NO. _____

In The
Supreme Court of the United States

JAMAL HUTCHINSON,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CHRISTINE A. FREEMAN
EXECUTIVE DIRECTOR
MACKENZIE S. LUND
Counsel of Record
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, AL 36104
(334) 834-2099
Mackenzie_S_Lund@fd.org

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QUESTION PRESENTED

In *Rehaif*, *v. United States,* this Court held that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. 2191, 2200 (2019). Since then, the federal Courts of Appeals have taken divergent approaches to plain error review of pre-*Rehaif* guilty pleas, where, as here, the defendant argues that his guilty plea was unknowing and involuntary because he was affirmatively misinformed about the critical elements of his § 922(g) offense. As a majority of Circuits have held, does an appellant seeking reversal based on *Rehaif* overcome plain error review only if he makes a specific showing that he would not have plead guilty, but for the error? Or, as the Fourth Circuit has determined, does a pre-*Rehaif* guilty plea present a "structural" error that automatically satisfies the third prong of plain error review and requires reversal?

The question presented is: Can the appellate courts' divergent approaches to plain error review of pre-*Rehaif* guilty pleas be reconciled with one another? Are the federal Courts of Appeals reviewing *Rehaif*-related errors in a manner that is contrary to this Court's precedent in *Henderson v. Morgan*, 426 U.S. 637, 646-47 (1976)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Jamal Hutchinson*, No. 17-cr-481, U.S. District Court for the Middle District of Alabama. Judgment entered on April 12, 2019.
- *United States v. Jamal Hutchinson*, No. 19-11869, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on June 1, 2020.

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Mr. Jamal Hutchinson respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision below is unpublished. *United States v. Hutchinson,* 815 Fed. App'x 422 (11th Cir. 2020) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

JURISDICTION

The Eleventh Circuit's opinion in this case was issued on June 1, 2020. *See* Pet. App. 1a. No rehearing was sought, rendering Mr. Hutchinson's petition for a writ of certiorari due in this Court on August 31, 2020. However, due to public health concerns relating to the COVID-19 pandemic, this Court entered an order, extending the deadline to file the petition to 150 days from the date of the lower court judgment. The certiorari petition is now due on October 29, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in relevant part, that: "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides that, "[i[n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury . . . and to be informed of the nature and cause of the accusation . . . ."

Title 18, United States Code § 924(a)(2) provides that "[w]hoever knowingly violates" 18 U.S.C. § 922(g) "shall be" subject to term of imprisonment not to exceed 10 years. Section 922(g)(1), in turn, makes it unlawful for any person "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." 18 U.S.C. § 922(g)(1).

Federal Rule of Criminal Procedure 52 provides:

> **(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.

STATEMENT OF THE CASE

In November 2017, a federal grand jury returned a four-count indictment against Mr. Jamal Aikeem Hutchinson. Of relevance to this petition, Count Three charged Mr. Hutchinson with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Specifically, the indictment alleged that, on or about April 5, 2017, Mr. Hutchinson:

> having previously been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, to-wit:
>
> 1. Burglary in the Third Degree in the Circuit Court of Lee County, Alabama, case number CC-2013-000946;

2. Theft of Property in the Second Degree in the Circuit Court of Lee County, Alabama, case number CC-2013-000946;

3. Promoting Prison Contraband in the Circuit Court of Lee County, Alabama, case number CC-2013-000948; and

4. Theft of Property in the Second Degree in the Circuit Court of Lee County, Alabama, case number CC-2015-000668,

did knowingly possess a firearm and ammunition that traveled in and affected interstate commerce, that is a Ruger .45 caliber handgun, and live ammunition, better descriptions of which are unknown to the Grand Jury.

Notably, the indictment did not allege that Mr. Hutchinson *knew* that he had previously been convicted of an offense punishable by more than one year imprisonment. The indictment did not contain any citation to 18 U.S.C. § 924(a)(2), nor did it track the statutory language of that provision. *See* 18 U.S.C. § 924(a)(2) (providing that "[w]hoever knowingly violates" § 922(g) shall be imprisoned not more than 10 years).

Although Mr. Hutchinson was initially named in three additional counts—that is, one count of Hobbs Act robbery under 18 U.S.C. § 1951 and two 18 U.S.C. § 924(c) violations—all three of those counts were later dismissed by government motion.

