No. 20-5489

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY LAVALAIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

BRIAN C. RABBITT
Acting Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. 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.

2. Whether the district court correctly applied a two-level enhancement for possession of a stolen firearm under Sentencing Guidelines § 2K2.1(b)(4)(A) (2016).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. La.):

United States v. Lavalais, No. 17-cr-243 (Feb. 21, 2019)

United States Court of Appeals (5th Cir.):

United States v. Lavalais, No. 19-30161 (May 22, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 960 F.3d 180.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2020. The petition for a writ of certiorari was filed on August 20, 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 Eastern District of Louisiana, 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 105 months of imprisonment, to be followed by three years of supervised release. Pet. App. 5. The court of appeals affirmed. Id. at 1-12.

1. In November 2016, police in Kenner, Louisiana, conducted a sting operation targeting illegal escort services operating at local hotels. C.A. ROA 36. Police arranged for an undercover officer to meet an escort named Chyna at a hotel. Ibid. The officer met Chyna, identified her as an escort, and gave her $300 for her services. Pet. App. 2. But before the police could arrest Chyna, she fled with the money to an awaiting silver Ford Explorer. Id. at 2-3. Officers obtained the Explorer's license plate number as it left the scene. Id. at 3. They later identified it as a rental from Avis and identified petitioner as the renter. Ibid.

Police successfully arranged a second meeting with Chyna. Pet. App. 3. That time, they arrested both Chyna and petitioner, who was serving as her driver. Ibid. Police then obtained a warrant to search the car that petitioner was driving. Near the driver's seat, they found a .40 caliber Glock pistol loaded with one round in the chamber and 11 rounds in the magazine, as well as a cellphone that contained a video of petitioner using a pistol similar to the Glock at a shooting range. C.A. ROA 36-37.

Officers later learned that the Glock had been purchased not by petitioner but by a woman who was working with petitioner on

recording a music video. Pet. App. 3; Presentence Investigation Report (PSR) ¶ 13. That woman had rented another car from Avis and had allowed petitioner to drive the car after leaving some personal items, including her Glock pistol, inside of it. Pet. App. 3. Petitioner, however, never returned either the rental car or the Glock to her. Ibid. Avis eventually located the missing rental car at the address listed on petitioner's driver's license. Ibid. When Avis contacted the renter to inform her that her rental car had been found, the renter sent an email asking if Avis had also found the Glock and stating that, if not, then she would "have to file a police report that it is missing." Ibid.

2. Petitioner was charged with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-2. The indictment alleged, among other things, that at the time that petitioner possessed the firearm, he had previously been convicted of a crime punishable by more than one year of imprisonment -- specifically, furnishing and exhibiting a false, fictitious, and misrepresented identification in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6) and 924(a)(2). C.A. ROA 8. Petitioner had been sentenced to 24 months of imprisonment for that offense and had served more than one year in prison. PSR ¶ 33 (petitioner sentenced in April 2008 and released in September 2009).

In March 2018, petitioner pleaded guilty to the single charge in the indictment without a plea agreement. C.A. ROA 110-111.

Petitioner admitted in writing that he had possessed a firearm, that the firearm traveled in and affected interstate commerce, and that he had been convicted of a felony in federal court in 2008. Pet. App. 3; C.A. ROA 35-38. At the change-of-plea hearing, the district court informed petitioner that if he proceeded to trial, the government would need to prove that petitioner knowingly possessed a firearm, that the firearm had traveled in or affected interstate commerce, and that he had previously been convicted of a crime punishable by a term of imprisonment greater than one year. C.A. ROA 93. Consistent with the courts of appeals' uniform interpretation of the felon-in-possession offense at that time, the district court 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. Schmitt, 748 F.2d 249, 252 (5th Cir. 1984) (holding that knowledge of status is not an element of an offense under 18 U.S.C. 922(g) and 924(a)(2)), cert. denied, 471 U.S. 1104 (1985), abrogated by Rehaif v. United States, 139 S. Ct. 2191 (2019); see also Rehaif, 139 S. Ct. at 2195 (noting prior uniformity). After petitioner acknowledged that he understood the charge, the district court accepted the plea. C.A. ROA 110-111.

