

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY ZACHARY GREEN

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

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR
Acting Solicitor General
NICHOLAS L. MCQUAID
*Acting Assistant Attorney
General*
ERIC J. FEIGIN
Deputy Solicitor General
BENJAMIN W. SNYDER
*Assistant to the Solicitor
General*
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a court of appeals may, on plain-error review, affirm a conviction for possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), on the ground that the entire record demonstrates that the defendant was not prejudiced by the application of later-overruled circuit precedent under which the government was not required to charge or prove knowledge of felon status.

(I)

RELATED PROCEEDINGS

United States District Court (D. Md.):

United States v. Green, No. 17-cr-590 (May 3, 2019)

United States Court of Appeals (Fourth Circuit):

United States v. Green, No. 19-4348 (Aug. 28, 2020)

TABLE OF CONTENTS

	Page
Opinion below.....	1
Jurisdiction.....	1
Statutory provisions and rule involved.....	1
Statement	2
Reasons for granting the petition	6
Conclusion	7
Appendix A — Court of appeals opinion (Aug. 28, 2020).....	1a
Appendix B — Court of appeals order (Oct. 19, 2020).....	8a
Appendix C — Statutory provisions and rule.....	9a

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY ZACHARY GREEN

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

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 973 F.3d 208.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2020. A petition for rehearing was denied on October 19, 2020 (App., *infra*, 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

The pertinent statutory provisions and rule are reproduced in the appendix to this brief. App., *infra*, 9a-11a.

(1)

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, respondent was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). App., *infra*, 1a. The court sentenced respondent to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The Fourth Circuit vacated and remanded with instructions to dismiss the indictment without prejudice. App., *infra*, 1a-7a.

1. On June 29, 2017, a team of law enforcement officers executed an arrest warrant and apprehended respondent at a property in Camp Springs, Maryland. App., *infra*, 2a. Respondent was wanted in connection with a home invasion that he was accused of committing at a family member's residence several days earlier. *Ibid.* When the officers arrived to make the arrest, respondent was sitting under an open-air gazebo in the yard. *Ibid.* As the officers announced themselves and approached him, respondent removed a firearm from his pocket, placed it on the shelf of one of the gazebo's pillars, and backtracked away from the gazebo. *Ibid.* The officers cornered respondent and took him into custody. *Ibid.*

A federal grand jury indicted respondent on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). C.A. J.A. 13. The indictment alleged that respondent, "having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm in and affecting commerce." *Ibid.*

2. Respondent proceeded to trial. At trial, he stipulated that “[p]rior to June 29, 2017, [he] had been convicted of a crime punishable by imprisonment for a term exceeding one year as defined in 18 U.S.C. § 921, and he had neither sought nor received restoration of his right to possess a firearm.” C.A. J.A. 888; see *id.* at 664.

The district court instructed the jury that, in order to find respondent guilty, it had to find three elements established beyond a reasonable doubt: “First, that the defendant was convicted, in any court, of a crime punishable by imprisonment for a term exceeding one year * * * ; [s]econd, that the defendant knowingly possessed the firearm as charged; [a]nd third, that the possession charged was in or affecting interstate or foreign commerce.” App., *infra*, 3a. As to the knowledge element, the district court further instructed the jury that “the government is not required to prove that the defendant knew that he was breaking the law, nor is the government required to prove that he knew that he had been previously convicted of a crime punishable by imprisonment for more than one year.” *Id.* at 4a. Respondent did not object to the indictment or to the jury instructions. *Ibid.*

The jury found respondent guilty. Judgment 1. Prior to sentencing, the Probation Office prepared a presentence report reflecting, as relevant here, that respondent previously had been convicted of multiple felony offenses and had served nearly a decade in prison. C.A. J.A. 1142-1165. The district court sentenced respondent to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. While respondent’s appeal was pending, this Court held in *Rehaif v. United States*, 139 S. Ct. 2191

(2019), that in a Section 922(g)(1) prosecution, the government must prove both “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. In his appellate proceedings, respondent argued, for the first time, that his indictment and conviction were invalid because the indictment did not allege, and the jury had not been required to find, that he knew of his felon status at the time he possessed the firearm at issue here. See App., *infra*, 4a.

