No. _____

In the

Supreme Court of the United States

ROBERT LOUIS BRANDON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Is a district court's error under *Rehaif v. United States*, 139 S. Ct. 2191 (2019), a structural error that warrants automatic reversal of a guilty plea, as the Fourth Circuit has held, or is there no structural error in the context of *Rehaif*, as most other circuits have held?[1]

2. Relatedly, what prejudice inquiry (if any) applies to appellate review of an unknowing and involuntary guilty plea?[2]

[1] The Petitions for a Writ of Certiorari in *Isaac L. Hobbs v. United States*, No. 20-171 (cert. petition filed Aug. 13, 2020) and *United States v. Rodney Lavalais*, No. 20-5489 (cert. petition filed Aug. 24, 2020) raise the same issue.

[2] The Petition for a Writ of Certiorari in *United States v. Rodney Lavalais*, No. 20-5489 (cert. petition filed Aug. 24, 2020) raises the same issue.

RELATED PROCEEDINGS

Proceedings directly on review:

United States v. Brandon, No. 7:18-cr-00232-DC-1
(W.D.T.X. Mar. 13, 2019)

United States v. Brandon, No. 19-50227
(5th Cir. Jul. 14, 2020)

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PRAYER

Petitioner Robert Louis Brandon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-9a) is published at *United States v. Brandon*, 965 F.3d 427 (5th Cir. 2020). The relevant orders of the district court (App. 16a-46a) are unpublished.

JURISDICTION

The court of appeals entered its judgment on July 14, 2020. In light of the ongoing COVID-19 pandemic, the Court extended the time to file this Petition to 150 days from the date of the lower court judgment. On September 25, 2020, petitioner timely filed this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Federal Rule of Criminal Procedure 52(b) permits an appellate court to correct a trial court's plain error, even though the defendant did not object to that error in the trial-court proceedings. *United States v. Olano*, 507 U.S. 725, 732 (1993). Plain error review requires the appellant to show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his or her substantial rights. If the appellant can meet this test, the appellate court has discretion to grant relief. *Id*.

By contrast, errors that are closely linked to "certain basic, constitutional guarantees that define . . . the framework of any criminal trial," are deemed

"structural," *Weaver v. Massachusetts*, 137 S. Ct. 1819, 1907-08 (2017), and may satisfy the third prong of plain-error review, regardless of their actual effect on the outcome of the proceedings. *See Olano*, 507 U.S. at 735.

The Fifth Amendment makes plain that no person shall be deprived of life, liberty, or property without due process of law. This command requires courts to ensure that a defendant's guilty plea is made knowingly and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). To that end, the government must prove every element of each offense charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970). A defendant's guilty plea is out of sync with his due-process rights if the defendant did not understand "the essential elements of the crime with which he was charged." *Bousley v. United States*, 523 U.S. 614, 618-19 (1998).

Title 18 U.S.C. § 922(g)(1), the offense under which petitioner was convicted, prohibits certain persons from knowingly possessing firearms. The Court set forth four essential elements of this offense in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). For a valid conviction under § 922(g)(1), the government must show that: (1) the defendant belonged to the category of persons barred from possessing firearms; (2) the defendant knew that he belonged to the category of persons barred from possessing firearms; (3) the defendant knowingly possessed a firearm; and (4) the firearm traveled in or affected interstate commerce. *Id*. at 2195-96.

STATEMENT OF THE CASE

Petitioner Robert Louis Brandon's direct appeal to the Fifth Circuit raised a question in light of *Rehaif* that has not yet been resolved by this Court: Can a *Rehaif* error resulting in a constitutionally invalid plea qualify as a structural error? The Fifth Circuit's Opinion below, along with its prior precedent, answers in the negative. The Fifth Circuit and most other circuits contradict the Fourth Circuit. Accordingly, petitioner now asks this Court to grant certiorari, resolve the circuit split, and provide guidance to the lower courts**.**

Petitioner's State Conviction (Felon-in-Possession Predicate Conviction)

In 2008, petitioner pleaded guilty to burglary of a building, a felony, in state court. The judge imposed three years' probation. However, petitioner's "probation was revoked due to failing to report to a probation officer, failing to pay fees and fines, failing to complete community service, and changing residence without permission." App. 3a-4a. Upon revocation, the state court sentenced petitioner to seven months in prison. App. 4a. In short, petitioner never served more than a seven-month term of imprisonment in connection with his state burglary conviction.

Petitioner's Felon-in-Possession Conviction

On October 24, 2018, the government filed in the U.S. District Court for the Western District of Texas, Midland-Odessa Division, a single count indictment against petitioner. The indictment charged him of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment alleges nothing about whether, on the day of the alleged crime, petitioner knew that he was a prior felon.

On December 17, 2018, petitioner pleaded guilty to count 1 of the indictment. App. 44a. There was no plea agreement. App. 21a.

On March 12, 2019, the court sentenced petitioner to serve 30 months in the custody of the Bureau of Prisons "to run consecutively to any sentence imposed in the pending felony charge of prohibited substance in a correctional facility in the 142nd Judicial District Court under Cause Number CR-51860." App. 10a-11a.