3. The Probation Office prepared a presentence report that calculated petitioner's total offense level as 17 under the advisory Sentencing Guidelines. Pet. App. 4. The Probation Office began with a base offense level of 14 under Sentencing Guidelines

§ 2K2.1(a)(6)(A) and then applied a two-level increase under Section 2K2.1(b)(4)(A) (2016) because the firearm was stolen, and a four-level increase under Section 2K2.1(b)(6)(B) because petitioner allegedly used the gun while engaging in another felony (commercial sex trafficking). Pet. App. 4. With a three-point reduction for acceptance of responsibility and a criminal history category of III, the Probation Office calculated an advisory sentencing range of 30 to 37 months. Ibid.

Both parties objected to the Probation Office's calculations. Petitioner objected to the proposed two- and four-point enhancements, while the government argued that the court should apply a two-level increase for obstruction of justice. Pet. App. 4. The government argued in particular that petitioner had attempted to obstruct the investigation when, a few weeks after his arrest, he called Chyna from prison and persuaded her to submit an affidavit in state proceedings representing that the gun found in the car was hers. C.A. ROA 173-178. The government also urged the district court to impose a sentence above the Guidelines range on the ground that petitioner had continued to engage in repeated criminal conduct since his arrest in this case. C.A. ROA 69.

At the sentencing hearing, the district court agreed with the government that the two-point obstruction enhancement was warranted. Sent. Tr. 9-15. As to petitioner's objections, it sustained the objection to the four-point enhancement for using the firearm in furtherance of another felony, but overruled the

objection to the two-point enhancement for possessing a stolen firearm. Id. at 3-9. The court observed that both parties had cited decisions that defined the word "stolen" for purposes of the Guidelines provision as reaching "all felonious or wrongful takings with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." Id. at 7. And the court found it "clear that [petitioner]" had the "requisite intent * * * to deprive the owner of her firearm, even if not permanently." Id. at 8. The court observed that petitioner had taken "the firearm from the owner's rental car without her permission and never returned it"; that the owner had denied giving petitioner the firearm or knowing that he had it; and that rather than attempting to return the firearm to the owner after his arrest, petitioner had convinced Chyna "to inform court personnel that it belonged to her, when he knew that it did not." Ibid.

After calculating a total offense level of 15 and a revised criminal history category of V, the district court determined that petitioner's advisory Guidelines range was 37 to 46 months. Sent. Tr. 15-16. The court then determined that a term of imprisonment above that range was appropriate because the range underrepresented the seriousness of petitioner's criminal history and likelihood that he would reoffend. Id. at 19-23. The court ultimately sentenced petitioner to 105 months of imprisonment, to be followed by three years of supervised release. Id. at 25.

4. The court of appeals affirmed. Pet. App. 1-12.

a. The court of appeals first determined that petitioner was not entitled to relief under this Court's decision in Rehaif, which was decided after the district court had accepted petitioner's plea but before petitioner filed his opening brief on appeal. See Pet. App. 1-3, 6-9.

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; see Pet. App. 6 (recognizing abrogation). Petitioner argued that, in light of Rehaif, his indictment was defective and his guilty plea was not knowing and voluntary, because neither had made reference to his knowledge of his status as a felon. Pet. C.A. Br. 20-32; Pet. C.A. Reply Br. 1-13.

The court of appeals observed that petitioner's unpreserved "challenge to the validity of the guilty plea" was reviewable only "for plain error." Pet. App. 5. The court explained that, to prevail on plain-error review, petitioner bore the burden of showing "(1) an error, (2) that is clear or obvious, and (3) that affects [his] substantial rights," and that, if he made that showing, the court could "exercise its discretion to grant relief

if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Ibid. The court noted the government's concession that petitioner satisfied the first two of those components because the "failure to inform [him] of the knowledge element as required in Rehaif" was, by the time of appeal, "an obvious error." Id. at 6. The court determined, however, that petitioner could not satisfy either "the third [or] fourth prongs of plain error review." Ibid.

