No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSE SANCHEZ-ROSADO,

***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

Whether an unconstitutional conviction based on a plea colloquy that omitted an element of the offense must be reversed where the defendant objected to the involuntary plea for the first time on appeal. The Fourth Circuit said yes, and this Court's precedents support its decision. *See United States v. Gary*, 954 F.3d 194, 198, 207 (4th Cir. 2020), *reh'g en banc denied*, 963 F.3d 420 (4th Cir. 2020) (en banc). Other appellate courts, including the Eleventh Circuit, have required the defendant to show a reasonable probability that he would not have pled guilty but for the error. *See, e.g., United States v. Bates*, 960 F.3d 1278, 1296 (11th Cir. 2020). This Court's intervention is needed.

LIST OF PARTIES

Petitioner, Jose Sanchez-Rosado, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Statutes **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jose Sanchez-Rosado, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion affirming Mr. Sanchez-Rosado's conviction and sentence is provided in Appendix A. The district court's final judgment is in Appendix B.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Sanchez-Rosado. The Eleventh Circuit issued its opinion on March 9, 2020. This petition is timely filed under Supreme Court Rule 13.1 and this Court's Order of March 19, 2020. Mr. Sanchez-Rosado invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18, United States Code Section 922(g) provides:

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; . . .

to . . . possess in or affecting commerce, any firearm or ammunition . . . .

STATEMENT OF THE CASE

1. Jose Sanchez-Rosado pled guilty to an indictment charging him with possessing, in and affecting interstate commerce, a firearm after a previous felony conviction, in violation of 18 U.S.C. § 922(g)(1). The indictment did not allege that Mr. Sanchez-Rosado knew he was a convicted felon at the time of his possession of the firearm, and the court did not ask him to admit this element when he pled guilty. Mr. Sanchez-Rosado did not object to the constitutional validity of his plea on any ground.

2. The court sentenced Mr. Sanchez-Rosado to the mandatory minimum 180 months of imprisonment, followed by five years of supervised release, under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Mr. Sanchez-Rosado objected to the application of the ACCA enhancement. He argued that his predicate offenses for Florida robbery and Florida domestic battery by strangulation did not

qualify as "violent felonies," and he pursued these claims on appeal. One of his arguments was that Florida robbery by "putting in fear" does not satisfy the elements clause. *See* Initial Brief of Appellant at 24-35 (April 15, 2019); Reply Brief of Appellant at 17-19 (July 19, 2019).[1]

3. On appeal, Mr. Sanchez-Rosado challenged his conviction for the first time as unconstitutional. He argued that his plea was unknowing and involuntary because the district court did not advise him at the plea colloquy that knowledge of his status as a prohibited person was an element of the crime, as this Court held in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *See* Initial Brief of Appellant at 39-41; Reply Brief of Appellant at 9-16; Supp. Brief of Appellant at 1, 10-17 (Nov. 21, 2019). He argued that the due process violation required vacatur of his conviction. *See* Initial Brief of Appellant at 41; Reply Brief of Appellant at 15-16; Supp. Brief of Appellant at 10, 13-17.

4. The Eleventh Circuit affirmed Mr. Sanchez-Rosado's conviction. The court agreed the indictment was defective because it failed to allege the element of his offense that he knew he was a felon. App. A. at 3. The Eleventh Circuit also agreed that plain error occurred when the trial court did not tell Mr. Sanchez-Rosado during his change-of-plea hearing that he had to know that he was a felon when he possessed the gun. App. A at 3. However, the Eleventh Circuit held that Mr. Sanchez-Rosado waived the indictment defect by pleading guilty and that he did not

[1] The page citations refer to the computer-generated page numbers in the top headers of the pages.

and could not prove that he was prejudiced by the errors in his indictment or during his change-of-plea hearing. App. A at 3, 4.

5. The Eleventh Circuit affirmed Mr. Sanchez-Rosado's sentence under the ACCA. Relying on *Stokeling v. United States*, 139 S. Ct. 544, 555-56 (2019), and *United States v. Dixon*, 874 F.3d 678, 682 (11th Cir. 2017), the Eleventh Circuit rejected Mr. Sanchez-Rosado's arguments that his prior convictions for Florida robbery and domestic battery by strangulation were not violent felonies.

