

No. 19-8816

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIE EDWARD BLACKSHIRE, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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#### QUESTION PRESENTED

Whether petitioner, who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), was entitled to plain-error relief because the district court did not advise him during the plea colloquy that one element of that offense is knowledge of his status as a felon, where the court of appeals determined that he had failed to show that the district court's error affected the outcome of the proceedings.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter but is reprinted at 803 Fed. Appx. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2020. The petition for a writ of certiorari was filed on June 22, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Alabama, petitioner was convicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-10a.

1. On April 20, 2017, local police officers obtained a warrant to search petitioner's home in Eufaula, Alabama, based on information from a confidential informant that the home contained guns, drugs, and drug distribution paraphernalia. Presentence Investigation Report (PSR) ¶ 4. Officers executed the warrant the next day. PSR ¶ 5. In the laundry room, they found a Remington model 12-gauge shotgun, 12 rounds of 12-gauge ammunition, cocaine, baggies, and three digital scales. Ibid. And in a dresser drawer in the bedroom, officers found, among other things, a Raven Arms .25 caliber pistol loaded with seven bullets, a box of 23 additional rounds of .25 caliber ammunition, and five additional rounds of 12-gauge ammunition. Ibid.

At the time the officers executed the warrant, petitioner was on probation following two prior state convictions for distribution of a controlled substance. PSR ¶ 25. Petitioner had been sentenced for those crimes to a "split" term of up to 15 years imprisonment and been transferred to probation after 6 months.

Gov't C.A. Br. 31; PSR ¶ 25. While present during the search, petitioner was advised of his Miranda rights, voluntarily agreed to speak with officers, and directed officers to the locations of the firearms, drugs, and drug paraphernalia in the home. C.A. Supp. App. 15. Petitioner also told officers that he was aware that he was not permitted to be in possession of handguns or long guns in light of his two prior convictions for distributing controlled substances. Ibid.

2. A federal grand jury charged petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. App. 17. The indictment alleged that, having previously been convicted of a crime punishable by more than a year of imprisonment, petitioner "did knowingly possess" live ammunition and two firearms: a Remington 12-gauge shotgun and a Raven Arms handgun. Ibid.

Petitioner pleaded guilty, without a plea agreement, in July 2018. C.A. App. 23, 32. At the outset of the change-of-plea hearing held before a magistrate judge, petitioner's counsel stated that petitioner would accept responsibility for possessing the 12-gauge shotgun but not the .25 caliber handgun also listed in the indictment. Id. at 21.<sup>1</sup> The magistrate judge then conducted a colloquy in accordance with Federal Rule of Criminal Procedure 11, reviewing with petitioner the constitutional rights he was

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<sup>1</sup> The district court later granted the government's oral motion to amend the indictment to eliminate the handgun as a basis for the charged offense. C.A. App. 51-52.

waiving by pleading guilty and the elements the government would have "to prove beyond a reasonable doubt and by competent evidence" if petitioner proceeded to trial. Id. at 7-13.

The magistrate judge explained that the government would have to prove that petitioner had been convicted "of a crime for which [he] could have received more than a year in custody" and that, to satisfy this requirement, the government "wouldn't have to show that [he] actually served more than a year or that [he] received a sentence in excess of a year," so long as it showed that petitioner "either pled guilty or w[as] convicted by a jury of a crime for which the judge could have sentenced [him] to more than a year in jail and that after having been so convicted, [he] possessed a firearm knowingly." C.A. App. 7-13. Consistent with the courts of appeals' uniform interpretation of the felon-in-possession offense at that time, the magistrate judge did not advise petitioner that the government would also need to prove that he was aware that he was a felon when he possessed the firearm. See United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam) (holding that knowledge of status is not an element of an offense under 18 U.S.C. 922(g) and 924(a)(2)), abrogated by Rehaif v. United States, 139 S. Ct. 2191 (2019); see also Rehaif, 139 S. Ct. at 2195 (noting prior uniformity).

Petitioner affirmed that, at the time he possessed the firearm, he had been convicted "of a crime for which [he] could have received more than a year in custody." C.A. App. 31.

Petitioner also admitted that he possessed the firearm at issue knowingly and intentionally, and his counsel expressed satisfaction with the factual basis for the plea. Id. at 31-32. The magistrate judge then accepted the plea. Id. at 32.

c. The Probation Office prepared a presentence report that calculated petitioner's advisory Sentencing Guidelines range as 92 to 115 months, based on a total offense level of 24 and a criminal history category of V. PSR ¶ 68. The district court addressed petitioner's objections to that calculation at a contested sentencing hearing, at which the government presented testimony from the officer who had interviewed petitioner during the execution of the search warrant and petitioner introduced the police report that the officer prepared following the search, as well as other testimony. C.A. App. 53-75; C.A. Supp. App. 15. After hearing that evidence, the court overruled petitioner's principal objections to the Guidelines range calculated by the Probation Office. C.A. App. 88-92. The court then indicated that it intended to sentence petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Id. at 114-116.

