a specific date, but at trial, the government presented alternative theories of guilt based on evidence of petitioner's uncharged possession of other firearms on other occasions. The government presented no evidence of, and the trial court did not instruct the jury on, the knowledge element of a § 922(g) offense; thus the question of whether petitioner knew he was ineligible to possess a firearm was not decided by the jury. The questions presented are:

1. Does the failure to require a unanimous jury verdict on either charged or uncharged theories of prosecution violate the Sixth Amendment right to a verdict under *Richardson v. United States*, 526 U.S. 813 (1999)?

2. Should certiorari be granted and the case remand for reconsideration in light of *Rehaif v. United States*, 139 S.Ct. 2191 (2019), because the government did not endeavor to make the required showing of petitioner's knowledge of his prohibited status and the jury was not instructed on the knowledge element?

INTERESTED PARTIES

The are no parties interested in the proceeding other than those named in the caption of the appellate decision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

PETITION FOR WRIT OF CERTIORARI

Rakeem Davis respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 18-10140 in that court on June 12, 2019, *United States v. Davis*, 777 Fed.Appx. 360.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1), along with a copy of the order of the Eleventh Circuit denying the petition for panel rehearing (App. 19).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1255 and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 12, 2019, and rehearing was denied on August 14, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

U.S. Const. amend. V (Due Process Clause):

> No person shall … be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. VI (right to jury trial in criminal cases):

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATEMENT OF THE CASE

Petitioner was charged in a one-count indictment with possessing Browning 9-mm handgun and ten rounds of ammunition after being convicted of a felony, in violation of 18 U.S.C. § 922(g). The petitioner proceeded to a jury trial.

At trial, the government presented testimony that three rounds of ammunition were found in the gun named in the indictment, and seven rounds were found in another, uncharged gun. Further testimony showed that both guns originated in a single location within an apartment; the uncharged gun was moved to a different location; and both guns later were found in two separate locations within the apartment. The district court gave a general unanimity instruction ("Your verdict, whether guilty or not guilty, must be unanimous. In other words, you must all agree." DE:80:210), but it did not instruct the jurors that they were required to agree on the guns(s) or ammunition petitioner possessed, or when or where he possessed the forbidden item(s).

Evidence was presented that Michael Williams was a paid confidential informant (CI) for the Bureau of Alcohol, Tobacco and Firearms (ATF) and the Metro-Dade Police Department. Over a period of about one and one-half years, Williams worked on about ten cases (according to his recollection) or dozens (according to the recollection of his ATF handler). Williams earned around $20,000 in total as a

CI. He was the chief witness against petitioner, and he was paid about $1,900 for his work in bringing this case to trial.

Williams testified that an acquaintance named Emmanuel Duncanson called him on July 28, 2017, and asked to meet. Williams drove to a park, where Duncanson and petitioner were waiting for him. After driving separately from the park to a nearby home, Duncanson and the petitioner got into Williams' car. Williams testified that Duncanson asked Williams and the petitioner if they had a gun. According to Williams, both said no, but the petitioner said he could get one. The petitioner gave Williams directions to a residence. En route, Duncanson announced he had to kill a man named Ike, because Ike said Duncanson's sister could not sell drugs in a particular apartment complex.

Williams testified that the petitioner led the others into an apartment, where three guns were lying on a bed: a rifle, a 9 millimeter pistol, and a gun Williams recognized as a .45 caliber handgun. Duncanson selected the 9 millimeter, and the petitioner carried it out of the house. They returned to the car.

Williams drove Duncanson and the petitioner to another apartment complex, where they drove around and looked for Ike. They spotted Ike, and Duncanson asked the petitioner to shoot him. The petitioner refused. Duncanson grabbed the gun from the petitioner, stuck his arm through the window, and started shooting. Williams testified he sped away in an effort to prevent Duncanson from hitting anyone.

Williams dropped Duncanson off at a residence and took petitioner back to the apartment where they had retrieved the gun. The petitioner had the gun at that point. DE:80:53.

Williams had been in contact with law enforcement at various times while these events unfolded. After dropping off his passengers, Williams led a police officer to the site where Duncanson had shot the gun. Officers recovered three shell casings and two damaged projectiles.

Hours later, at approximately 2:00 a.m., six ATF agents entered the apartment where the gun had been retrieved and executed a search warrant. The team broke the door down when it was not opened immediately after they knocked and announced themselves. They found petitioner and a woman in the apartment. The agents searched the apartment and found two guns: a Browning 9 millimeter pistol loaded with three rounds of ammunition and an SCCY 9 millimeter pistol containing seven rounds of ammunition. The Browning pistol looked like a .45 caliber handgun. The agents did not find a rifle in the apartment.

