NO: 20-5157

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a defendant pled guilty to a violation of 18 U.S.C. § 922(g) prior to *Rehaif v. United States*, 139 S.Ct. 2191 (2029), and it is undisputed that the plea was neither knowing nor voluntary because he was not told that knowledge-of-status is a crucial element of the offense, is this plea entered in clear violation of the Due Process Clause reversible error *per se*, or must a defendant prove that he would not have pled had he been advised of the knowledge-of-status element?

2. Does a state robbery offense that may be committed by putting the victim "in fear" – which is judged by an objective "reasonable person" standard, and does not require proof that the offender subjectively intended to put the victim "in fear" – "have as an element the use, attempted use, or threatened use of physical force against the person of another" as is necessary to qualify as a "violent felony" under the Armed Career Criminal Act?

TABLE OF CONTENTS

REPLY ARGUMENT

This case is a ready and suitable vehicle to resolve whether an unknowing and involuntary plea after *Rehaif* is automatically reversible as a structural error; if the Court chooses to grant certiorari to resolve that issue in another case, it should hold this case pending final resolution of that issue.

The government has rightly acknowledged that the courts of appeals are intractably divided on whether an involuntary guilty plea is a structural error, and whether a structural error is automatically reversible under the plain error standard. U.S. Br. at 12. It asks that the circuit conflict on that issue be resolved in *United States v. Gary*, *pet. for cert. filed* Oct. 5, 2020 (No. 20-444), where it has sought to reverse the Fourth Circuit's holding that because an unknowing and involuntary guilty plea amounts to structural error, it satisfies both the third and fourth prongs of the plain error standard in *United States v. Olano*, 507 U.S. l725 (1990).

The government asks the Court to hold Petitioner's case pending resolution of the circuit conflict in *Gary*, "because the Court's disposition in *Gary* could potentially affect the proper resolution of this case." U.S. Br. at 16. While Petitioner agrees that his case should be held pending *Gary* if the Court chooses to resolve the circuit conflict in that case, he disagrees with the government's suggestion that his own case is an "unsuitable vehicle" to resolve the circuit conflict because of "a potential need to address a threshold dispute as to the appropriate standard of review." U.S. Br. at 15.

What the government means in referring obliquely to this "threshold dispute" here, is that the Eleventh Circuit arguably erred in holding that Petitioner's involuntary guilty plea was reviewable for plain error only. In *United States v. Louissant*, 558 F. App'x 893 (11th Cir. Mar. 7, 2014) (discussed in the Petition at 10), the same judge denied counsel an opportunity to fully state objections after imposition of sentence, and because of that, the Eleventh Circuit held that

its review would be *de novo* rather than for plain error. *Id.* at 896 (where a court fails to elicit objections other than those already stated, the deferential standard usually applied to claims raised for the first time on appeal "becomes *de n*ovo because such violation implies that the defendant's opportunity to raise objections was someone limited"). Here, as the government acknowledges, U.S. Br. at 8, defense counsel expressly stated that she wished to "preserve" a *Rehaif* objection at the conclusion of Petitioner's sentencing. Although the district court cut counsel off before she could fully articulate her objection, the court was clear (in the concluding portion of the transcript the government does not mention) that it viewed the objection to be preserved, stating: "[Counsel] wishes to add one case [*Rehaif*] to her statement. *Motion granted*." Under such circumstances, and particularly in light of *Louissant,* appellate review of Petitioner's unknowing and involuntary plea claim should have been *de novo* rather than for plain error.

Given *Louissant* and this record, the government has rightly conceded that although the court below stated that plain error review applied, there is a "potential need to address a threshold dispute as to the appropriate standard of review" here. That concession is significant since the government has acknowledged in its *Gary* petition that under *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), "structural error warrants reversal 'without regard to the mistake's effect on the proceeding' [] in the context of '*preserved* error.'" *Gary* pet. at 15 (citing *Dominguez Benitez* at 81; emphasis added by the government). Given that acknowledgement, as well as the Court's reiteration in *Weaver v. Massachusetts*, 137 S.Ct. l899, 1905 (2017) that a preserved objection to a structural error entitles a defendant on direct appeal "to 'automatic reversal' regardless of the error's actual 'effect on the outcome," *id.* at 1910 (citation omitted),

the "threshold question" here as to the proper standard of review does not undercut the certworthiness of Petitioner's case. It enhances it.