REASONS FOR GRANTING THE WRIT

I. There is a circuit split on the standard for vacating a conviction predicated on a plea colloquy that omitted an element of the offense, where the defendant objects to the plea for the first time on appeal, and the Eleventh Circuit's approach conflicts with this Court's precedents.

The Eleventh Circuit correctly found that, in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), "plain error occurred when Mr. Sanchez-Rosado was not informed during his change of plea hearing that he had to know that he was a felon barred from possessing a firearm." App. A at 3.[2] However, the Eleventh Circuit erred when it found that the plain error only violated Federal Rule of Criminal Procedure 11(b)(1)(G), App. A at 3, and applied the standard for determining an effect on substantial rights in Rule 11 cases. App. A. at 4 (finding that Mr. Sanchez-Rosado "c[ould not] prove that he was prejudiced by the errors in his indictment or during his change of plea hearing."). The Eleventh Circuit failed to treat this plain error—omitting an element from the plea colloquy—as a constitutional error.

By requiring Mr. Sanchez-Rosado to show a reasonable probability that, but for the plain error, he would not have entered his plea, the Eleventh Circuit's holding conflicts directly with this Court's decisions in *Henderson v. Morgan*, 426 U.S. 637, 647 (1976), *Boykin v. Alabama*, 395 U.S. 238, 244 (1969), *United States v. Dominguez Benitez*, 542 U.S. 74, 84, n.10 (2004), and the Fourth Circuit's decision in *United States v. Gary*, 954 F.3d 194, 198, 207 (4th Cir. 2020), *reh'g en banc denied*, 963 F.3d

[2] The Eleventh Circuit also found correctly that Mr. "Sanchez-Rosado's indictment was defective because it failed to allege the element of his offense that he knew he was a felon." App. A at 3.

420 (4th Cir. 2020) (en banc).[3] And to the extent the Eleventh Circuit treated the plain error here as merely a violation of Federal Rule of Criminal Procedure 11, instead of a due process violation, the Eleventh Circuit's decision conflicts directly with this Court's decisions in *Henderson* and *Dominguez Benitez* and the Fourth Circuit's decision in *Gary*.

A. The Eleventh Circuit's decision conflicts with this Court's precedents reversing involuntary pleas.

This Court has long held that unknowing and involuntary pleas must be reversed because they are unconstitutional and void. *See Henderson*, 426 U.S. at 644-45 (stating that an involuntary plea cannot support a judgment of guilt); *Boykin*, 395 U.S. at 243-44 (finding reversible error where the defendant's pleas were involuntary); *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938) (stating that, absent a competent and intelligent waiver of Sixth Amendment right to counsel, the court lacked jurisdiction to convict a defendant and deprive him of his liberty, and the resulting judgment is void); *cf. Dominguez Benitez*, 542 U.S. at 84, n.10 ("[W]hen the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed."); *McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of

[3] Mr. Sanchez-Rosado's case is not an isolated instance of the Eleventh Circuit requiring proof of prejudice where the defendant claims an involuntary, unconstitutional plea due to omission of the *Rehaif* element. *See, e.g., United States v. Stokeling*, 798 F. App'x 443 (11th Cir. 2020), *pet. for cert. filed* July 24, 2020; *United States v. Thomas*, 810 F. App'x 789 (11th Cir. 2020); *United States v. Rolle*, 806 F. App'x 775 (11th Cir. 2020).

due process and is therefore void"); *see also Smith v. O'Grady*, 312 U.S. 329, 334 (1941) (referring to due process violations that invalidate the judgment on which the imprisonment rests). Even if overwhelming evidence shows that the defendant would have pleaded guilty regardless of the error, the appellate court must vacate the conviction. *Dominguez Benitez*, 542 U.S. at 84, n.10.