The parties stipulated that petitioner previously had been convicted of a felony (prior to July 29, 2017) and that he was not permitted to possess a firearm at the relevant time, but there was no stipulation or evidence regarding whether petitioner was aware that he had been convicted of a felony.[1] They also stipulated that the

[1] During jury selection, the district court advised the jury venire, in relation to its duty to reveal prior convictions: "[T]here are some things that are kind of real hard not to remember. ... I would probably remember if I were convicted of a crime. Things like that that you really -- it's not normal to not remember." Trial trans. at 8.

Browning pistol and ten rounds of ammunition had moved in interstate commerce. The SCCY pistol was manufactured in Florida, and had not moved in interstate commerce. Petitioner was not charged with possessing it. A firearms examiner testified the casings recovered at the reported shooting site were fired from the SCCY pistol, and the damaged projectiles could have been fired from the same gun.

In its jury charge, the district court failed to instruct the jury that it was required to agree unanimously about which, if any, object(s) petitioner possessed illegally, or the time and place of the possession. The district court also failed to instruct the jury that on the knowledge-of-felon-status element of the offense. At the conclusion of trial and following jury deliberations, the jury returned a general verdict of guilty. At sentencing, the district court imposed a 100-month term of imprisonment and a 3-year term of supervised release.

The petitioner appealed to the Eleventh Circuit, challenging, *inter alia*, whether the district court erred by not instructing the jury that it was required to reach a unanimous decision about which, if any, firearm or ammunition petitioner possessed, and about when and where any possession occurred. The court of appeals issued an unpublished opinion affirming the judgment, concluding that petitioner "has identified no on-point precedent in this Court or the Supreme Court holding that a special unanimity instruction is required in the circumstances presented by this case." App. 14 (internal quotation marks omitted). The court of appeals reasoned that "even assuming there were multiple possible sets of facts on which [petitioner]'s conviction

could have been based, jurors would have understood from the court's instructions that they were required to 'all agree' on which set of facts grounded the conviction," because the indictment charged only one event and the district court "repeatedly instructed the jury that its verdict must be unanimous." App. 15.

REASONS FOR GRANTING THE PETITION

I. Non-unanimous verdict. The district court's jury instructions erroneously permitted the jury to convict petitioner of violating 18 U.S.C. § 922(g)(1) even if the jurors disagreed on which firearm and/or ammunition he possessed, if any, as well as where and when he possessed such a firearm and/or ammunition. In light of evidence that the petitioner possessed firearms or ammunition at different times and at different places, the jurors may have convicted him based on non-unanimous findings about how and where the charged offense occurred.

As the Eleventh Circuit recognized in its decision, this Court has ruled that "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." App. 13 (quoting *Richardson v. United States*, 526 U.S. 813, 817 (1999)). Pursuant to the Sixth Amendment, a defendant is entitled to a unanimous jury verdict. *See United States v. Lapier*, 796 F.3d 1090, 1098 (9th Cir. 2015).[2] In the present case, the district court's jury instructions erroneously permitted the jury to convict the petitioner of violating 18 U.S.C. § 922(g)(1), even if

[2] The Court will decide this term whether the Sixth Amendment right to a unanimous verdict also applies to the States under the Fourteenth Amendment's due process clause. *See Ramos v. Louisiana*, 139 S.Ct. 1318 (2019).

the jurors disagreed on which guns and ammunition he possessed, if any, and when and where any such possession occurred. In light of government's presentation of, and reliance on, evidence that the petitioner possessed the forbidden items at different times and at different places, the jurors were left free to convict him based on non-unanimous findings about how, when, and where the charged offense occurred.

The petitioner was charged with specific firearm possession conduct alleged to have been committed after he was convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). The government presented testimony that three rounds of ammunition were found in the gun named in the indictment, and seven rounds were found in another, uncharged gun. Further testimony showed that (1) both guns (and possibly all of the ammunition) originated in a single location within an apartment; (2) the uncharged gun (and possibly the associated ammunition) was moved to a different location; and (3) the two guns and all associated ammunition later were found in two separate locations within the apartment. *See also* App. 12 (court of appeals recognizing that "the evidence showed possession of guns or ammunition at three separate points: (1) before the shooting, when the guns were at the apartment; (2) during the shooting, when the uncharged gun was used; and (3) after the shooting, when both guns and all associated ammunition were found in separate locations in the apartment.").

In assessing the evidence regarding possession of the charged and uncharged guns and the ammunition, different jurors could have made conflicting findings about when and where petitioner possessed the forbidden items, and which forbidden items he possessed. Under these circumstances, where the indictment was limited to

allegations as to only one specifically-identified firearm and a fixed amount of ammunition, while the evidence extended to uncharged proscribed items, the district court's failure to give a specific unanimity instruction to the jury was plain error.