Following the district court's indication of its intended sentence, petitioner made an oral motion to withdraw his plea based on dissatisfaction with the court's sentencing decision. C.A. App. 118. After taking a brief recess, the court denied the motion to withdraw the plea, concluding that petitioner had identified no

"fair and just" reason for allowing withdrawal of the plea, as required by Federal Rule of Criminal Procedure 11(d)(2)(B). C.A. App. 119. The court then imposed a sentence of 96 months of imprisonment, to be followed by three years of supervised release. Id. at 119-120; Judgment 2-3.

3. Petitioner initially appealed only his sentence, arguing that the district court committed several errors in calculating the advisory Guidelines range and imposed a substantively unreasonable sentence. Pet. C.A. Br. 7-18. Shortly after petitioner filed his opening brief, however, this Court issued its decision in Rehaif. In Rehaif, this Court concluded that the courts of appeals had erred in their interpretation of the mens rea required to prove unlawful firearm possession under 18 U.S.C. 922(g) and 924(a)(2). Abrogating the precedent of every circuit, the Court held that the government not only "must show that the defendant knew he possessed a firearm," but "also that he knew he had the relevant status" -- e.g., that he was a felon -- "when he possessed it." 139 S. Ct. at 2194.

Petitioner sought and was granted leave to file a supplemental brief raising a claim under Rehaif. In that brief, he argued that his "guilty plea was not knowing, intelligent, and voluntary because" he had not been informed "of an essential element of the offense the [g]overnment was required to prove," namely, "that he knew he had a disqualifying conviction at the time he possessed the firearm." Pet. C.A. Supp. Br. 3. Petitioner further contended



that his "resulting conviction violates due process," that his plea was "void," and that the proper remedy was to permit him "to either withdraw his guilty plea or re-plead." Id. at 4-5; see Pet. C.A. Reply Br. 1-2.

The court of appeals rejected petitioner's claim under Rehaif in an unpublished, per curiam opinion. Pet. App. 2a-4a.<sup>2</sup> The court first determined that, because petitioner had challenged the validity of his plea for the first time on appeal, his claim was reviewable only for plain error. Id. at 2a. The court explained that the plain-error standard required petitioner to show "that an error occurred that was both plain and that affected his substantial rights" and that, even then, the court would correct the error "only if it 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" Ibid. (quoting United States v. Reed, 941 F.3d 1018, 1020 (11th Cir. 2019), petition for cert. pending, No. 19-8679 (filed June 8, 2020)) (brackets omitted).

The court of appeals "assume[d] that plain error occurred under Rehaif" but found that petitioner did not satisfy the remaining requirements for relief. Pet. App. 4a. The court explained that petitioner could not "'show a reasonable probability that \* \* \* the outcome of the proceeding would have

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<sup>2</sup> The court of appeals also rejected petitioner's challenges to his sentence. Pet. App. 5a-10a. Petitioner does not renew those challenges in this Court.

been different’” had he been informed of Rehaif’s knowledge requirement at the plea colloquy because petitioner had admitted during that colloquy that he had previously “been convicted of a crime for which he could have served more than one year in custody” and had separately “admitted that he knew he was prohibited from owning” firearms. Ibid. (quoting Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016)). The court further noted that petitioner made no argument that “he would have pled differently but-for the error.” Ibid. And the court explained that “[b]ecause the record indisputably establishes that [petitioner] knew he was a felon and that 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.” Ibid.

#### DISCUSSION

The court of appeals correctly determined that petitioner is not entitled to vacatur of his felon-in-possession conviction because he cannot show that the error during his plea colloquy affected his substantial rights or seriously undermined the fairness, integrity, or public reputation of judicial proceedings. See United States v. Marcus, 560 U.S. 258, 262 (2010). Petitioner is correct, however, that the decision below implicates a circuit conflict that has arisen in the wake of this Court’s decision in Rehaif v. United States, 139 S. Ct. 2191 (2019). As the government explains in its petition for a writ of certiorari in United States

v. Gary, No. 20-\_\_\_\_ (filed Oct. 5, 2020) (Gary Pet.), that conflict warrants the Court's view this term. Because Gary is a better vehicle for resolving the question presented, the Court should hold the petition in this case pending its consideration of the petition in Gary and then dispose of it as appropriate.<sup>3</sup>

1. For the reasons stated on pages 9 to 21 of the government's petition for a writ of certiorari in Gary, a defendant who pleaded guilty to possessing a firearm as a felon in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) without being advised that knowledge of status is an element of that offense is not automatically entitled to relief on plain-error review.<sup>4</sup> Rather, the defendant may obtain such relief only if he can make a case-specific showing on both the third and fourth prerequisites for plain-error relief. The court of appeals correctly denied plain-error relief to petitioner, who cannot satisfy either of those requirements.