The court of appeals found that petitioner had not established the prejudice required to satisfy the third plain-error element because he could not show "a reasonable probability that he would not have pled guilty had he known of" Rehaif's knowledge requirement. Pet. App. 7 (quoting United States v. Hicks, 958 F.3d 399, 402 (5th Cir. 2020)). The court observed that petitioner had twice admitted to his previous federal felony conviction; that "the [presentence report] listed his prior felony offense and its two-year sentence"; and that petitioner had not alleged either that this "conviction was somehow new information" unknown to him at the time of his offense "or that the absence of this information in any way impacted his decision to plead guilty." Ibid. And on the fourth plain-error requirement, the court explained that the error did "not remotely -- let alone seriously -- affect the fairness, integrity, or public reputation of judicial proceedings," because it is not unfair to affirm a defendant's

"'conviction when the record contains substantial evidence that he knew his felon status.'" Id. at 8 (citation omitted).

In reaching that result, the court of appeals rejected petitioner's reliance on United States v. Gary, 954 F.3d 194 (2020), in which the Fourth Circuit held that a defendant need not "demonstrate prejudice" because "Rehaif error [i]s structural error." Pet. App. 7. The court of appeals reviewed the "three narrow categories" of structural errors that this Court has recognized, and saw "no basis for fitting Rehaif error into any of" them. Id. at 7-8. The court noted that the Fourth Circuit in Gary understood Rehaif error to fall within, inter alia, the category of errors whose "effects are too hard to measure." Id. at 8. The court of appeals observed, however, that "[i]f the effects of Rehaif error are too hard to measure, it's because it's almost always harmless -- because convicted felons typically know they're convicted felons." Ibid.

b. The court of appeals also affirmed the two-level enhancement under Sentencing Guidelines § 2K2.1(b)(4)(A) (2016) for possessing a "stolen" firearm. Pet. App. 9-10. The court joined other courts of appeals in defining "stolen" to require an "intended deprivation of the rights and benefits of ownership of the gun." Id. at 10. And the court determined that the district judge had "properly found * * * by a preponderance of the evidence" that petitioner had the requisite intent, because petitioner "took the Glock from the car without permission," "did

not let its true owner know of its whereabouts," and, after his arrest, "asked another person * * * to falsely claim that she owned the Glock." Id. at 9-10.

DISCUSSION

The court of appeals correctly determined that petitioner is not entitled to vacatur of his felon-in-possession conviction because he cannot satisfy either the third or fourth prerequisites for plain-error relief. As petitioner observes (Pet. 10, 16-17), however, the circuits are divided as to whether 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), is automatically entitled to plain-error relief if the district court failed to advise him that one element of that offense is knowledge of his status as a felon. That conflict warrants the Court's review this Term. Contemporaneously with this brief, the government is filing a petition for a writ of certiorari in United States v. Gary, No. 20-___ (Gary Pet.), seeking further review of that issue. Although Gary presents the best vehicle for considering the issue, this case would also be a suitable vehicle. The Court should therefore either hold the petition here for the petition in Gary and dispose of it accordingly; grant the petition here on the first question as formulated on page I of this brief (potentially without awaiting the completion of certiorari-stage briefing in Gary); or grant both cases and consolidate them for briefing and argument on the

merits.[1] Certiorari is not, however, warranted on any other issue in this case.

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. 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] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation and internal quotation marks omitted). For a defendant who pleaded guilty to a felon-in-possession offense without being advised that

[1] 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); 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); Stokeling v. United States, No. 20-5157 (filed July 9, 2020); and Blackshire v. United States, No. 19-8816 (filed June 22, 2020).

conviction requires proof that he knew his felon status, this Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), suffices to establish the first two requirements, because it shows an error that was clear or obvious at "the time of 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.[2] 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 (Pet. App. 1-2, 5-9) that petitioner's inability to show a reasonable probability that he would have insisted on a trial, as well as petitioner's actual imprisonment for more than a year for a previous crime, foreclosed plain-error relief here.

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

[2] We have served petitioner with a copy of the government's petition for a writ of certiorari in Gary.

error in his plea colloquy. As petitioner observes (Pet. 3-4, 16-17), 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. That conflict requires this Court's intervention.