The Eleventh Circuit's decision, finding no plain error in the failure to instruct the jury on unanimity, is at odds with the decision of the Ninth Circuit in *United States v. Garcia-Rivera*, 353 F.3d 788, 790-92 (9th Cir. 2003). In *Garcia-Rivera*, a defendant was charged with one count of violating § 922(g)(1). 353 F.3d at 790. The government presented evidence that would have supported findings that the defendant possessed a single gun during three overlapping time periods. *Id.* The district court gave the jury an instruction that would have allowed a conviction based on findings that the illegal gun possession occurred during any of the three periods, without a unanimous agreement about when the possession occurred. *Id.* The reviewing court held that, regardless of whether an abuse of discretion or plain error standard of review applied, the district court committed reversible error by failing to require the jurors to agree on the date or incident used to find the defendant guilty. *Id.* at 792. The Ninth Circuit further held that the district court's failure to poll the jury to determine the basis for their verdict "resulted in a questionable verdict." *Id.*

The same result reached in *Garcia-Rivera* is compelled here. The jury heard evidence of impermissible gun and/or ammunition possession occurring in different times and at different places during the course of a day. The court instructed the jury that they were required to agree unanimously that an illegal possession had occurred, but it did not instruct that unanimity was required concerning which firearm or

ammunition petitioner possessed, or when or where the possession occurred. The court simply stated: "Your verdict, whether guilty or not guilty, must be unanimous. In other words, you must all agree." DE:80:210. The court also read the general verdict form to the jury as "another reminder that it has to be unanimous." DE:80:211. The form, as quoted by the court, stated, "We, the jury… find the Defendant guilty or not guilty." *Id.*

Contrary to the Eleventh Circuit, this general instruction was inadequate where it was unaccompanied by any explanation of the nature of the required agreement with respect specifically to the single firearm and ammunition violation charged. *Cf. United States v. Villegas*, 494 F.3d 513 (5th Cir. 2007) (no error in failing to give specific unanimity charge where the indictment alleged "one or more firearms" that together formed a single crime—unlike petitioner's case in which the multiple-firearm and ammunition evidence involved *uncharged* firearms and ammunition that were not elements of the charged offense); *United States v. Verrecchia*, 196 F.3d 294 (1st Cir. 1999) (no plain error in failing to afford jury specific unanimity instruction, where the evidence was limited to the charged firearms—contrary to the circumstances in petitioner's case involving evidence of other firearms and ammunition that were not charged in the indictment and thus not elements of the charged offense).

The return of a general verdict of guilty left open the possibility that the jurors did not agree on the firearm and/or ammunition the petitioner possessed, or the time or location of the possession, contrary to the principle enunciated in *Richardson*, 526 U.S. at 817, that "a jury in a federal criminal case cannot convict unless it

unanimously finds that the Government has proved each element." The instructional lapse in this case, which permitted the jury to reach a verdict that was non-unanimous as to the firearm element of the charged offense, infringed petitioner's Sixth Amendment rights. In order to clarify the scope of the Sixth Amendment principles articulated by this Court in *Richardson*, and to resolve the conflicting circuit court rulings regarding the impropriety of the type of non-specific jury instruction given in this case, certiorari is warranted.

II. *Rehaif* error. On June 21, 2019, while petitioner's direct appeal was pending, this Court decided *Rehaif v. United States*, 139 S.Ct. 2191 (2019), and held that, to prove a status-based possession charge under § 922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* at 2194. Because the government did not prove that petitioner Rehaif knew that he was illegally in the United States, the Court reversed the judgment and remanded. *Id.* at 2200.

As Justice Alito observed in his dissent, "[t]hose for whom direct review has not ended will likely be entitled to a new trial" because of the Court's decision. *Id.* at 2213 (Alito, J., dissenting). And indeed, this Court has issued at least two dozen orders since *Rehaif* granting certiorari, vacating the judgment, and remanding for reconsideration in cases where the petitioners were convicted of a § 922(g) offense, but the jury was not required to find knowledge of the relevant status.[3] Many of these cases involved

[3] See *Allen v. United States*, No. 18-7123 (U.S. June 28, 2019); *Reed v. United States*, No. 18-7490 (U.S. June 28, 2019); *Moody v. United States*, No. 18-9071 (U.S. June 28, 2019

§922(g)(1) felon-in-possession convictions, and while the issue was raised for the first time before this Court in many of them, the Court has not treated that as an obstacle to obtaining a remand.

