NO. _____

In The
Supreme Court of the United States

WILLIE EDWARD BLACKSHIRE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that, for a guilty plea to satisfy constitutional due process requirements, the defendant must have been informed of all elements of the offense. Following this Court's recent decision in *Rehaif v. United States*, the Eleventh Circuit held that it may decide whether a defendant who pleaded guilty without knowledge of an element would have pleaded guilty anyway, rendering the error harmless. The Eighth Circuit has put it more starkly, "hold[ing] that [a] constitutionally-invalid guilty plea is not structural error." The Second, Fifth, and Seventh Circuits have held likewise. Only the Fourth Circuit has held the opposite, concluding that such a plea constitutes structural error. This circuit split implicates the continuing validity of *Henderson v. Morgan*, 426 U.S. 437 (1976).

The question presented is:

Whether a "constitutionally-invalid guilty plea" is structural error?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

PROCEEDINGS RELATED DIRECTLY TO THIS CASE

United States v. Blackshire, No. 2:18-cr-00160-ECM-GMB-1 (M.D. Ala. 2019)

United States v. Blackshire, 803 F. App'x 308 (11th Cir. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Willie Edward Blackshire respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a) was not selected for publication. *United States v. Blackshire*, 803 F. App'x 308 (11th Cir. 2020).

JURISDICTION

The judgment of the Eleventh Circuit was entered on February 13, 2020. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This petition is timely pursuant to this Court's March 19, 2020, Order extending "the deadline to file any petition for a writ of certiorari due on or after the date of this order . . . to 150 days from the date of the lower court judgment[.]"

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment, in relevant part, provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. AMEND. V.

STATEMENT OF THE CASE

1. In late July 2012, Willie Edward Blackshire sold a confidential informant a total of 10 pills (five oxycodone and five hydrocodone). Presentence Investigation Report ("PSR") at ¶25. As a result, Mr. Blackshire was sentenced in Alabama state court to a six month term of incarceration and five years of probation. *Id.*

2. Fast-forward to July 2018, when Mr. Blackshire pleaded guilty to violating 18 U.S.C. § 922(g)(1) for possessing a shotgun in his home. DE37.[1] Consistent with the law as it was then

[1] "DE" refers to docket entries in the district court proceedings below.

universally interpreted, Mr. Blackshire was not informed that, to be found guilty, the Government was required to prove he *knew* he was disqualified from possessing a firearm at the time he possessed it. DE37:4-5. As such, his plea colloquy did not include an admission or stipulation that he *knew* he had a disqualifying conviction at the time he possessed the firearm. DE37:10-13. Ultimately, Mr. Blackshire was sentenced to 96 months in prison.[2] DE70:2.

3. Mr. Blackshire timely appealed, DE73, and filed an initial brief raising sentencing error. Nine days later, this Court issued *Rehaif v. United States*, 588 U.S. __, 139 S. Ct. 2191 (2019). In light of *Rehaif*, the court granted Mr. Blackshire's request to file a supplemental brief challenging the validity of his guilty plea. The Government conceded plain error existed, and the Eleventh Circuit "assume[d] that plain error occurred under *Rehaif*[.]" Pet. App. 4a.

4. The Eleventh Circuit denied relief. It reasoned that Mr. Blackshire could not "prove the error affected his substantial rights" because: (1) he "admitted during the plea colloquy that he had been convicted of a crime for which he could have served more than one year in custody and that he possessed a shotgun;" (2) he "never argue[d] he would have pled differently but-for the error;" and (3) "the record indisputably establishe[d] that Blackshire knew he was a felon and that he possessed a firearm[.]" Pet. App. 4a. The judgment issued on February 13, 2020. Pet. App. 1a.

[2] Because his prior felony was a drug crime, Mr. Blackshire's base offense level was 20. PSR at ¶ 14. He received a four-level enhancement because he "possessed a firearm in connection with another felony offense," and did not receive a reduction for acceptance of responsibility because, *inter alia*, he was arrested for misdemeanor traffic offenses while on pretrial release. PSR at ¶¶ 12, 15, 21. Due to his disqualifying felony, which he was on supervision for, and prior misdemeanor convictions, his criminal history category was V. PSR ¶¶ 25-33. With a total offense level of 24 and a criminal history category of V, his advisory guidelines range was 92 to 115 months.