In May 2018, Mr. Hutchinson pled guilty to Count Three without the benefit of a written agreement. At the change of plea hearing, the magistrate judge noted that Count Three charged Mr. Hutchinson with possession of a

firearm by a convicted felon, and it provided the following explanation of the essential elements of the offense:

> Now, Mr. Hutchinson, to obtain a conviction of you at trial, the government would have to show several things, all beyond a reasonable doubt and by competent evidence.
>
> They would have to show, first, that on or about the time set out in the indictment that you had in your possession a firearm, and that your possession of that firearm was knowingly and intentionally done; that is, you knew it was a firearm that you had, and you purposefully and willfully intended to have the firearm on that day.
>
> They would also have to show that that firearm traveled in interstate commerce, that is, from either outside the state of Alabama from another state, or from outside the United States into the state of Alabama.
>
> And they would have to show that at some point prior to April the 5th of 2017, that you have been convicted – and a conviction would be you either pled guilty to or were found guilty after a trial in either state or federal court – of a crime for which you could have received more than a year in custody as a sentence. Now, they wouldn't have to show that you actually received a sentence of more than a year or that you actually served a sentence of more than a year. All they would have to show in that regard is that the law would have allowed the judge, if the judge chose to, to sentence you to more than a year in prison or a year in custody.

The magistrate judge did not inform Mr. Hutchinson that the government was also required to prove, beyond a reasonable doubt, that he *knew* that he belonged to the relevant category of persons barred from possessing firearms.

The magistrate judge then elicited the following factual basis for the guilty plea:

> The Court: Mr. Hutchinson, before I may accept a plea of guilty from you, I must ask you some questions to satisfy myself that you are, in fact, guilty.

Mr. Hutchinson, are you the Jamal Aikeem Hutchinson listed in Count 3 of the indictment?

The Defendant: Yes, sir.

The Court: Mr. Hutchinson, on April the 5th of 2017, were you in Lee County, Alabama?

The Defendant: Yes, sir.

The Court: I take judicial notice that that is in the Middle District of Alabama.
And on that day, did you have in your possession a Ruger .45 caliber handgun and live ammunition?

The Defendant: Yes, sir.

The Court: And was your possession of that firearm knowing and intentional? That is, you knew it was a firearm and ammunition that you had, and you purposefully intended to have it on that day?

The Defendant: Yes, sir.

The Court: Mr. Hutchinson, at some point prior to April the 5th, were you convicted of one of these crimes listed in the indictment?

The Defendant: Yes, sir.

The Court: I take judicial notice that those crimes listed in Count 3 of the indictment are felonies under the law of the State of Alabama.
And was the firearm that you possessed on April the 17th [sic] a Ruger .45 caliber pistol?

The Defendant: Yes, sir.

The Court: I take judicial notice that Ruger firearms are not made in the State of Alabama.

Both parties stated that they were satisfied with this factual basis. The magistrate judge then accepted Mr. Hutchinson's guilty plea, and adjudged him guilty.

At sentencing, the district court calculated a total offense level of 28 and a criminal history category of V, corresponding to a guideline range of 130-162 months. However, the court noted that the guideline range was restricted to 120 months by § 5G1.1(a) and the statutory maximum. Ultimately, the district court sentenced Mr. Hutchinson to 120 months' imprisonment.

The district court entered judgment on April 12, 2019, and Mr. Hutchinson filed his notice of appeal on May 10, 2019. Mr. Hutchinson also filed a motion for leave to file his notice of appeal out of time, which the district court granted.

Subsequently, on June 21, 2019, this Court decided *Rehaif v. United States*, and held that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. 2191, 2200 (2019).

On appeal, Mr. Hutchinson argued that his § 922(g) conviction must be set aside in light of *Rehaif,* because: (1) the indictment failed to set forth the essential elements of the offense; and (2) his guilty plea was not knowing and voluntary. With respect to this latter point, Mr. Hutchinson pointed out that he had been affirmatively misinformed—albeit in accordance with then-

binding Eleventh Circuit precedent—regarding what the government was required to prove in order to satisfy the status element of his § 922(g) offense. Thus, per *Henderson v. Morgan*[1] and its progeny, his conviction violated due process because he was never informed of the essential elements of the offense. He argued that, in contrast to mere Rule 11 violations, a constitutionally involuntary guilty plea of this nature required *per se* reversal rather than standard plain error review.

The Eleventh Circuit rejected Mr. Hutchinson's arguments, and affirmed his conviction. *United States v. Hutchinson*, 815 Fed. App'x 422 (11th Cir. 2020). Reviewing for plain error only, the Eleventh Circuit held that Mr. Hutchinson was unable to demonstrate that any *Rehaif*-related error affected his substantial rights. *Id.* at 424-25. The Court explained its conclusion as follows:

> That an error occurred during Hutchinson's plea colloquy and that the error was made plain by *Rehaif* is undisputed. Thus, we address only whether Hutchinson has satisfied his burden of showing that the error affected his substantial rights. We conclude that he has not.
>
> The record sufficiently evidences that Hutchinson was aware of his status as a convicted felon when he possessed the firearm. According to the undisputed facts in the Presentence Investigation Report, Hutchinson had four prior felony convictions -- each of which resulted in a sentence exceeding one year. Hutchinson also testified at the plea colloquy that he had been convicted of at least one of the four felonies listed in the indictment. *Cf. Reed*, 941 F.3d at 1021 (concluding the record established adequately that defendant knew of his convicted-felon status given defendant's 8 prior felony convictions, defendant's

[1] *Henderson v. Morgan*, 426 U.S. 637, 646-47 (1976).