Here, too, petitioner was convicted of a § 922(g) offense, but the jury was not required to find that he knew that he had the relevant status. Accordingly, as it has done in analogous cases, the Court should grant, vacate, and remand for the lower courts to reconsider petitioner's conviction in light of *Rehaif*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.
Counsel for Petitioner

Miami, Florida
November 2019

Order); *Hall v. United States*, No. 17-9221 (U.S. June 28, 2019); Humbert v. United States, No. 18-8911 (U.S. Oct. 7, 2019); *Contreras v. United States*, No. 18-9425 (U.S. Oct. 7, 2019); *Greer v. United States*, No. 18-9444 (U.S. Oct. 7, 2019); *Gilbert v. United States*, No. 18-9589 (U.S. Oct. 7, 2019); *Cook v. United States*, No. 189707 (U.S. Oct. 7, 2019); *Hale v. United States*, No. 18-9726 (U.S. Oct. 7, 2019); *Robinson v. United States*, No. 19-5196 (U.S. Oct. 7, 2019); *Jackson v. United States*, No. 19-5260 (U.S. Oct. 7, 2019); *McCormick v. United States*, No. 19-5270 (U.S. Oct. 7, 2019); *Parks v. United States*, No. 19-5330 (U.S. Oct. 7, 2019); *Donate-Cardona v. United States*, No. 19-5014 (U.S. Oct. 15, 2019); *Thomas v. United States*, No. 19-5025 (U.S. Oct. 15, 2019); Stacy v. United States, No. 19-5383 (U.S. Oct. 15, 2019); *McCants v. United States*, No. 19-5456 (U.S. Oct. 15, 2019); *Atkinson v. United States*, No. 19-5572 (U.S. Oct. 15, 2019); *Perez v. United States*, No. 19-5565 (U.S. Oct. 15, 2019); *Cox v. United States*, No. 19-5027 (U.S. Oct. 15, 2019); *Johnson v. United States*, No. 19-5181 (U.S. Oct. 21, 2019); *Watkins v. United States*, No. 19-5217 (U.S. Oct. 21, 2019); *Legrier v. United States*, No. 19-5623 (U.S. Oct. 21, 2019).

APPENDIX

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10140
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20582-JEM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RAKEEM ASAAD DAVIS,
a.k.a. Poo Poo,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 12, 2019)

Before MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Rakeem Davis appeals his conviction and sentence for unlawful possession of a firearm and ammunition. He argues that he is entitled to a new trial for two reasons: (1) the district court failed to conduct an inquiry into his counsel's pretrial motion to withdraw; and (2) the court failed to give a special instruction to the jury to ensure unanimity with respect to the factual grounds of conviction. He also challenges his sentence, arguing that the court procedurally erred by failing both to verify that he and his counsel had reviewed the presentence investigation report and to calculate the guideline range. After careful review, we reject these arguments and affirm.

I.

Davis was indicted in August 2017 for possession of a firearm and ammunition after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). The indictment charged possession of a Browning 9mm handgun and ten rounds of 9mm ammunition on July 29, 2017. Davis pled not guilty.

About two weeks before the trial was scheduled to start in late October 2017, Davis's counsel, Ruben Garcia, who had been appointed in early September 2017 under the Criminal Justice Act, 18 U.S.C. § 3006A, moved to withdraw. Counsel sought withdrawal due to "unreconcilable differences about the conduct of the Defendant's defense and because Mr. Davis does not trust counsel and he wishes to proceed to trial." Counsel explained that he had met with Davis four times and had gone over the evidence, jury instructions, voir dire questions, the government's

intent to introduce Rule 404(b), Fed. R. Evid., evidence, and a plea offer and proposed factual proffer. At the last conference, according to counsel, Davis had "angrily ended" the conversation and asked for Garcia to withdraw. Counsel wrote that "Davis does not believe undersigned counsel is acting in Defendant's best interest and believes that counsel wants the Defendant to plead guilty." Nevertheless, counsel stated that he had informed the government that Davis was going to trial.

The district court denied the motion a few days later at a status conference. The court stated that it had reviewed the motion and the reasons given therein. The court then addressed Davis as follows:

> Mr. Davis, I just want to tell you, you can replace him with any lawyer you want if you can hire a lawyer, but you got a competent lawyer. Mr. Garcia is a competent lawyer that has been tried and tested. We have -- he has tried many cases in front of me. He is a competent lawyer. He may not be telling you what you want to hear, but I bet he's telling you what the law is. And if you find another lawyer, I want to tell you that he better be ready to go to trial next week because that's when the trial is set. Excuse me. A week from Monday.
>
> And whether -- it seems to be the motion du jour over at the prison now that a week or two before trial, they say oh, I don't like my lawyer anymore, he's not giving me good advice and I'm not going to take it anymore, I want a new lawyer and then try to get a continuance. I don't know for what reason, but it's not happening. The case is going to trial.

Without asking to hear from Davis or Garcia, the court found that Garcia was "more than capable of representing [Davis]" in this "very simple case" and denied the motion to withdraw.