REASONS FOR GRANTING THE WRIT

Whether a "constitutionally-invalid guilty plea" is structural error is an important issue that has resulted in a circuit split, and implicates the continuing validity of *Henderson v. Morgan*, 426 U.S. 437 (1976).

A guilty plea results in the waiver of at least three "important federal [constitutional] rights": the privilege against self-incrimination; the right to a jury trial; and the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (citations omitted). "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury, it is conclusive." *Kercheval v. United States*, 274 U.S. 220, 223 (1927). This Court has long held that, to be constitutionally valid, "a guilty plea must be both knowing and voluntary." *Parke v. Raley*, 506 U.S. 20, 28 (1992) (citations omitted). Further, this Court has long recognized that "real notice of the true nature of the charge against" a criminal defendant is "the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941).

In *Henderson v. Morgan*, 426 U.S. 637 (1976), this Court considered the validity of a guilty plea to second-degree murder. There, as here, it was undisputed the defendant was not informed of one of the elements of the offense (there it was an intent to cause death). *Henderson*, 426 U.S. at 645. Further, as here, no charging instrument contained the element, and nothing in the record existed to substitute for a voluntary admission, as "[d]efense counsel did not purport to stipulate to that fact; they did not explain to [Henderson] that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent." *Id.* at 646.

This Court reasoned that its approach was unlikely to spark "countless collateral attacks" because "[n]ormally the record contains either an explanation of the charge by the trial judge, or

at least a representation by defense counsel that the nature of the offense has been explained to the accused." *Id.* at 647. Further mirroring Mr. Blackshire's case was a court's finding "that the element of intent was not explained to respondent." *Id.*

In dicta, this Court touched on harmless error, noting that "respondent's unusually low mental capacity provides a reasonable explanation for counsel's oversight," and "forecloses the conclusion that the error was harmless beyond a reasonable doubt" because "it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as manslaughter rather than a murder." *Id.* However, this Court's *holding* was that the guilty plea "was involuntary and the judgment of conviction was entered without due process of law" *because* "respondent did not receive adequate notice of the offense to which he pleaded guilty[.]" *Id.* at 647.

In reaching this holding, this Court assumed the defendant would have, contrary to his testimony at the evidentiary hearing, pleaded guilty to the crime even if he had been informed of the intent element. *Id.* at 644 n. 12. "Such an assumption is, however, an insufficient predicate for a conviction of second-degree murder." *Id.* This Court also "assume[d] . . . that the prosecutor had overwhelming evidence of guilt available," and that defense counsel was competent in advising Henderson to plead guilty. *Id.* at 644. Thus, although this Court did not employ the term "structural error," and discussed harmlessness in dicta, it decided the case in a manner consistent with the structural error approach. There can be no other explanation for its assumption that defense counsel was competent, the prosecutor's case was overwhelming, and Henderson would have pleaded guilty regardless of whether he had been informed of the missing element. *Id.* at 644, 644 n. 12.

Henderson has not been overruled. In *Bousley*, this Court described the petitioner's claim as follows: "In other words, the petitioner contends that the record reveals that neither he, nor his

counsel, nor the court correctly understood the essential elements of the crime with which he was charged." *Bousley*, 523 U.S. at 618. This Court reasoned, "Were this contention proved, petitioner's plea would be, contrary to the view expressed by the Court of Appeals, constitutionally invalid." *Id.* at 618-19.

In *Rehaif*, this Court held that, to obtain a conviction under 18 U.S.C. § 922(g), the Government was required to prove that a defendant knew he or she was prohibited from possessing a firearm. For a defendant, like Mr. Blackshire, who pleaded guilty and whose conviction was not yet final, *Rehaif* applies on direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). This has resulted in a number of decisions concerning the validity of convictions obtained via both trials and guilty pleas. As discussed below, aside from the Fourth Circuit, all other circuits to address the issue have adopted the harmless error approach. The circuit split needs to be resolved to ensure uniformity, fairness, and respect for this Court's precedent. Further, given the sheer number of cases impacted by the split—almost certainly over 5,000 defendants per year plead guilty to violating 18 U.S.C. § 922(g)[3]—it is important to resolve. Additionally, even in the absence of a circuit split, permitting a defendant to spend nearly a decade in prison despite a constitutionally-invalid guilty plea is unconscionable.