Petitioner was convicted and sentenced without ever having been informed by the government that he was a prior felon within the meaning of § 922(g)(1), or that knowing his felon status at the time of his possession was an element of § 922(g)(1). App. 20a-47a. Petitioner did not specifically object on this basis because the Court had not yet issued its decision in *Rehaif*.

The *Rehaif* Decision

Six months after petitioner entered his guilty plea and just months after sentencing, the United States Supreme Court held that convictions under § 922(g) require proof the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (June 21, 2019). In other words, the Supreme Court confirmed that § 922(g) has a knowledge-of-status element. In petitioner's case, that element requires the government to allege and prove that he "*actually knew*—not should have known or even strongly suspected but *actually knew*" that he was previously convicted of a crime that that had a punishment of imprisonment exceeding one year. *Id.* at 2208 (Alito, J., dissenting).

Before, the Fifth Circuit required the government to prove three elements for a § 922(g)(1) conviction: (1) that the defendant previously had been convicted of a felony; (2) that he possessed a firearm; and (3) that the firearm traveled in or affected interstate commerce." *United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005). Thus, *Rehaif* added a fourth, knowledge-of-status element to this equation.

Petitioner's Appeal to the Fifth Circuit

Petitioner timely appealed the district court's sentence imposed on March 12, 2019, as reflected in the notice of appeal entered on March 15, 2019. The U.S. District Court for the Western District of Texas appointed counsel under the Criminal Justice Act to represent petitioner on appeal.

Petitioner raised two issues on appeal. Both issues were based on the government's failure to inform petitioner of the knowledge-of-status element under § 922(g)(1), as *Rehaif* requires.

First, does the evidence establish that petitioner knew on the date alleged in the indictment that he had been previously convicted for an offense "punishable by imprisonment for more than one year"?

Second, if not, did the district court plainly err by accepting his guilty plea in the absence of such evidence?

The court held that petitioner "is not entitled to relief because he has not shown 'a reasonable probability that, but for the error, he would not have entered the plea' and therefore has not shown the district court's error affected his substantial rights."

App. 6a. Had the Fifth Circuit applied a proper structural-error test its analysis and its outcome would have been different.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's decision in *Gray* "creates a circuit split of yawning proportions" that "the Supreme Court should consider . . . promptly."

United States v. Gray, 954 F.3d 194 (4th Cir. 2020) "is far-reaching in its implications. It not only creates a circuit split of yawning proportions, but also an equally profound schism with the Supreme Court's whole approach to error review and remediation." *United States v. Gray*, 963 F.3d 420, 420 (4th Cir. 2020) (Wilkinson, J., concurring in denial of rehearing *en banc*). In fact, according to Judge Harvie Wilkinson of the Fourth Circuit, "the Supreme Court should consider it promptly." *Id*.

A. The Fourth Circuit is alone in holding that a *Rehaif* error is a structural error that warrants automatic reversal of a guilty plea.

In *Gray*, the Fourth Circuit held that "a standalone *Rehaif* error satisfies plain error review because such an error is structural, which *per se* affects a defendant's substantial rights." *United States v. Gray*, 954 F.3d 194, 200 (4th Cir. 2020). The Fourth Circuit further found "that the error seriously affected the fairness, integrity and public reputation of the judicial proceedings and therefore [it] must exercise our discretion to correct the error." *Id*.

As noted by Judge Wilkinson, "eight—or nine—circuits . . . disagree with" the Fourth Circuit decision in *Gray* and the "ranks are growing." *Gray*, 963 F.3d at 420 (4th Cir. 2020) (Wilkinson, J., concurring in denial of rehearing *en banc*). Outside the Fourth Circuit, "the circuits have uniformly held that a defendant cannot show an

effect on his substantial rights where the evidence shows that the defendant knew of his status as a felon at the time of his gun possession." *Id.* at n. (citing *United States v. Burghardt*, 939 F.3d 397, 403-05 (1st Cir. 2019); *United States v. Balde*, 943 F.3d 73, 97 (2d Cir. 2019); *United States v. Denson*, 774 F. App'x 184, 185 (5th Cir. 2019); *United States v. Hobbs*, 953 F.3d 853, 857-58 (6th Cir. 2020); *United States v. Williams*, 946 F.3d 968, 973-75 (7th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019); *United States v. Fisher*, 796 F. App'x 504, 510-11 (10th Cir. 2019); *United States v. McLellan*, 958 F.3d 1110, 1118-20 (11th Cir. 2020); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019); *United States v. Hicks*, 958 F.3d 399, 401-402 (5th Cir. 2020)).

B. The court of appeals are incapable of resolving this frequently recurring conflict.

The decisions discussed in Part I(A) of this petition show that courts of appeals have repeatedly been confronted with the issue of whether there is structural error in the context of *Rehaif*. That is hardly surprising. As noted by Justice Alito, *Rehaif* "create[s] a mountain of problems with respect to the thousands of prisoners currently serving terms for § 922(g) convictions." *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting). What the courts of appeals' opinions reveal, beyond the fact that issues regarding *Rehaif* error arise frequently and have produced a "circuit split of yawning proportions," is that the Fourth Circuit and the other circuits are not converging on a consistent approach.