The case proceeded to trial. A confidential informant ("CI") testified that he met up with Davis and Emmanuel Duncanson on July 28. According to the CI, Duncanson asked the other two if they had a gun, and Davis said he could get one. The CI further testified that Davis gave directions to an apartment. On the way, Duncanson announced that he wanted to kill a man named Ike for interfering with his sister's drug business. At the apartment, the CI attested, Davis showed Duncanson two handguns and a rifle, which were lying on a bed. Duncanson selected one of the handguns, and Davis carried it out of the house. The CI then drove Duncanson and Davis to an apartment complex where they spotted Ike. The CI explained that when Davis refused to shoot at Ike, Duncanson grabbed the gun and fired several shots out of the car window, which missed, as the CI sped away from the scene.

At 2:00 a.m. the next morning, July 29, federal law-enforcement agents executed a search warrant at the apartment where Davis had retrieved the gun before the shooting. Davis and a woman were present in the apartment. The search revealed two handguns: (1) a Browning 9mm loaded with three rounds of ammunition; and (2) an SCCY 9mm loaded with seven rounds of ammunition.

According to the CI, both guns were present at the apartment before the shooting, but only the SCCY 9mm was used in the shooting. A federal law-enforcement agent testified that Davis was not charged with possession of the SCCY 9mm because there was no evidence it had moved in interstate commerce. The parties stipulated that Davis was not permitted to possess a firearm due to a prior felony conviction.

Based upon the parties' joint proposed jury instructions, the district court informed the jury that "[t]he sole count of the indictment charges the Defendant with being a felon in possession of a firearm and ammunition," and that the jury would be given a copy of the indictment. The court instructed the jury that the offense had two elements: (1) knowing possession of a firearm or ammunition in or affecting interstate commerce, (2) that occurred after having been convicted of a felony. The court cautioned the jury that Davis was "on trial only for the specific crime charged in the indictment" and that it was the jury's job "to determine from the evidence in this case whether the Defendant is guilty or not guilty of that specific crime." The court further advised that the "verdict, whether guilty or not guilty, must be unanimous. In other words, you must all agree." Finally, when going over the general verdict form—which simply asked the jury to find whether Davis was guilty or not guilty—the court reiterated to the jury that the verdict needed to be unanimous. Defense counsel did not object to these instructions.

The jury unanimously found Davis guilty.

Davis's presentence investigation report ("PSR") recommended a total offense level of 24 and criminal-history category of V. This established a recommended guideline imprisonment range of 92 to 115 months. Davis did not file any objections. The government filed a sentencing memorandum.

The district court began sentencing by stating that it had reviewed the PSR, the government's sentencing memorandum, and the addendum to the PSR, and the court noted that no objections had been made. The court then asked the parties for their views on an appropriate sentence. The government asked for a sentence at the "high end of the guidelines," citing the seriousness of the offense conduct and Davis's substantial criminal history. Davis's counsel argued for a sentence at "the low end of the guidelines, 92 months," referencing the PSR and asserting that Davis's criminal history was due to drug abuse, lack of guidance, and other circumstantial factors. Davis personally requested 92 months.

The district court sentenced Davis to 100 months. The court explained that it believed Davis was "a danger to the community" but that it wanted to give Davis an opportunity to reform by sentencing him "toward the low end of the guideline range," though not "all the way down to 92." Davis did not raise any objections at sentencing. He now appeals.

II.

Davis first appeals the denial of his counsel's motion to withdraw, which we will characterize as a "substitution motion." Davis argues that the district court erred in failing to conduct an inquiry into why he wanted new counsel and that he was prejudiced by counsel's continued representation during trial.

Substitution motions must be decided "in the interests of justice," 18 U.S.C. § 3006A(c), a standard that "contemplates a peculiarly context-specific inquiry," *Martel v. Clair*, 565 U.S. 648, 663 (2012). In reviewing substitution motions, we consider several factors, including the timeliness of the motion; the adequacy of the court's inquiry into the merits of the motion; and the asserted cause for the motion, including the extent of the conflict or breakdown in communication between the defendant and his counsel. *Id.*; *United States v. Calderon*, 127 F.3d 1314, 1343 (11th Cir. 1997). "Because a trial court's decision on substitution is so fact-specific, it deserves deference[.]" *Martel*, 565 U.S. at 663–64. We may overturn it "only for an abuse of discretion." *Id.* at 664; *Calderon*, 127 F.3d at 1343.

The first factor—the timeliness of the motion—slightly favors denial. While counsel appears to have promptly moved to withdraw when asked by Davis, the substitution motion was filed just two weeks before the trial was scheduled to begin and after a continuance had already been granted. While we see nothing to indicate intentional delay, we also understand the court's concern about the potential for delay. *Cf. Robinson v. Boeing Co.*, 79 F.3d 1053, 1055 (11th Cir. 1996) ("Courts

have long accepted that resulting delay may justify the exercise of a trial judge's discretion to deny substitute counsel in the midst of litigation.").