In the Fourth Circuit, a pre-*Rehaif* guilty plea to a violation of 18 U.S.C. § 922(g) is invalid, as structural error, where the defendant was not informed of the element identified by this Court in *Rehaif*: that the defendant *knew* he was prohibited from possessing a firearm.

[3] In his dissent, Justice Alito noted, "The U.S. Sentencing Commission reports that in fiscal year 2017 there were 6,032 offenders convicted under 18 U.S.C. § 922(g)[.]" *Rehaif*, 139 S. Ct. at 2212 n. 8 (Alito, J., dissenting). In fiscal year 2017, 92 percent of federal criminal defendants pleaded guilty. Table 5.4, U.S. District Courts, Criminal Defendants Disposed of, by Method of Disposition, During the 12-Month Periods Ending June 30, 1990, and September 30, 1995 Through 2019, https://www.uscourts.gov/sites/default/files/data_tables/jff_5.4_0930.2019.pdf (last accessed: June 11, 2020).

United States v. Gary, 954 F.3d 194 (4th Cir. 2020).[4] This is consistent with *Henderson* and its predecessors and successors.

For plain instructional error based on *Rehaif*, the Eleventh Circuit has adopted a harmless error approach. *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019) (citing *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016)). It then applied *Reed* to guilty pleas in denying relief to Mr. Blackshire. It reasoned no relief was due because: (1) Mr. Blackshire "admitted during the plea colloquy that he had been convicted of a crime for which he could have served more than one year in custody and that he possessed a shotgun;" (2) he "never argue[d] he would have pled differently but-for the error;" and (3) "the record indisputably establishe[d] that [he] knew he was a felon and the he possessed a firearm, he cannot prove that the error affected his substantial rights or the fairness, integrity, or public reputation of the judicial system." Pet. App. 4a. Of course, under *Henderson*, whether he would have pleaded guilty but-for the error and the strength of the Government's case are immaterial.[5]

The Second Circuit, having adopted the harmless error approach, has reached different results based on different facts. In *United States v. Keith*, 797 F. App'x 649 (2d Cir. 2020) (unpublished), it held that, where a defendant had previously served two years in prison, "the government would have such persuasive proof of Keith's awareness that he was a convicted felon" that it could "see no reasonable probability that [he] would not have entered the plea had the District Court correctly explained the elements of the offense."[6] *Keith*, 797 F. App'x at 692. Earlier, in *United States v. Balde*, 943 F.3d 73 (2d Cir. 2019), it reached a different conclusion,

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[4] The Government has filed a petition for rehearing *en banc*.

[5] Mr. Blackshire's case was on direct appeal at the time *Rehaif* was decided, and as such, the record is silent as to whether he would not have pleaded guilty but-for the error. Furthermore, given that Mr. Blackshire had never spent longer than six months in custody, it is hardly "indisputabl[e]" he knew he was disqualified at the time of the offense. This further supports applying structural error to *Henderson* / *Rehaif* error.

[6] *Keith* concerned a Rule 11 challenge only; Mr. Blackshire has raised a due process claim.

holding that, where an alien contested his status at multiple hearings and entered a conditional guilty plea reserving the right to challenge the determination of his legal status, he satisfied the prejudice element, rendering the error non-harmless.

Recently, the Eighth Circuit identified the circuit split on this issue, while "hold[ing] that [a] constitutionally-invalid guilty plea is not structural error." *United States v. Coleman*, __ F.3d __, 2020 WL 3039057 at *3-4 (8th Cir. June 8, 2020). The Fifth, Seventh, and Tenth Circuits have also declined to find *Rehaif* error in a guilty plea to be structural. *United States v. Lavalais*, 960 F.3d 180 (5th Cir. 2020); *United States v. Williams*, 946 F.3d 968 (7th Cir. 2020); *United States v. Trujillo*, __ F.3d __, 2020 WL 2745526 (10th Cir. 2020).

The circuit split should be resolved to ensure uniformity, fairness, and respect for this Court's precedent. This Court's longstanding precedent cannot be reconciled with the decisions of the Second, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits. Further, even absent a circuit split, whether it is appropriate to permit a person to spend years in prison despite a "constitutionally-invalid guilty plea" is for this Court to determine.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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