As petitioner observes (Pet. 10-11), the Fourth Circuit held in United States v. Gary, 954 F.3d 194 (2020), that failure to inform a defendant of the knowledge-of-status element articulated in Rehaif is a structural constitutional error that automatically entitles a defendant to relief under Federal Rule of Criminal Procedure 52(b). 954 F.3d at 198, 202-208. The Fourth Circuit subsequently denied the government's petition for rehearing en banc, over a statement joined by five judges calling that view "so incorrect and on an issue of such importance that" this "Court should consider it promptly." United States v. Gary, 963 F.3d 420, 420 (4th Cir. 2020) (Wilkinson, J., joined by Niemeyer, Agee, Quattlebaum, and Rushing, JJ., concurring in the denial of rehearing en banc). The Fourth Circuit's entrenched decision conflicts with the decision below in this case, as well as with the determination of every other circuit to consider the question. See id. at 420 n.*.

Three courts of appeals -- the Fifth Circuit (in the decision below), the Eighth Circuit, and the Tenth Circuit -- have expressly rejected Gary's structural-error holding in precedential opinions. Pet. App. 1, 7-9 (following United States v. Hicks, 958 F.3d 399, 401-402 (5th Cir. 2020)); United States v. Coleman, 961 F.3d 1024, 1029 n.3 (8th Cir. 2020); United States v. Trujillo, 960 F.3d 1196, 1205-1207 (10th Cir. 2020). The result in Gary is also irreconcilable with decisions of at least five other courts of appeals that have required defendants raising forfeited challenges to their guilty pleas under Rehaif to make a case-specific showing that the error affected the outcome of the proceedings. See United States v. Burghardt, 939 F.3d 397, 403-405 (1st Cir. 2019), cert. denied, 140 S. Ct. 2550 (2020); United States v. Balde, 943 F.3d 73, 97 (2d Cir. 2019); United States v. Hobbs, 953 F.3d 853, 857-858 (6th Cir. 2020), petition for cert. pending, No. 20-171 (filed Aug. 13, 2020); United States v. Williams, 946 F.3d 968, 973-975 (7th Cir. 2020); United States v. Bates, 960 F.3d 1278, 1296 (11th Cir. 2020); see also United States v. Sanabria-Robreno, 819 Fed. Appx. 80, 83-84 (3d Cir. 2020).

The circuit conflict concerns an important and recurring issue that requires prompt resolution in this Court. Even when considered only in relation to claims based on Rehaif, the issue affects convictions for one of the most frequently prosecuted federal offenses, a significant number of which rest on the defendant's guilty plea. See Gary, 963 F.3d at 420 (Wilkinson,

J., concurring in the denial of rehearing en banc) (observing that "[m]any, many cases await resolution of this question"); see also Rehaif, 139 S. Ct. at 2212-2213 (Alito, J., dissenting); United States Sentencing Commission, Quick Facts, Felon in Possession of a Firearm (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf (reporting that approximately 10% of cases reported to the Sentencing Commission in Fiscal Year 2019 involved convictions under 18 U.S.C. 922(g)). And beyond Rehaif-related errors, the question has potential application to other circumstances in which this Court, or a court of appeals, construes a federal criminal statute in a manner that increases the proof required to satisfy the elements of a given offense. Under the Fourth Circuit's approach, those statutory-interpretation decisions, too, may presage automatic relief for any defendant who pleaded guilty and whose case is on direct review, irrespective of whether the defendant was prejudiced. Immediate review is warranted to avoid that result, which creates a "profound schism with [this] Court's whole approach to error review and remediation," and would add "major burdens to our system" of justice. Gary, 963 F.3d at 420, 424 (Wilkinson, J., concurring in the denial of rehearing en banc).

3. As noted above, the government is filing a petition for a writ of certiorari in Gary contemporaneously with the submission of this brief. That case would be the best vehicle for this Court's review of the plain-error issue, but this case would also

be a suitable vehicle (and would allow the Court to grant certiorari now without waiting for the certiorari-stage briefing in Gary to conclude).