The second factor—the adequacy of the court's inquiry—cuts in favor of Davis. As the Supreme Court has stated, "courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer." *Martel*, 565 U.S. at 664. The district court must engage in at least some inquiry about "the source and factual basis" of the defendant's dissatisfaction with an attorney, even if the judge is professionally acquainted with the attorney. *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973)[1]; *see also Brown v. United States*, 720 F.3d 1316, 1336 (11th Cir. 2013) ("The trial court is obliged to explore the extent of the conflict and any breakdown in communication between the lawyer and the client."). Moreover, such "an on-the-record inquiry into the defendant's allegations 'permit[s] meaningful appellate review' of a trial court's exercise of discretion." *Martel*, 565 U.S. at 664.

The district court here addressed the substitution motion at a hearing and considered the reasons for withdrawal listed in the motion. But the court did not probe the extent of the conflict and any breakdown in communication, notwithstanding the court's professional familiarity with Davis's counsel or its

[1] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

doubts about the motivations behind the motion. *See Brown*, 720 F.3d at 1336; *Young*, 482 F.2d at 995.

Nevertheless, we do not believe that the district court's failure to probe more deeply is enough, on this record, to render the court's ruling an abuse of discretion. That's because Garcia, Davis's counsel, listed the reasons for withdrawal in the substitution motion, and the court reasonably could have concluded that further inquiry was unnecessary because the clearly listed reasons did not warrant substitution. *See McKee v. Harris*, 649 F.2d 927, 934 (2d Cir. 1981) ("If the reasons are made known to the court, the court may rule without more."); *cf. Young*, 482 F.2d at 995 (stating that inquiry is necessary when the defendant presents a "seemingly substantial complaint about counsel"). In other words, the third factor—the asserted cause for the motion—strongly favors denial of the motion.

"An indigent criminal defendant has an absolute right to be represented by counsel, but he does not have a right to have a particular lawyer represent him, nor to demand a different appointed lawyer except for good cause." *Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985); *see United States v. Garey*, 540 F.3d 1253, 1263 (11th Cir. 2008) (*en banc*). Whether good cause exists "cannot be determined 'solely according to the subjective standard of what the defendant perceives.'" *Thomas*, 767 F.2d at 742 (quoting *McKee*, 649 F.2d at 932). For that

reason, "[a] defendant's general loss of confidence or trust in his counsel, standing alone, is not sufficient." *Id.*

Here, the substitution motion reveals little more than Davis's "general loss of confidence or trust in his counsel," Garcia. *Id.* According to the motion, the conflict between attorney and client was that Garcia wanted Davis to accept the government's plea offer, but Davis wanted to proceed to trial. As a result, Davis did not trust Garcia and did not believe that Garcia was acting in his best interests. In resolving the motion, the court understood that the nature of the conflict stemmed from Davis's dissatisfaction with Garcia's plea advice, *see* Doc. 85 at 2 ("He may not be telling you what you want to hear, but I bet he's telling you what the law is."), which alone does not constitute good cause, *see McKee*, 649 F.2d at 932–33 (defendant's dissatisfaction with counsel's "frank advice" to plead guilty does not amount to good cause). And the record reflects that Garcia respected Davis's desire to proceed to trial and was prepared for it. Because the clearly listed reasons in the substitution motion did not indicate that Davis could establish good cause, we cannot say that the court abused its discretion in denying the motion without a probing inquiry.

Nevertheless, we acknowledge that our review is inhibited by the district court's lack of a formal inquiry. *See Martel*, 565 U.S. at 664. All we have to go on is the substitution motion itself. And the motion may not fully convey "the extent

of the conflict and any breakdown in communication," which is why further inquiry by the court is generally necessary. *See Brown*, 720 F.3d at 1336.

However, while the district court should have probed the matter more deeply at the status hearing, and even assuming the court erred in failing to do so, we conclude that the failure to conduct an inquiry in this case was harmless.[2] *See McKee*, 649 F.2d at 933 ("[W]hile [the trial judge] should have conducted a formal inquiry, the failure to do so in this case was harmless."). In his briefing on appeal, Davis does not suggest any other reason beyond those listed in the motion that would have been elicited by a formal inquiry. His reply brief merely states that he "lacked confidence in his attorney's ability or willingness to advocate effectively on his behalf," which is not sufficient to warrant substitution. *See Thomas*, 767 F.2d at 742. Nor can we infer a breakdown in communication from the trial errors allegedly committed by counsel—asking a particular question on cross-examination and failing to request a special verdict—since they do not appear to stem in any way from the dispute that precipitated the substitution motion. Aside from those

[2] Our harmlessness inquiry focuses on the state of facts at the time of the substitution motion. While Davis argues that the failure to inquire into a substitution motion warrants a new trial, a remedy some courts have granted in the past, the Supreme Court has now stated that "[t]he way to cure that error" is to remand to the district court "to decide whether substitution was appropriate at the time of [the substitution motion]." *Martel*, 565 U.S. at 666 n.4 (noting that the court of appeals had "ordered the wrong remedy even assuming the District Court had abused its discretion in denying Clair's substitution motion without inquiry"). Because the remedy for a lack of inquiry would be remand for consideration of the substitution motion, we must consider whether Davis could show on remand that substitution was appropriate at the time the motion was filed.

unrelated errors, Davis has pointed us to nothing in the record that would suggest that the conflict between Davis and Garcia affected Davis's trial defense. Accordingly, despite the court's failure to conduct an appropriate inquiry, we cannot conclude that Davis was harmed by that failure.