The court of appeals vacated and remanded with instructions to dismiss the indictment without prejudice. App., *infra*, 1a-7a. At the outset, the court recognized that because respondent did not raise his challenge to the indictment or jury instructions in the district court, he would need to satisfy the plain-error standard in order to secure appellate relief. *Id.* at 4a; see Fed. R. Crim. P. 52(b). The court of appeals stated that to prevail on plain-error review, respondent “must show (1) an error, (2) that is plain, and (3) that affected his substantial rights.” App., *infra*, 4a (citation omitted). The court of appeals further stated that if respondent satisfied those requirements, “we ‘should exercise [our] discretion to correct the forfeited error if the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.”’” *Id.* at 5a (quoting *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1901 (2018) (brackets in original)).

Because the parties had agreed that the first two requirements of the plain-error test were satisfied, the court of appeals focused on the remaining two requirements—whether the error had affected respondent’s substantial rights, and whether leaving it

uncorrected would affect the integrity of judicial proceedings. App., *infra*, 5a. Applying the then-binding decision of a separate panel of the court of appeals in *United States v. Medley*, 972 F.3d 399 (4th Cir.), rehearing en banc granted, 828 Fed. Appx. 923 (2020), the court found that respondent had satisfied those latter two requirements. In particular, it “conclude[d] the errors warrant correction under plain error review” because the indictment failed to provide respondent with sufficient notice of the knowledge-of-status element, the jury was instructed that the Government was not required to prove respondent had known his status, and “[a]t trial, there was little—if any—evidence presented that would support that [respondent] knew his prohibited status.” App., *infra*, 7a. Although the court acknowledged the government’s reliance on information in the presentence report showing that petitioner in fact “had been convicted of several felonies, which led to him serving nearly a decade in prison,” *id.* at 5a, the court did not appear to consider that evidence in assessing whether plain-error relief was appropriate, see *id.* at 6a-7a.

4. On October 5, 2020, the government filed petitions for rehearing in both this case and *Medley*, *supra*. The court of appeals denied the petition for rehearing in this case on October 19, 2020. See App., *infra*, 8a. On November 12, 2020, however, the en banc court of appeals granted the petition for rehearing in *Medley* and directed that the case be set for oral argument. See 828 Fed. Appx. 923 (4th Cir.). The court of appeals subsequently suspended oral argument in *Medley* and placed the case in abeyance pending a decision from this Court in *Greer v. United States*, cert. granted, No. 19-8709

(oral argument scheduled for April 20, 2021). See Order, *United States v. Medley*, No. 18-4789 (4th Cir. Jan. 14, 2021).

REASONS FOR GRANTING THE PETITION

On January 8, 2021, this Court granted the petition for a writ of certiorari in *Greer v. United States*, No. 19-8709, to decide whether an appellate court may consider materials not presented to the jury—such as information in a presentence report—in assessing whether to grant plain-error relief to a defendant who was convicted of possessing a firearm following a felony conviction based on an indictment and jury instructions that did not accurately reflect the knowledge-of-status requirement announced by this Court in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). This Court’s decision in *Greer* may affect the proper disposition of this case. Indeed, the court of appeals has already placed *United States v. Medley*, on which the decision here was based, in abeyance pending a decision in *Greer*. See Order, *United States v. Medley*, No. 18-4789 (4th Cir. Jan. 14, 2021). The petition for a writ of certiorari in this case should similarly be held pending the Court’s decision in *Greer*, and then disposed of as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Greer v. United States*, cert. granted, No. 19-8709 (oral argument scheduled for April 20, 2021), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
NICHOLAS L. MCQUAID
*Acting Assistant Attorney
General*
ERIC J. FEIGIN
Deputy Solicitor General
BENJAMIN W. SNYDER
*Assistant to the Solicitor
General*
THOMAS E. BOOTH
Attorney

MARCH 2021

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-4348
(8:17-cr-00590-GJH-1)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TIMOTHY ZACHARY GREEN, DEFENDANT-APPELLANT

Submitted: May 8, 2020
Decided: Aug. 28, 2020

Appeal from the United States District Court
for the District of Maryland, at Greenbelt
George Jarrod Hazel, District Judge

Before: GREGORY, Chief Judge, WYNN, and HARRIS, Circuit Judges.