> testimony that he "knew" he was not supposed to have a gun, and that defendant had served 18 years in prison before his arrest for possessing a firearm). We also note that Hutchinson never claims on appeal that he was actually unaware he was a convicted felon when he possessed the firearm.
>
> On this record, Hutchinson cannot demonstrate -- nor does he contend -- that he would not have pleaded guilty but for the magistrate judge's failure to advise him of the knowledge-of-status element. Moreover, Hutchinson did benefit from his decision to plead guilty: in exchange for Hutchinson's guilty plea for being a felon in possession of a firearm, the government moved to dismiss Counts 1 and 2 of the indictment (charging Hutchinson with Hobbs Act Robbery and with brandishing a firearm during a crime of violence).[2]

Id. at 424-25.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. The decisions of the federal Courts of Appeals are in conflict with one another concerning plain error review of pre-*Rehaif* guilty pleas.

Under this Court's precedent, an appellate court will only correct an error that the defendant failed to raise in the district court if: (1) an error occurred; (2) the error was plain; and (3) the error affected substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). If all three conditions are

[2] This is not an accurate characterization of the record. Mr. Hutchinson pled guilty without the benefit of a written agreement, and the government's decision to dismiss Counts One, Two, and Four was not contingent upon or in exchange for his decision to plead guilty to Count Three. On the contrary, the government unilaterally dismissed Counts One and Two because of a material change in the evidence which created a "significant concern that Counts 1 and 2 of the Indictment (Doc. 1) [could] be proven beyond a reasonable doubt." Likewise, it dismissed Count Four because it was "unable, in good faith, to determine an appropriate 'crime of violence' for which Defendant[] may be charged in relation to Count Four."

met, this Court may, in its discretion, correct an error if it "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

At the time criminal proceedings were initiated against Mr. Hutchinson, the Eleventh Circuit held that, to successfully prosecute a defendant under § 922(g), the government was required to prove three elements: (1) that the defendant fell within one of the prohibited categories listed in the § 922(g) subdivisions ("the status element"); (2) that the defendant knowingly possessed a firearm ("the possession element"); and (3) that the possession was in or affecting interstate or foreign commerce ("the commerce element"). *See* 11th Circuit Pattern Jury Instruction (Criminal), § O34.6 (2016); *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997); *United States v. Rehaif*, 888 F.3d 1138, 1143 (11th Cir. 2018). There was no mens rea requirement with respect to the status element of § 922(g), and the government was not required to prove that the defendant knew he was a convicted felon in order to sustain a conviction. *See Jackson*, 120 F.3d at 1229 (addressing § 922(g)(1), and holding that the district court did not err by instructing the jury that it was not necessary for it to find that the defendant knew he had been convicted of a felony); *Rehaif*, 888 F.3d at 1143 (addressing the illegal-alien prohibited status in § 922(g)(5)(A)).

Subsequently, on June 21, 2019, this Court decided *Rehaif*, and expressly overruled the Eleventh Circuit's precedent. 139 S. Ct. at 2200. Specifically, this Court held that, "in a prosecution under 18 U.S.C. § 922(g)

and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* The Court explained that "[t]he term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." *Id.* at 2195. Thus, since Congress specified that a defendant may be convicted only if he "knowingly violates" § 922(g), the government must establish that the defendant *knew* he violated each of the material elements of § 922(g). *Id.* Therefore, the term "knowingly" extends to both the possession and the status element of § 922(g), and the government must prove "that a defendant knew both that he engaged in the relevant conduct (that he possessed a firearm) and also that he fell within the relevant status (that he was a felon, an alien unlawfully in this country, or the like)[.]" *Id.* at 2194. Only the jurisdictional commerce element is excluded from the reach of the word "knowingly." *Id.* at 2196 (noting that jurisdictional elements "simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct," and as such are not subject to the presumption in favor of scienter because they have "nothing to do with the wrongfulness of the defendant's conduct").