We therefore affirm the district court's denial of the substitution motion.

III.

Davis next argues that the district court plainly erred by failing to instruct the jury that it was required to reach a unanimous decision about which, if any, firearm or ammunition Davis possessed, and where and when any possession occurred. He says that jurors could have made conflicting findings on these points, in violation of his Sixth Amendment right to a unanimous jury verdict, because the evidence showed possession of guns or ammunition at three separate points: (1) before the shooting, when the guns were at the apartment; (2) during the shooting, when the uncharged gun was used; and (3) after the shooting, when both guns and all associated ammunition were found in separate locations in the apartment.

We review this argument for plain error because Davis did not object to the jury instructions before the district court. *United States v. Felts*, 579 F.3d 1341, 1343 (11th Cir. 2009). Under the "plain error" standard, the defendant must demonstrate that (1) an error occurred, (2) the error was plain, and (3) the error affected substantial rights. *Id.* at 1344. "An error is not plain unless it is contrary to

explicit statutory provisions or to on-point precedent in this Court or the Supreme Court." *United States v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013) (quotation marks omitted). Further, "[j]ury instructions will not be reversed for plain error unless the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice, or the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Starke*, 62 F.3d 1374, 1381 (11th Cir. 1995) (quotation marks omitted).

"[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Richardson v. United States*, 526 U.S. 813, 817 (1999). But "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Id.* For instance, jury disagreement about whether a robber used a knife or a gun—a disagreement about means—would not matter so long as the jury "unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force." *Id.*

Relying on *Richardson*'s distinction between elements and means, several of our sister circuits have concluded that jury unanimity is not required as to the particular firearm or ammunition possessed for purposes of § 922(g). *E.g.*, *United States v. Pollock*, 757 F.3d 582, 587–88 (7th Cir. 2014); *United States v. Talbert*,

501 F.3d 449, 451–52 (5th Cir. 2007); *United States v. DeJohn*, 368 F.3d 533, 542 (6th Cir. 2004); *United States v. Verrecchia*, 196 F.3d 294, 298–301 (1st Cir. 1999). These circuits have reasoned that unanimity is not required because the particular firearm or ammunition possessed is not an element of the crime under § 922(g) but instead the means used to satisfy the element of "any firearm or ammunition." *E.g.*, *DeJohn*, 368 F.3d at 541–42.

Here, Davis has not established plain error. Davis has identified no "on-point precedent in this Court or the Supreme Court" holding that a special unanimity instruction is required in the circumstances presented by this case. *See Hoffman*, 710 F.3d at 1232. Nor is it obvious or clear that the matters he wished to have decided by special verdict are elements of the offense requiring unanimity, as opposed to "possible sets of underlying brute facts [which] make up a particular element" for which unanimity is not required. *Richardson*, 526 U.S. at 817. For example, numerous circuits have held that jury unanimity is not required as to the particular firearm or ammunition possessed. *Pollock*, 757 F.3d at 587–88; *Talbert*, 501 F.3d at 451–52; *DeJohn*, 368 F.3d at 542; *Verrecchia*, 196 F.3d at 298–301. Accordingly, even assuming the court erred, the error was not "plain."

Davis's reliance on *United States v. Garcia-Rivera*, 353 F.3d 788 (9th Cir. 2003), is unavailing. First, that decision is from the Ninth Circuit, so it cannot establish a "plain" error in this Circuit. *See Hoffman*, 710 F.3d at 1232.

Second, even if *Garcia-Rivera* were somehow binding here, it is not on point. The indictment in *Garcia-Rivera* charged possession of a firearm over a time frame between May 19, 2001, and June 7, 2001. 353 F.3d at 790. At trial, the court instructed the jury that, to find the defendant guilty, it must find that the possession occurred (a) uninterrupted between May 19, 2001, and June 7, 2001; (b) about a week after the purchase of the firearm; and (c) on June 7, 2001. *Id.* The court told the jury that it "must unanimously agree that the possession occurred during (a) above, or on (b) or (c) above." *Id.* The Ninth Circuit held that this instruction was "fatally ambiguous" because the "jury could have concluded that they were required to decide unanimously only that possession occurred during any of the three times enumerated, not that they had to unanimously agree on which one." *Id.*

