

No. _____

IN THE
Supreme Court of the United States

ROOSEVELT COOPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CARUSO

FEDERAL PUBLIC DEFENDER

ANDREW L. ADLER

Counsel of Record

ASS'T FED. PUBLIC DEFENDER

1 E. Broward Blvd., Ste. 1100

Ft. Lauderdale, FL 33301

(954) 536-7436

Andrew_Adler@fd.org

Counsel for Petitioner

NOVEMBER 6TH, 2020

QUESTION PRESENTED

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), is automatically entitled to plain error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings.¹

¹ This question is also presented in several other pending petitions, including *United States v. Gary*, Sup. Ct. No. 20-444 (pet. filed Oct. 5, 2020).

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
LEGAL PROVISIONS INVOLVED	1
STATEMENT.....	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION.....	6

TABLE OF APPENDICES

Appendix A: Opinion of the U.S. Court of Appeals for the Eleventh Circuit (August 5, 2020)	1a
Appendix B: Opinion of the U.S. Court of Appeals for the Eleventh Circuit (June 12, 2019)	9a
Appendix C: Indictment (Mar. 22, 2018)	14a
Appendix D: Plea Colloquy (May 8, 2018)	18a
Appendix E: Judgment of Conviction (July 20, 2018)	32a

TABLE OF AUTHORITIES

CASES

<i>Rehaif v. United States</i> , 139 S. Ct. 2191 (2019)	<i>passim</i>
<i>United States v. Balde</i> , 943 F.3d 73 (2d Cir. 2019)	5
<i>United States v. Bates</i> , 960 F.3d 1278 (11th Cir. 2020)	5
<i>United States v. Burghardt</i> , 939 F.3d 397 (1st Cir. 2019)	5
<i>United States v. Coleman</i> , 961 F.3d 1024 (8th Cir. 2020)	5
<i>United States v. Gary</i> , 954 F.3d 194 (4th Cir. 2020), <i>reh’g en banc denied</i> 963 F.3d 420 (4th Cir. 2020), <i>pet. for cert. filed</i> (U.S. No. 20-444)	<i>passim</i>
<i>United States v. Hobbs</i> , 953 F.3d 853 (6th Cir. 2020), <i>cert. pending</i> , No. 20-171 (filed Aug. 13, 2020)	5
<i>United States v. Lavalais</i> , 960 F.3d 180 (5th Cir. 2020), <i>cert. pending</i> , No. 20-5489 (filed Aug. 20, 2020)	5
<i>United States v. Trujillo</i> , 960 F.3d 1196 (10th Cir. 2020)	5
<i>United States v. Williams</i> , 946 F.3d 968 (7th Cir. 2020)	5

STATUTES

18 U.S.C. § 922(g)(1)	1, 2, 3
18 U.S.C. § 924(a)(2)	1, 2, 3
28 U.S.C. § 1254(1)	1

RULES

Fed. R. Crim. P. 52(b)	1
------------------------------	---

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit’s opinion is reported at 824 F. App’x 656, and is reproduced as Appendix (“App.”) A. App. 1a–7a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on August 5, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

Section 922(g)(1) of Title 18 of the U.S. Code provides that “[i]t shall be unlawful for any person . . . who has been convicted” of a felony to possess a firearm. Section 924(a)(2) provides that “[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be . . . imprisoned not more than 10 years.”

Rule 52(b) of the Federal Rules of Criminal Procedure provides: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

STATEMENT

A federal grand jury in the Southern District of Florida returned an indictment charging Petitioner with being a felon in possession of a firearm. The indictment alleged that Petitioner, “having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting interstate and foreign commerce a firearm . . . , in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).” App. 14a. Notably, the indicted alleged only that Petitioner knowingly possessed a firearm and ammunition. But it did not allege that he knew of his status as a felon at the time of possession.

Consistent with the indictment, at the plea hearing the government proffered facts that it would have proved at trial, which showed that Petitioner knowingly possessed a firearm and ammunition, and that Petitioner was a convicted felon at that time. App. 21a–25a. But it did not allege that Petitioner knew he was a felon at the time. *See id.* Likewise, the court confirmed with Petitioner only that that he “possessed [a] gun after having been convicted of a felony,” but not that he knew he was a felon at that time. App. 21a.

At sentencing, the court varied upward from the guideline range and imposed a sentence of 60 months’ imprisonment. App. 9a. Petitioner challenged that sentence on Fifth Amendment grounds, but the court of appeals affirmed that sentence on appeal. App. 9a–13a; 777 F. App’x 371 (11th Cir. 2019).