C. The decision below conflicts in principal, if not directly, with *Rehaif*.

In *Rehaif*, this Court held that it did not "believe that Congress would have expected defendants under §922(g) and §924(a)(2) to know their own statuses." *Rehaif*, 139 S. Ct. at 2197. "If the provisions before us were construed to require no knowledge of status, they might well apply to . . . a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is "*punishable* by imprisonment for a term exceeding one year." *Id*. at 2197-98 (citing § 922(g)(1) (emphasis added); *see also United States v. Games-Perez*, 667 F.3d 1136, 1138 (10th Cir. 2012) (defendant held strictly liable regarding his status as a felon even though the trial judge had told him repeatedly—but incorrectly—that he would "leave this courtroom not convicted of a felony")). This case falls within this scenario.

Here, before his arrest for violating the federal felon-in-possession statute, petitioner had only been convicted of one felony offense, burglary of a building. For his burglary conviction, the state court initially sentenced petitioner to three years of probation. App. 3a-4a. After petitioner violated the terms of his probation, the state court sentenced petitioner to only seven months of incarceration. App. 4a. Based on these facts alone, petitioner did not necessarily know that his burglary conviction subjected him to punishment "by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

To be sure, when petitioner pleaded guilty to the burglary charge, he did sign a judgment which identified burglary as a "felony offense" and was admonished concerning the range of punishment at his guilty plea hearing. At most, however,

these facts establish only that he was made aware of the statutory maximum on June 25, 2008, the date of his sentencing for burglary. Whether he remembered these facts over a decade later on September 23, 2018, the day he violated the federal felon-in-possession statute, is unclear from this record, and to hold otherwise would be to accept with regard to factual bases an inference this Court rejected with regard to congressional intent. *See Rehaif*, 139 S. Ct. at 2197-98.

In short, the district court was required to develop facts to support each element of the offense charged below, *United States v. Garcia – Paulin*, 627 F. 3d 127, 131 (5th Cir. 2010), but the record fails to establish knowledge of prohibited status, *see Rehaif*, 139 S. Ct. at 2200. Accordingly, the decision below conflicts in principal, if not directly, with *Rehaif*.

D. This case presents the right opportunity for resolving the circuit conflict.

This case presents a perfect opportunity for this Court to decide whether a *Rehaif* error is a structural error that warrants automatic reversal of a guilty plea. Significantly, the circuit conflict identified above was outcome determinative in this case. The Fourth Circuit vacated a conviction that was in the same posture as petitioner's, holding that "[i]t is the duty of the court to ensure that each defendant who chooses to plead guilty enters a knowing and voluntary plea." *Gray*, 954 F.3d at 207-08.

II. Even if *Rehaif* error does not mandate automatic reversal, this Court should clarify the prejudice framework applicable to unknowing and involuntary guilty pleas.

Even if this Court ultimately disagrees that an unknowing and involuntary plea is reversible *per se*, it should clarify the prejudice inquiry applicable to that special brand of constitutional error. In petitioner's case, the Fifth Circuit—like most other circuits—simply squeezed the defect into an ill-fitting Rule 11 mold. But "the concept of prejudice is defined in different ways depending on the context in which it appears." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). And *United States v. Dominguez Benitez*, 542 U.S. 74 (2004)—at the very least—made clear that its prejudice analysis was limited to the Rule 11 context and should not be stretched to encompass constitutional errors like the one in this case.

At the very least, if this Court does intend to permit continued use of the *Dominguez Benitez* prejudice framework in this context, the contours of that standard must be carefully defined. The Fifth Circuit took liberties with its application—imposing an actual innocence standard that imagined the outcome of a theoretical trial, rather than focusing on the soundness of petitioner's decision-making at the time of his plea. In essence, the Fifth Circuit concluded that the constitutional validity of a guilty plea and resulting unlawful conviction is of no consequence so long as the defendant is unable to scrap together conclusive proof from an underdeveloped record that he would have prevailed at trial. Importantly, "[t]he reasonable probability standard is not the same as, and should not be confused with, a

requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 83 n.9.

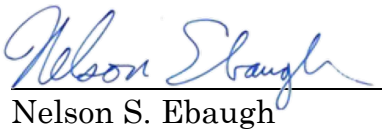
Moreover, the Fifth Circuit's approach is particularly dangerous in this context, in which defendants are unaware of the government's additional burden and therefore have no reason to develop record evidence relevant to the missing element or dispute incorrect record evidence that may appear to support it. *See Descamps v. United States*, 570 U.S. 254, 270 (2013) ("A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense."). And, most fundamentally, the constitutional ill in this context is not the wrongful conviction, but instead the invalid adjudication itself. The Fifth Circuit's approach to constitutional error transforms reviewing courts into mere deciders of guilt or innocence, rather than custodians of fair process.

Accordingly, regardless of this Court's leanings on the structural error question, it is critical—at the very least—to clarify the prejudice standard applicable to appellate review of unknowing and involuntary guilty pleas.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,



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