The decisions in both cases are precedential and directly address the application of both the third and fourth prerequisites for plain-error relief to a defendant who pleaded guilty without being advised of the knowledge-of-status requirement of the felon-in-possession offense. See Pet. App. 5-9; see Gary, 954 F.3d at 202-208. Gary has a more extended discussion of the issue, which includes the views of Fourth Circuit judges who were not on the panel but who addressed the issue in response to the government's rehearing petition. See Gary, 954 F.3d at 202-208; Gary, 963 F.3d at 420-424 (Wilkinson, J., concurring in the denial of rehearing en banc). But the decision below here expressly acknowledges Gary and briefly explains its disagreement with the Fourth Circuit's reasoning and result. See Pet. App. 8-9. Granting review in either case would thus put squarely before the Court a decision that addresses all components of the plain-error inquiry in a reasoned opinion.

Two factors suggest that Gary is a preferable vehicle, but neither factor would preclude the Court from alternatively -- or additionally -- granting review in this case. First, if the Court were to grant certiorari in this case, it would be necessary to reformulate the question presented in the manner suggested at p. I, supra. The first two questions as presented in the petition

itself do not focus on the specific question, about advisement of an offense element, that has divided the courts of appeals. See Pet. ii. And the petition's presentation of the issue in two questions, rather than one, risks bifurcating a holistic issue -- the circumstances (if any) in which Rehaif error warrants plain-error relief from a guilty plea.

Although petitioner would separate consideration of the specific prejudice standard that should apply under the third prerequisite of plain-error review, the only circuit conflict he identifies is the overarching conflict about whether to conduct a case-specific prejudice inquiry at all. As far as the government is aware, every circuit that applies a prejudice standard applies the same standard that the court of appeals applied here -- namely, the standard from United States v. Dominguez Benitez, 542 U.S. 74 (2004), which requires a defendant to show "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." Pet. App. 6 (quoting Dominguez-Benitez, 542 U.S. at 81) (brackets omitted). Petitioner appears to disagree with that standard, but does not specifically suggest another. And while petitioner contends (Pet. 17-18) that the decision below in actuality deviated from that standard, that fact-bound contention does not warrant separate review. It would instead naturally be addressed by a decision of this Court that affirms the decision below, reverses it, or vacates it and remands for reconsideration under a different standard.

Second, in a footnote in its appellate brief below, the government stated that "[s]hould [the court of appeals] determine that the error affects [petitioner's] substantial rights, the government concedes in this case that the [court of appeals] may remedy the error." Gov't C.A. Br. 11 n.4. That statement was not a concession that the fourth requirement of plain-error review is inapplicable; rather, it reflected that the specific arguments made in the court of appeals about why petitioner's substantial rights were or were not affected were closely tied to the considerations that would be relevant in assessing that whether the fourth requirement was met. See id. at 9-11. Accordingly, rather than interpreting the government's statement to concede that the fourth requirement for plain-error review had been met, the court of appeals correctly recognized that both the third and fourth requirements precluded relief. The statement in the government's brief below would therefore not impede the Court from following the approach that it has taken in certain other plain-error cases, in which it has assumed an effect on substantial rights and made clear that relief is in any event unwarranted under the fourth requirement. See United States v. Cotton, 535 U.S. 625, 633-634 (2002); Johnson v. United States, 520 U.S. 461, 468-469 (1997). Nevertheless, to the extent that the Court is concerned that the footnote might preclude the full range of options in this case, that would be a reason to grant certiorari in Gary instead.

If the Court does grant certiorari in Gary, it should hold the petition here pending Gary's resolution. The Court could alternatively grant both petitions and consolidate the cases for argument, or hold the petition in Gary pending its resolution of this case. But regardless of whether the Court grants review in this case, in Gary, or in both cases, the Court should consider and decide the question presented this Term in light of the large number of cases potentially affected by such a decision.

4. Whatever course the Court follows on the plain-error issue, it should deny certiorari on the third question presented in the petition here. With respect to that question, petitioner contends (Pet. 18-21) that the court of appeals erred in affirming the imposition of a two-level enhancement for possession of a "stolen" firearm under Sentencing Guidelines § 2K2.1(b)(4)(A) (2016). That contention, which concerns only the application of the advisory Sentencing Guidelines, does not warrant further review.