Omitting a *mens rea* element from a plea colloquy renders the plea unknowing, involuntary, and unconstitutional. *See Bousley v. United States*, 523 U.S. 614, 618-19 (1998); *Henderson*, 426 U.S. at 647. In *Henderson*, this Court reaffirmed that a guilty plea is not "voluntary in a constitutional sense" unless the defendant receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." 426 U.S. at 644-45 (citation omitted). If the defendant has an incomplete understanding of the charge against him, his plea cannot stand as an intelligent admission of guilt and is not voluntary in a constitutional sense. *Id.* at 645 & n.13.[4] A defendant who is not informed of a *mens rea* element of his offense does not receive adequate notice of the offense, enters an involuntary plea, and stands convicted in violation of due process. *Id.* at 647; *see also Bousley*, 523 U.S. at 618-19 (stating that where "neither [the defendant,] nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged . . . [the] plea [is] constitutionally invalid").

[4] In addition, where the accused does not understand the nature of the constitutional protections that he waives, the guilty plea is likewise involuntary and unconstitutional. *See Boykin*, 395 U.S. at 243; *Johnson*, 304 U.S. at 464-56.

Because the court did not inform Mr. Sanchez-Rosado of a required element of § 922(g)(1)—that he knew he had the relevant status when he possessed the firearm—his plea is involuntary and unconstitutional. But the Eleventh Circuit failed to acknowledge the unconstitutionality of Mr. Sanchez-Rosado's plea. Instead, the Eleventh Circuit found only that the omission of the *Rehaif* element from Mr. Sanchez-Rosado's plea colloquy violated Rule 11(b)(1)(G). App. A at 3. Accordingly, the Eleventh Circuit applied the standard applicable to plain error review of Rule 11 errors, which requires the defendant to show a reasonable probability that, but for the error, he would not have entered his plea. App. A at 3; *Dominguez Benitez*, 542 U.S. at 83.

To the extent that the Eleventh Circuit held implicitly that omission of a *mens rea* element from a plea colloquy does not offend due process, the decision conflicts directly with this Court's precedents in *Henderson* and *Bousley*, as well as other circuit courts.[5] Whether the Eleventh Circuit held implicitly that omission of a *mens*

[5] Other circuit courts have indicated that guilty pleas omitting the knowledge-of-status element in a § 922(g) prosecution are constitutionally invalid because the defendant did not understand the essential elements of the offense to which he pleaded guilty. *See, e.g., United States v. Coleman*, 961 F.3d 1024, 1027 (8th Cir. 2020) (holding that the plea was constitutionally invalid because the defendant did not understand the essential elements of the offense); *Gary*, 954 F.3d at 198, 201 (holding that the guilty plea was not knowingly and intelligently made and that the court denied defendant due process because he did not understand the essential elements of the offense); *see also United States v. Trujillo*, 960 F.3d 1196, 1203, 1205 (10th Cir. 2020) (contemplating without deciding that the court's failure to advise of the knowledge-of-status element at the plea colloquy violated defendant's constitutional right to due process); *United States v. Hicks*, 958 F.3d 399, 401-02 (5th Cir. 2020) (recognizing that due process concerns are implicated when a defendant claims that a *Rehaif* error rendered his guilty plea unknowing and involuntary); *United States v. Williams*, 946 F.3d 968, 972 (7th Cir. 2020) (accepting undisputed

rea element from a plea colloquy does not offend due process or held that Sanchez Rosado must prove prejudice regardless of whether the plain error was constitutional, the Eleventh Circuit's decision conflicts with this Court's precedents holding that omission of a *mens rea* element from a plea colloquy renders the plea involuntary, unconstitutional, void, and subject to reversal.

B. The circuits are split as to the standard for vacating a conviction predicated on a plea colloquy that omitted an element of the offense, where the defendant objects to the plea for the first time on appeal.

Applying *United States v. Olano*, 507 U.S. 725, 732 (1993), the circuit courts are split on what, if anything, a defendant claiming an involuntary plea must show to satisfy the third prong of the plain error test, an effect on substantial rights. *See United States v. Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020) ("The circuits are already split over how *Rehaif* claims should be analyzed for plain error."). The Fourth Circuit held in *Gary* that the district court's constitutional error in accepting a plea where the defendant did not understand the essential elements to which he pled was a structural error, which per se affected the defendant's substantial rights. *Gary*, 954 F.3d at 200.[6] But the Eleventh Circuit here held that Mr. Sanchez-Rosado had

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contention that a misunderstanding of the elements shared by the defendant, the lawyers, and the judge at a plea colloquy violates due process).