No similar ambiguity is present here. The indictment charged possession of a single firearm and ammunition on a specific date, July 29, which was after the shooting. And the district court's unanimity instructions, though general, were not "fatally ambiguous" like the choose-your-own-adventure instructions in *Garcia-Rivera*. The court here repeatedly instructed the jury that its verdict must be unanimous and the jurors "must all agree." So even assuming there were multiple possible sets of facts on which Davis's conviction could have been based, jurors would have understood from the court's instructions that they were required to "all agree" on which set of facts grounded the conviction. The instructions, considered

as a whole, were not "so clearly erroneous as to result in a likelihood of a grave miscarriage of justice" or to "affect the fairness, integrity, or public reputation of judicial proceedings." *Starke*, 62 F.3d at 1381.

For these reasons, Davis has not shown that the district court plainly erred in failing to give a specific instruction on unanimity.

IV.

Finally, Davis contends that the district court procedurally erred at sentencing in two ways: (1) failing to verify that Davis and his counsel had reviewed the PSR and addendum, as required by Rule 32, Fed. R. Crim. P.; and (2) failing to calculate the applicable guideline range at sentencing. We review these arguments for plain error because they were raised for the first time on appeal. *See United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014) (applying plain-error review where the defendant failed to object to a claimed procedural error).

Sentencing courts "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," which is "the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007). The failure to calculate the guideline range is a "significant procedural error." *Id.* at 51. Before calculating the guideline range, the district court "must verify that the defendant and the defendant's attorney have read and discussed the [PSR] and any addendum to the report." Fed. R. Crim. P. 32(i)(1)(A). No specific inquiry is required for the

district court to meet its obligation under Rule 32, as long as the record indicates that counsel reviewed the PSR with the defendant. *See United States v. Aleman*, 832 F.2d 142, 144 & n.6 (11th Cir. 1987) (applying a prior version of Rule 32(i)(1)(A)).

Here, Davis has not established plain error. Even assuming that the district court erred by failing to verify that Davis and his counsel had reviewed the PSR and by failing to state the guideline range on the record at sentencing, Davis has not shown that these errors affected his substantial rights. *See Felts*, 579 F.3d at 1343.

First, the sentencing transcript indicates that Davis's counsel had reviewed the PSR. After the court noted that there were no objections to the PSR, counsel argued for a sentence at "the low end of the guidelines, 92 months," which was the range recommended by the PSR, and he cited facts from the PSR in support of that request. Although the court did not verify that Davis personally had reviewed the PSR, nothing in the record indicates that sentencing would have gone any differently had the court personally questioned Davis.

Second, the record is clear that the district court implicitly adopted the PSR's guideline range of 92 to 115 months. And both parties framed their arguments based on that range. The government asked for a sentence at "the high end of the guidelines in this case[,] which is 115 months." Davis's counsel argued for a sentence at "the low end of the guidelines, 92 months." The district court then sentenced Davis "toward the low end of the guideline range," but not "all the way down to 92."

Because there was no confusion about the guideline range on which the sentence was based, Davis has not shown that the court's failure to state the guideline range on the record affected his substantial rights.

V.

We affirm Davis's conviction and sentence.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10140-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RAKEEM ASAAD DAVIS,
a.k.a. Poo Poo,

Defendant - Appellant.

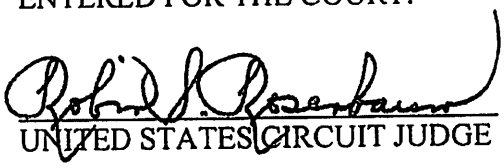
Appeal from the United States District Court
for the Southern District of Florida

BEFORE: MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-41

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.

RAKEEM ASAAD DAVIS

JUDGMENT IN A CRIMINAL CASE

Case Number: **17-20582-CR-MARTINEZ**
USM Number: **14912-104**

Counsel For Defendant: **Ruben Garcia**
Counsel For The United States: **Daniel Marcet**
Court Reporter: **Dawn Whitmarsh**

The defendant was found guilty on count(s) 1 of the indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C.§ 922(g)(1)	possession of a firearm and ammunition by a convicted felon	07/29/2017	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **1/9/2018**

Jose E. Martinez
United States District Judge

Date: 1/10/18

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **100 months** as to Count One.

The court makes the following recommendations to the Bureau of Prisons: The defendant shall be assigned to a facility as close to South Florida as possible commensurate with his background and the offense of which he stands convicted.

The Court also recommends that the defendant be screened for substance abuse problems and be referred to participate in an appropriate drug education/treatment program as deemed appropriate by the Bureau of Prisons. This may include placement in the Residential Drug Abuse Treatment Program (i.e. 500 hour drug treatment program) at a designated Bureau of Prisons institution.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years** as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.