GREGORY, Chief Judge:

Timothy Green was indicted, tried, and convicted of a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The district court sentenced Green to 84 months in prison and three years of supervised release. Green's indictment alleged, and the jury was instructed it must find, that Green knew he possessed the firearm. But neither the grand jury nor the petit jury considered whether Green "knew he belonged to the relevant category of persons barred from

(1a)

possessing a firearm.” *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019). Recently, in *United States v. Medley*, — F.3d — (4th Cir. 2020), we held that the failure of an indictment to provide proper notice combined with an improper jury instruction that omits an element of a crime are substantial errors that ought to be corrected under plain error review. For similar reasons, we vacate Green’s conviction and remand this case to the district court for further proceedings.*

I.

On June 29, 2017, a law enforcement team executed an arrest warrant and apprehended Green at a property in Camp Springs, Maryland. Green was wanted for a home invasion incident that occurred at a family member’s residence a few days earlier. The officers testified that when they arrived on the scene, Green was sitting with the property’s owner under an open-air gazebo in the yard. As the officers announced themselves and moved to make the arrest, Green removed a firearm from his pocket, placed it on the shelf of one of the gazebo’s pillars, and backtracked away from the gazebo. The officers cornered Green and he was taken into custody.

On November 6, 2017, a grand jury returned a one-count indictment charging Green with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The indictment read as follows:

* Because Green’s *Rehaif* claims sufficiently resolves this case, we do not consider his claims that the district court erred in denying his motion to suppress and by enhancing his sentence based on unreliable, and unrelated, allegations.

On or about June 29, 2017, in the District of Maryland, the defendant, Timothy Zachary Green, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm in and affecting commerce, specifically, a loaded Taurus Millennium PT111 G2, 9 millimeter semiautomatic handgun.

J.A. 13.

Prior to trial, Green moved to suppress the firearm, arguing that he had a reasonable expectation of privacy on the property and the officers lacked a sufficient basis to search the gazebo, which was part of the property. After conducting an evidentiary hearing, the district court rejected Green's Fourth Amendment challenge, denied the motion to suppress, and permitted the case to proceed to trial.

After a three-day jury trial, the district court instructed the petit jury on what it had to find in order to convict Green of the single § 922(g) offense. The court read the indictment to the jury and clarified the three elements that the Government was required to prove beyond a reasonable doubt.

First, that the defendant was convicted, in any court, of a crime punishable by imprisonment for a term exceeding one year . . . ;

Second, that the defendant knowingly possessed the firearm as charged;

And third, that the possession charged was in or affecting interstate or foreign commerce.

J.A. 753. When discussing the knowledge element, the district court instructed the jury that it must "find that

the defendant knowingly possessed the firearm.” J.A. 755. “However,” the court continued, “the government is not required to prove that the defendant knew that he was breaking the law, nor is the government required to prove that he knew that he had been previously convicted of a crime punishable by imprisonment for more than one year.” J.A. 755-56.

The jury returned a guilty verdict. And the district court sentenced Green to 84 months in prison and three years of supervised release. Green timely appealed.

II.

A.

On appeal, Green argues that the Supreme Court’s recent decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), renders his indictment and conviction invalid. In *Rehaif*, the Supreme Court held that to convict a defendant of violating 18 U.S.C. § 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.” 139 S. Ct. at 2194. Here, Green argues that neither the indictment nor the jury instructions included a crucial element of the offense—that he knew his relevant status when he possessed the firearm. Thus, by permitting him to be tried on an indictment, and convicted based on jury instructions, that omitted the prohibited status element, Green argues, his constitutional rights were inexcusably violated.