As an initial matter, this Court ordinarily leaves issues of Sentencing Guidelines application in the hands of the Sentencing Commission, which is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991). Given that the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error, this Court ordinarily does not review

decisions interpreting the Guidelines. See ibid. Adherence to that principle is particularly appropriate in this case, where petitioner does not assert that the decision below conflicts with any decision of this Court or another court of appeals. See Pet. 19-20.

In any event, petitioner's contention lacks merit. Sentencing Guidelines § 2K2.1(b)(4)(A) (2016) provides for a two-level enhancement in felon-in-possession prosecutions where the gun that the defendant possessed was "stolen." The Guidelines do not define the word "stolen." In analogous circumstances in United States v. Turley, 352 U.S. 407 (1957), which addressed the term in the context of the National Motor Vehicle Theft Act, 18 U.S.C. 2312, this Court recognized that the word "has no accepted common-law meaning" and must be given "the meaning consistent with the context in which it appears." Turley, 352 U.S. at 411, 413. Turley accordingly rejected a narrow construction of the term, instead defining it to reach "all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." Id. at 417.

Relying on Turley, as well as the basic rationale underlying the stolen-firearm enhancement, the circuits have uniformly recognized that "stolen" within the meaning of Section 2K2.1(b)(4)(A) should similarly be defined to "include[] all felonious or wrongful takings with the intent to deprive the owner

of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." United States v. Bates, 584 F.3d 1105, 1109 (8th Cir. 2009); accord Pet. App. 9; United States v. Colby, 882 F.3d 267, 272 (1st Cir.), cert. denied, 138 S. Ct. 2664 (2018); United States v. Jackson, 401 F.3d 747, 749-750 (6th Cir. 2005). And the courts below in this case correctly determined that petitioner possessed a "stolen" firearm under that definition. Pet. App. 9; Sent. Tr. 5-9. Petitioner took the gun from the owner's car without permission; used it for at least a month; did not alert the owner to its whereabouts at any point, prompting the owner to write to the rental car company out of concern that the "gun had been stolen" from the car that she had rented; and urged someone (Chyna) other than the rightful owner to claim the gun. Pet. App. 9; Sent. Tr. 8.

Petitioner's challenges to the lower courts' fact-bound determination lack merit. He suggests (Pet. 19) that it was not enough for the district court to find an intent to deprive the gun owner of the benefits of ownership, see Pet. App. 9-10, because some authorities define theft to require an intent to deprive permanently or for a lengthy period. Even putting aside that petitioner withheld the gun from its owner for at least a month, see PSR ¶¶ 7-11, other relevant sources do not "suggest that a permanent deprivation is required in order to conclude that property is 'stolen.'" Jackson, 401 F.3d at 750. Petitioner also asserts (Pet. 20) that the term "stolen" is sufficiently ambiguous

that a more demanding intent standard should be required under the rule of lenity. But it is questionable whether the rule of lenity applies to a Guidelines provision such as Section 2K2.1(b)(4)(A), given this Court's holding that the vagueness doctrine -- which bears important similarities to the rule of lenity -- does not apply to the advisory Guidelines. See Beckles v. United States, 137 S. Ct. 886, 890 (2017); see also United States v. Gordon, 852 F.3d 126, 130 n.4 (1st Cir.), cert. denied, 138 S. Ct. 256 (2017). And even if it did, the word "stolen" does not suffer from the type of "grievous ambiguity" needed to trigger the rule, United States v. Castleman, 572 U.S. 157, 173 (2014) (citation omitted), as demonstrated by the lower court decisions interpreting that term uniformly. See pp. 20-21, supra; cf. Turley, 352 U.S. at 413-417 (finding a broad reading of "stolen" to be consistent with the rule of lenity).

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-__, and then disposed of as appropriate in light of the Court's disposition in that case. In the alternative, the Court should grant the petition, limited to the first question as formulated on page I of this brief. The petition should otherwise be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBITT
Acting Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

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