Notably, the government has agreed that *Lavalais v. United States, pet. for cert. filed* Aug. 20, 2020 (No. 20-5489) would be an equally "suitable" a vehicle for certiorari as *Gary*, and importantly "would allow the Court to grant certiorari now without waiting for the certiorari-stage briefing in *Gary* to conclude." U.S. Brief, *Lavalais*, at 15-16. Here, as in *Lavalais*, the certiorari-stage briefing been concluded, and a cert grant in this case would likewise allow the Court to resolve the question dividing the circuits "without waiting for the certiorari-stage briefing in *Gary* to conclude." Moreover, the question presented for review in the instant petition is not only framed analogously to Question 1 in *Lavalais*; it is framed broadly enough to also comprise Question 2 in *Lavalais*, as well as the rephrased, consolidated questions suggested by both the government and petitioner in *Lavalois*. Because of the broad framing of Question 1 for review here, Petitioner's case would be as suitable a vehicle for certiorari as either *Gary* or *Lavalais* to resolve "the overarching conflict about whether to conduct a case-specific prejudice inquiry." U.S. Br., *Lavalais*, at 17. And in fact, it could actually be a better vehicle for certiorari because the lingering "threshold dispute as to the appropriate standard of review" will assure definitive resolution of the important and recurring question of whether an involuntary plea amounts to structural error.[1]

This Court has twice avoided resolving whether other challenged errors were "structural," after finding that the question ultimately made no difference to the resolution of the case since the defendant could not meet prong 4 of *Olano*. *See Johnson v. United States*, 520 U.S. 461, 469

[1] The government does not dispute that Petitioner specifically argued in his briefing to the Eleventh Circuit that his involuntary plea was a structural error requiring reversal without proof of prejudice, and therefore, the question of structural error is directly presented here. Petition at 10-11, 17.

(1997) (holding that "we need not decide that question because, even assuming that the failure to submit materiality to the jury 'affec[ted] substantial rights,' it does not meet the final requirement of *Olano*"); *United States v. Cotton*, 535 U.S. 625 (2002) (declining to resolve whether the indictment's failure to allege a fact that increased the statutory maximum was a structural error, or whether such an error otherwise met the third prong of *Olano*, "because even assuming respondent's substantial rights were affected, the error did not seriously affect the fairness integrity, or public reputation of judicial proceedings").

In its petition for certiorari in *Gary*, the government has already previewed this type of merits-stage argument. *See Gary* pet. at 19-21 (arguing that even if an involuntary plea were deemed a structural error that meets "the prejudice component of the plain error test," the Fourth Circuit's finding that a structural error necessarily meets the fourth prong of *Olano* cannot stand because "the fourth plain-error requirement 'is meant to be applied on a case-specific and fact-intensive basis;'" citing *Puckett v. United States*, 556 U.S. 129, 142 (2009)). Petitioner disputes that *Puckett*'s fourth prong analysis could apply to any case involving structural error (since the error in *Puckett* was ***not*** deemed structural, *id.* at 141-42), and specifically, to the type of Due Process error that exists here which has always been deemed reversible *per se* under both this Court's and the Eleventh Circuit's precedents. He urges the Court to reason, as the Fourth Circuit has, that an unknowing and involuntary plea meets prong 4 of *Olano* for the same reasons it is deemed a structural error that meets prong 3—namely, ensuring Due Process in accepting guilty pleas is vital to the integrity of our system of justice. *United States v. Gary*, 954 F.3d 194, 207-09 (4th Cir. 2020).

If the Court were to adopt the contrary approach to prong 4 of *Olano* articulated by the government in *Gary*, it might *assume without deciding* that an unknowing and involuntary plea is

a structural error that necessarily meets prong 3, and conclude (as it did in both *Johnson* and *Cotton*) that there is no relief for such an error under prong 4 without a showing of case-specific prejudice. But resolution of the circuit conflict in that matter would ***not*** definitively resolve Petitioner's case. Express resolution of the structural error question is crucial for Petitioner since the existence of structural error is case-dispositive under *de novo* review, and as the government has conceded, there is a "threshold dispute in this case as to the standard of review."

Accordingly, the Court should grant certiorari in this case either independently or together with *Lavalais* or *Gary*. If the Court concludes upon full merits briefing that an unknowing and involuntary plea does not meet prong 4 of *Olano* without a showing of case-specific prejudice, so long as the Court holds that an unknowing and involuntary plea after *Rehaif* is indeed a structural error, it should remand to the Eleventh Circuit for reconsideration of the appropriate standard of review in this case.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Writ of Certiorari, the Court should grant certiorari in this case or hold this case pending resolution of *Lavalais*, *Gary*, or another case in which it will resolve the current circuit conflict.

Respectfully submitted,

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