A defendant is entitled to plain-error relief only if he can show (1) "an error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his]

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<sup>3</sup> The same issue is also presented by the petitions for writs of certiorari in Rolle v. United States, No. 20-5499 (filed Aug. 21, 2020); Lavalais v. United States, No. 20-5489 (filed Aug. 20, 2020); Ross v. United States, No. 20-5404 (filed Aug. 14, 2020); Hobbs v. United States, No. 20-171 (filed Aug. 13, 2020); Sanchez-Rosado v. United States, No. 20-5453 (filed Aug. 6, 2020); and Stokeling v. United States, No. 20-5157 (filed July 9, 2020).

<sup>4</sup> We have served petitioner with a copy of the government's petition for a writ of certiorari in Gary.

substantial rights,” and (4) that “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” Marcus, 560 U.S. at 262 (citation and internal quotation marks omitted). For a defendant who pleaded guilty to a felon-in-possession offense without being advised that conviction requires proof that he knew his felon status, this Court’s decision in Rehaif suffices to establish the first two requirements, because it shows an error that was clear or obvious “at the time of direct appellate review.” Henderson v. United States, 568 U.S. 266, 269 (2013).

As the court of appeals here correctly recognized, however, a defendant who asserts such an error must still make case-specific showings of prejudice and an effect on the fairness, integrity, or public reputation of judicial proceedings. To satisfy the third element, the defendant must show a reasonable probability that he would have proceeded to trial had he been so advised. See Gary Pet. 9-18. And the fourth element is not satisfied where it is evident that the defendant was in fact aware of his status as a felon. See id. at 18-21. Accordingly, the court of appeals correctly determined that petitioner’s inability to show -- indeed, his failure even to assert -- a reasonable probability that he would have insisted on a trial, as well as petitioner’s admission that he “knew he was prohibited from owning a” firearm, foreclosed plain-error relief here. Pet. App. 4a.

2. Although the decision below is correct, this Court should grant review this Term to address the circumstances in which plain-error relief is warranted for a defendant who asserts Rehaif error in his plea colloquy. As petitioner observes (Pet. 5-7), the courts of appeals are in conflict as to whether a defendant in a Section 922(g) case is automatically entitled to plain-error relief when the district court has not advised him of the knowledge-of-status element during his plea colloquy, without regard to whether that error affected the outcome of the proceedings. See Gary Pet. 21-22. For the reasons explained in the government's petition in Gary, that conflict requires this Court's intervention.

The government's petition for certiorari in Gary, however, presents a better vehicle for plenary review than this case does. The Fourth Circuit in United States v. Gary, 954 F.3d 194 (2020), expressly held in a reasoned, precedential opinion that a district court's failure to advise a pleading defendant of Rehaif's knowledge element "is structural" error and automatically satisfies both the third and the fourth requirements of this Court's plain-error test. Id. at 198, 202-208. Five judges of that court criticized that holding in a published opinion respecting the denial of rehearing en banc, describing it as "so incorrect" as to warrant this Court's "prompt[]" review. United States v. Gary, 963 F.3d 420, 420 (4th Cir. 2020) (per curiam) (Wilkinson, J., joined by Niemeyer, Agee, Quattlebaum, and

Rushing, JJ., concurring in the denial of rehearing en banc). And three other courts of appeals have acknowledged but rejected the Fourth Circuit's approach in precedential opinions. See Gary Pet. 21-22.

By contrast, the court of appeals in this case resolved petitioner's forfeited challenge to his guilty plea in a brief unpublished opinion that predated -- and therefore did not engage with -- any of the court of appeals decisions to address structural error in the wake of Rehaif. Pet. App. 2a. Indeed, petitioner himself never argued in his supplemental or reply briefs that the Rehaif-related error he raised was "structural." Nor did the court of appeals discuss the decisions on which petitioner now relies in contending that he was entitled to automatic reversal. Instead, that court applied to petitioner's case its decision in United States v. Reed, 941 F.3d 1018 (11th Cir. 2019), petition for cert. pending, No. 19-8679 (filed June 8, 2020), which had addressed a claim of Rehaif error raised by a defendant convicted after a trial, not a guilty plea.

Moreover, because petitioner sought to withdraw his guilty plea in the district court based on dissatisfaction with his sentence, see pp. 5-6, supra, this case does not reflect the typical posture of cases in which courts of appeals have considered whether to grant plain-error relief for Rehaif-based challenges to previously entered pleas. See, e.g., Gary, 954 F.3d at 200 ("Because Gary did not attempt to withdraw his guilty plea in the

district court, we review his plea challenge for plain error.”). While petitioner (correctly) has not suggested that his motion to withdraw his plea based on dissatisfaction with his sentence was sufficient to preserve a challenge to the contents of the plea colloquy, that unusual feature of this case could potentially complicate the Court’s review.

For all of those reasons, the government’s petition for a writ of certiorari in Gary presents a superior vehicle for plenary review. Because petitioner might be entitled to relief if this Court granted review in Gary and affirmed, however, his petition should be held pending the Court’s consideration of that case and then disposed of as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending consideration of the government's petition for a writ of certiorari in United States v. Gary, No. 20-\_\_ (filed Oct. 5, 2020), and then disposed of as appropriate.

Respectfully submitted.

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OCTOBER 2020