Where, as here, a party raises an issue that was not raised in the district court, we review for plain error. *See United States v. Olano*, 507 U.S. 725, 731 (1993). Under this standard, Green “must show (1) an error, (2) that is plain, and (3) that affected his substantial rights.”

United States v. Dennison, 925 F.3d 185, 190 (4th Cir. 2019). If these conditions are met, we “should exercise [our] discretion to correct the forfeited error if the error ‘seriously affects the fairness, integrity, or public reputation of judicial proceedings.’” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1901, 201 L. Ed. 2d 376 (2018) (internal citation omitted). When reviewing for plain error, “an appellate court must apply the law in effect at the time it renders its decision.” *Henderson v. United States*, 568 U.S. 266, 271 (2013) (internal citation omitted).

B.

Both parties agree that in light of the Supreme Court’s intervening decision in *Rehaif*, the first two elements of the plain error standard are satisfied. It was plain error for Green to be tried on an indictment, and convicted based on jury instructions, that omitted the prohibited status element. However, the parties dispute whether these errors affected Green’s substantial rights and the integrity of the judicial proceedings. Accordingly, we focus on the third and fourth prongs of plain error review.

The Government argues that Green cannot show that the errors in the indictment and jury instructions affect his substantial rights or the fairness of the judicial proceedings. In the Government’s view, the prohibited status element is one that the Government could have easily proven to the grand jury and the petit jury. Pointing to the Presentence Report, the Government proclaims that Green had been convicted of several felonies, which led to him serving nearly a decade in prison for these combined crimes. Moreover, the Government continues, Green’s stipulation at trial barred the

Government from introducing additional evidence related to Green’s prior convictions. “Had the Supreme Court decided *Rehaif* prior to Green’s trial,” the Government predicts, “Green would have either stipulated that he was aware of his prior felony conviction or the government would have introduced” overwhelming evidence that Green knew his prohibited status. Gov. Br. at 43. Thus, the omission of the prohibited status element did not prejudice Green or change the result before the grand jury or at trial.

We recently rejected the same argument the Government raises in its brief. *Medley*, — F.3d at —. In *Medley*, the government argued that we should excuse the mistakes in the indictment and jury instructions when the record demonstrates that it did not affect the outcome of the proceedings. [*Id.* at —.] [10; 19]. We held that the petitioner showed that the flawed indictment prejudiced him because it failed to provide sufficient notice of the accusations against him. [*Id.* at —.] [17–18]. We also held that the district court’s failure to instruct the jury on the prohibited status element, and the government’s failure to present sufficient evidence on this point at trial, prejudiced the petitioner. [*Id.* at —.] [22–27]. Because these combined errors were sufficient to undermine the confidence in the outcomes of the proceedings, we exercised our discretion to correct the errors.

Applying the same reasoning, we conclude that the errors here also warrant correction. Green’s indictment failed to provide him with notice that the Government would attempt to prove that he knew his prohibited status. Afterwards, Green’s conviction was predicated on an indictment that failed to allege an essential

element of an offense and a verdict by a jury that was informed the Government was not required to prove that Green knew his prohibited status. At trial, there was little—if any—evidence presented that would support that Green knew his prohibited status. Thus, the errors here “occurred at the inception of the Government’s case against [Green] and continued throughout.” *[Id. at —.]* [28]. Under these circumstances, we conclude the errors warrant correction under plain error review.

III.

We therefore vacate Green’s § 922(g)(1) conviction and remand with instructions to the district court to enter judgment dismissing this count without prejudice.

*VACATED AND REMANDED
WITH INSTRUCTIONS*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4348
(8:17-cr-00590-GJH-1)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TIMOTHY ZACHARY GREEN, DEFENDANT-APPELLANT

Filed: Oct. 19, 2020

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Wynn, and Judge Harris.

For the Court

/s/ PATRICIA S. CONNOR, Clerk
PATRICIA S. CONNOR

APPENDIX C

1. 18 U.S.C. 922(g) provides:

Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

10a

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 924(a)(2) provides:

Penalties

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

3. Fed. R. Crim. P. 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.