[6] In *Weaver v. Massachusetts*, this Court explained that the "purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." 137 S. Ct. 1899, 1907 (2017). This Court identified three, non-rigid categories of structural errors. *Id.* at 1908. This Court also addressed the standard for addressing the violation of a structural right where the defendant does not preserve the structural error on direct review but raises it later in the context of an ineffective-assistance-of-counsel claim. *Id.* at 1910-12.

to show a reasonable probability that, but for the Rule 11 error, he would not have pled guilty. App. A at 3-4.[7] And the Fifth, Eighth, and Tenth Circuits have rejected the suggestion that a constitutionally invalid plea is a structural error for which no proof of prejudice is required. *See United States v. Coleman*, 961 F.3d 1024, 1029 (8th Cir. 2020) (holding that the constitutionally invalid plea was not structural error); *see also United States v. Trujillo*, 960 F.3d 1196, 1207-08 (10th Cir. 2020) (declining to hold the error structural without a more analogous case from this Court); *Lavalais*, 960 F.3d at 184, 187-88 (following *United States v. Hicks*, 958 F.3d 399 (5th Cir. 2020)).

In *Olano*, this Court refrained from deciding whether the phrase "affecting substantial rights" was "always synonymous with 'prejudicial.'" 507 U.S. at 735 (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). This Court contemplated that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed." *Id.* This Court also declined to address "those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.* This Court concluded that "[n]ormally, although perhaps not in every case, the defendant must

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[7] When the defendant's claimed error is a nonconstitutional violation of Rule 11, he demonstrates that the error affected his substantial rights by showing "a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 124 S. Ct. at 2340 (claiming that the district court violated Rule 11(c)(3)(B) by failing to warn that the defendant could not withdraw his guilty plea if the court did not accept the government's recommendations in the plea agreement); *see United States v. Davila*, 133 S. Ct. 2139, 2150 (2013) (claiming that the district court violated Rule 11(c)(1) by participating in plea discussions).

make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong." *Id.*

Since *Olano*, this Court "has several times declined to resolve whether 'structural' errors—those that affect 'the framework within which the trial proceeds,' [citation omitted]—automatically satisfy the third prong of the plain-error test." *Puckett v. United States*, 556 U.S. 129, 140 (2009) (citations omitted); *see also United States v. Davila*, 569 U.S. 597, 611 (2013) (avoiding resolution of whether structural errors automatically affect substantial rights because the error was not structural); *cf. United States v. Marcus*, 560 U.S. 258, 262-65 (2010) (same). Given the circuit split on this important issue, Mr. Sanchez-Rosado urges this Court to review and resolve whether the omission of a *mens rea* element from a plea colloquy constitutes structural error and whether structural error automatically satisfies the third prong of the plain-error test. And even if this error is not labeled "structural," this Court should decide whether the error falls within a special category of forfeited errors that courts may correct regardless of their effect on the outcome. *See Olano*, 507 U.S. at 735.

Mr. Sanchez-Rosado argued below, just as the Fourth Circuit later found in *Gary*, that his constitutionally invalid plea after *Rehaif* was indeed a structural error. Although the Eleventh Circuit did not expressly address that argument, it implicitly rejected it by insisting that Mr. Sanchez-Rosado must prove that he would not have pled guilty had the trial court informed him of the knowledge-of-status element.

Had Mr. Sanchez-Rosado presented his *Rehaif* challenge to the Fourth Circuit, his conviction would have been reversed and vacated. As such, he asks this Court to grant this petition for certiorari. If, however, the Court chooses to resolve the circuit conflict in *Gary* itself or another case presenting the issue, Mr. Sanchez-Rosado respectfully requests that the Court hold his petition pending resolution of this common issue in such other case.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Sanchez-Rosado's petition for writ of certiorari. Alternatively, this Court should hold this petition pending resolution of this common issue in another case.

Respectfully submitted,

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