In short, to sustain a conviction under § 922(g) post-*Rehaif*, the government must prove that: (1) the defendant knowingly possessed a firearm; (2) the defendant knew that he fell within one of the prohibited categories

listed in the § 922(g); and (3) the possession was in or affecting interstate or foreign commerce. *See id.*

Almost immediately, a circuit split developed concerning how appellate courts should review pre-*Rehaif* guilty pleas, where, as here, the defendant was affirmatively misinformed about the critical elements of the offense. As noted previously, the Eleventh Circuit has held that it will review all unpreserved, *Rehaif*-related errors for plain error only, and in doing so it will "consult the whole record" to determine whether the error affected the defendant's substantial rights. *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019) (addressing a pre-*Rehaif* jury verdict); *see also United States v. Bates*, 960 F.3d 1278, 1296 (11th Cir. 2020) (applying plain error review to the appellant's *Rehaif*-based challenge to the knowing and voluntary nature of his guilty plea). In the context of a guilty plea, the Eleventh Circuit has held that an appellant can satisfy this burden only if there is "a reasonable probability that, but for the error, he would not have entered the plea." *Bates*, 960 F.3d at 1296; *see also* Pet. App.1a (relying on *Reed* to reject Mr. Hutchinson's *Rehaif* arguments). Accordingly, the Eleventh Circuit: (1) requires the defendant to make a specific prejudice showing before it will grant relief; and (2) treats the *Rehaif* error as a technical Rule 11 violation, rather than a constitutional due process issue. *See Bates*, 960 F.3d at 1296 (applying *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004)).

The First, Second, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have each adopted a similar approach, and hold that, to satisfy the third prong of plain error review, the defendant must make a specific showing that he would not have plead guilty, but for the error. *See United States v. Burghardt*, 939 F.3d 397, 403-405 (1st Cir. 2019); *United States v. Balde*, 943 F.3d 73, 96-97 (2d Cir. 2019); *United States v. Lavalais*, 960 F.3d 180, 187-188 (5th Cir. 2020); *United States v. Hobbs*, 953 F.3d 853, 857-858 (6th Cir. 2020); *United States v. Williams*, 946 F.3d 968, 973-975 (7th Cir. 2020); *United States v. Coleman*, 961 F.3d 1024, 1029-1030 (8th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1208 (10th Cir. 2020).

In contrast to these authorities, the Fourth Circuit has taken an entirely different approach, and considers *Rehaif*-related constitutional errors to be "structural errors" that automatically satisfy the third prong of plain error review and require reversal. *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020). The Fourth Circuit recently denied rehearing en banc in *Gary*, rendering this circuit split intractable and ripe for this Court's review. *United States v. Gary*, 2020 WL 3767152 (4th Cir. 2020) (Wilkinson, J., concurring in the denial of rehearing en banc) (explaining that the issue was of "such importance that I think the Supreme Court should consider it promptly," in order to resolve "a circuit split of yawning proportions").

In short, the federal Courts of Appeals have taken vastly divergent approaches concerning how to handle plain error review of pre-*Rehaif* guilty

pleas. Not all of the Circuits can be correct, and one or more of the appellate courts has misinterpreted this Court's precedent regarding the intersection between plain error and structural error. As a result of this misapprehension, appellants in the Fourth Circuit have an avenue to setting aside their § 922(g) convictions that is unavailable to identically situated defendants in other geographic regions. This problem is one of widespread importance, as § 922(g) is one of the most commonly prosecuted federal crimes. Therefore, this Court should grant certiorari to resolve the circuit split, and ensure uniformity, fairness, and respect for this Court's precedent.

II. The Eleventh Circuit's decision is contrary to, or misapphrehends a crucial aspect of, *Henderson v. Morgan*, 426 U.S. 637 (1976).

"[R]eal notice of the true nature of the charge against" a criminal defendant is "the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941). "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (footnotes omitted). Where a defendant who pleads guilty is not informed of an element of the offense, the resulting conviction violates due process and is invalid. *Henderson*, 426 U.S. at 646-47; *see also Bousley v. United States*, 523 U.S. 614, 618-19 (1998) ("[P]etitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential

elements of the crime with which he was charged. Were this contention proved, petitioner's plea would be . . . constitutionally invalid.").

In *Henderson*, this Court was unequivocal: "Since respondent did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law." *Henderson*, 426 U.S. at 647. The constitutional error in *Henderson* required automatic, *per se* reversal, without any requirement that the defendant make a specific showing that he would not have pled guilty, but for the error. *See id.* The same result should control here. Per *Rehaif*, the government was required to prove that Mr. Hutchinson *knew* that he fell within one of the prohibited categories listed in § 922(g). *Rehaif*, 139 S. Ct. at 2200. However, the charging document does not reference this missing mens rea element, defense counsel never explained it, and the plea colloquy does not address it. Mr. Hutchinson's guilty plea cannot be deemed "voluntary in a constitutional sense" if "the element of intent was not explained" and Mr. Hutchinson never received true notice of the nature of the charge. *Henderson*, 426 U.S. at 645, 647. Per *Henderson,* this type of constitutional, due process error requires reversal, even in the face of "overwhelming evidence of guilt." *Id.* at 644. Accordingly, the Eleventh Circuit's decision below conflicts with a crucial aspect of this Court's precedent announced in *Henderson*.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

Christine Freeman, Executive Director
Mackenzie S. Lund, Assistant Federal Defender*
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, AL 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353

*Counsel of Record