Nine days after the court affirmed Petitioner’s sentence, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which held that, to prove a violation

of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), the government “must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.” *Id.* at 2191. Petitioner sought certiorari, arguing, *inter alia*, that his guilty plea was constitutionally invalid in light of *Rehaif*. This Court granted his petition, vacated the Eleventh Circuit’s judgment, and remanded for further reconsideration in light of *Rehaif*. 140 S. Ct. 605 (Dec. 9, 2019).

On remand, Petitioner reiterated his argument that his plea was constitutionally invalid in light of *Rehaif*. For support, he relied on the Fourth Circuit’s intervening decision in *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020), *reh’g en banc denied* 963 F.3d 420 (4th Cir. 2020), *pet. for cert. filed* (U.S. No. 20-444), which held that a defendant’s pre-*Rehaif* guilty plea was constitutionally invalid, and it vacated the conviction under plain error review. *See* Pet. C.A. Rule 28(j) Ltr. (Mar. 26, 2020) (11th Cir. No. 18-13266).

The Eleventh Circuit affirmed. Reviewing Petitioner’s constitutional claim for plain error, the court acknowledged that, because “the plea colloquy did not establish that Cooper knew he had been convicted of” a felony, “the error was plain under *Rehaif*.” App. 5a. However, the court concluded that Petitioner could not show that his substantial rights were affected, because the record reflected that he knew he was a felon, and thus still would have pled guilty but for the error. App. 5a–7a.

REASONS FOR GRANTING THE PETITION

The circuits are divided on the question presented. Like Petitioner, the defendant in *Gary* argued, for the first time on appeal, that his guilty plea was constitutionally involuntary in light of *Rehaif*, because he was not informed about the essential elements and nature of the offense. The Fourth Circuit applied plain error, found all four prongs satisfied, and vacated the conviction.

The government conceded, and the court of appeals agreed, that there was error under *Rehaif*, and this error was “plain.” The Fourth Circuit explained that the district court erred by failing to advise the defendant at the plea hearing that the government was required to prove that he knew he was a felon. And *Rehaif* rendered that error plain. *Gary*, 954 F.3d at 201–02.

The Fourth Circuit next concluded that this error affected the defendant’s substantial rights. Although the government argued that there was overwhelming evidence that the defendant knew he was a felon, the Fourth Circuit concluded that the failure to advise him about the nature of the charge rendered his plea “constitutionally invalid.” And, under this Court’s precedents, a constitutionally invalid plea could not be saved even by overwhelming evidence that the defendant would have pled guilty anyway. *Id.* at 202–03. The Fourth Circuit also concluded this amounted to a “structural error” because it deprived the defendant of the right to make an informed decision, its effect was too difficult to assess, and it resulted in fundamental unfairness. *Id.* at 203–07.

Finally, the Fourth Circuit found that the fourth prong of plain error was satisfied. It reasoned that “the structural integrity of the judicial process is . . .

undermined when we permit convictions based on constitutionally invalid guilty pleas to stand,” “particularly where a defendant who did not receive notice of the true nature of an offense might unknowingly forgo the opportunity to raise an available defense.” *Id.* at 207–08.

In contrast to the Fourth Circuit, every other circuit to address the issue has held a defendant cannot satisfy plain error review where the record reflects that he knew he was a felon and, therefore, would have still pled guilty notwithstanding the *Rehaif* error. *Gary*, 963 F.3d 420, 420 n.* (4th Cir. 2020) (Wilkinson, concurring in the denial of rehearing en banc); see *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. Lavalais*, 960 F.3d 180, 187–88 (5th Cir. 2020), *cert. pending*, No. 20-5489 (filed Aug. 20, 2020); *United States v. Hobbs*, 953 F.3d 853, 857–58 (6th Cir. 2020), *cert. pending*, No. 20-171 (filed Aug. 13, 2020); *United States v. Williams*, 946 F.3d 968, 973–75 (7th Cir. 2020); *United States v. Coleman*, 961 F.3d 1024, 1029 n.3 (8th Cir. 2020); *United States v. Trujillo*, 960 F.3d 1196, 1205–07 (10th Cir. 2020); App. 5a–6a (citing *United States v. Bates*, 960 F.3d 1278, 1296 (11th Cir. 2020)).

This Court should grant review to resolve the circuit conflict. Petitioner is identically-situated to the defendant in *Gary* and thus would have obtained relief had he been convicted in the Fourth Circuit. Like Mr. Gary, he pled guilty before *Rehaif* without being advised that the government had to prove that he knew he was a felon. And, after *Rehaif*, Petitioner argued on direct appeal that his guilty plea was constitutionally invalid, citing the Fourth Circuit’s decision in *Gary*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

MICHAEL CARUSO

FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler

Counsel of Record

ANDREW L. ADLER

ASS'T FED. PUBLIC DEFENDER

1 E. Broward Blvd., Ste. 1100

Ft. Lauderdale, FL 33301

(954) 536-7436

Andrew_Adler@fd.org

Counsel for Petitioner