No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAKEEM DAVIS,

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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QUESTION PRESENTED

In *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019), this Court held that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove that "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." The "relevant status" pertinent to this case is that Petitioner had a prior conviction for "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(l). The circuits are expressly split on a question of great importance with respect to cases that were tried to a jury before this Court decided *Rehaif:*

When determining whether a defendant's substantial rights were affected by an indictment and jury instructions that omitted an essential element of a § 922(g)(l) offense, *i.e.*, that the defendant knew he previously had been convicted of a crime punishable by imprisonment for a term exceeding one year, may a reviewing court consider facts about a defendant's criminal history that were not admitted at trial, including facts culled from a presentence report?

INTERESTED PARTIES

The caption contains the names of all of the parties interested in the proceedings.

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PETITION FOR WRIT OF CERTIORARI

Rakeem Davis respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 18-10140 on April 20, 2020, *United States v. Davis*, 811 Fed.Appx. 508 (11th Cir. 2020).

OPINION BELOW

This Court granted Petitioner's previous petition for writ of certiorari on January 27, 2020, vacating the judgment of the Eleventh Circuit and remanding for further consideration in light of *Rehaif v. United States*, 139 S.Ct. 2191 (2019). *See Davis v. United States*, 140 S.Ct. 952 (2020).

On remand, the Eleventh Circuit affirmed Petitioner's conviction in an unpublished opinion. *United States v. Davis*, 811 Fed.Appx. 508 (11th Cir. 2020), *see* App. 1-7. Petitioner filed a petition for en banc rehearing, which the Eleventh Circuit denied. App. .

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Court of Appeals issued its decision on April 20, 2020. App. 1–7. Petitioner filed a timely petition for

rehearing en banc on May 11, 2020, and the Court of Appeals denied the petition on June 22, 2020, App. 8. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the following constitutional and statutory provisions:

U.S. Const. amend. V (due process clause):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... ; nor shall any person be subject for the same offence 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.

U.S. Const. amend. VI (right to jury trial in criminal cases):

> 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 defence.

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

> 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.

Title 18, United States Code, Section 924(a)(2):

> Whoever knowingly violates subsection ... (g) ... of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

Petitioner was charged in a one-count indictment with violating 18 U.S.C. § 922(g)(1). The indictment alleged that Petitioner, "having been previously convicted of a crime punishable by imprisonment for a term of exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate commerce…."

Petitioner exercised his right to a jury trial. When the district court instructed the jury on the elements of the charged offense, it did not require the jury to find that Petitioner knew he previously had been convicted of a crime punishable by imprisonment for a term exceeding one year. At the conclusion of trial and following jury deliberations, the jury returned a general verdict of guilty. At sentencing, the district court imposed a 100-month term of imprisonment and a three-year term of supervised release.

In *Rehaif v. United States*, 139 S.Ct. 2191, 2194 (June 21, 2019), this Court held that 18 U.S.C. §§ 922(g) and 924(a)(2) require the government to prove not only that "the defendant knew he possessed a firearm," but "also that he knew he had the relevant status when he possessed it." *Rehaif* overturned contrary decisions of the

courts of appeals, including that of the Eleventh Circuit. *See United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997); *Rehaif*, 139 S.Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing *Jackson* and other decisions).

At the time *Rehaif* was decided, Petitioner's direct appeal was pending. The Eleventh Circuit, on affirmed Petitioner's conviction and sentence on June 12, 2019, *see* App. 9–26, and Petitioner thereafter filed a certiorari petition, seeking relief under *Rehaif*. On February 28, 2020, this Court granted certiorari, vacated Petitioner's judgment, and remanded for further proceedings in light of *Rehaif*. *Davis v. United States*, 140 S.Ct. 952 (2020).

On remand, the Eleventh Circuit directed the parties to file simultaneous supplemental letter briefs. Petitioner argued *Rehaif* established he was entitled to relief on three grounds: (1) the indictment was fatally defective because it omitted an essential element; (2) the trial evidence was insufficient to support the conviction because the government failed to prove Petitioner knew he previously had been convicted of a crime punishable by imprisonment for a term exceeding one year; and (3) the district court's jury instructions omitted an essential element of the charged offense because it did not require proof that Petitioner knew of his status. Petitioner argued that, in assessing whether the trial errors affected his substantial rights for the purpose of plain-error review, the court should consider only evidence that was

admitted at trial.[1] In contrast, the government urged the Eleventh Circuit to review the entire record, including information about Petitioner's criminal record that appeared in a post-trial presentence report (PSR).

The Eleventh Circuit affirmed Petitioner's conviction in an unpublished decision. App. 1–7. The Eleventh Circuit concluded that plain error occurred when the indictment failed to allege that Petitioner knew he was a felon and when the jury was not required to find he knew he was a felon. App. 5–6. The Eleventh Circuit, however, concluded that the plain errors did not affect Petitioner's "substantial rights or the fairness, integrity, or public reputation of his trial."[2] App. 6. In reaching this conclusion, the district court relied on "the whole record," and it cited *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019), to support its consideration of the "whole record." App. 4–5.

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[1] Petitioner argued the indictment error was subject to *de novo* review, because the *Rehaif* argument was not reasonably available before trial.

[2] To obtain relief on plain-error review, a defendant must show "(l) error, (2) that is plain, and (3) that affects substantial rights." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (internal quotation marks and bracket omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. (internal quotation marks and bracket omitted).

The Eleventh Circuit thus did not confine its review to the evidence that had been admitted at trial. By considering additional information, the Eleventh Circuit implicitly concluded that the trial evidence was not sufficient to sustain Petitioner's conviction in light of *Rehaif*. In addition to the trial evidence, the Eleventh Circuit relied on information concerning Petitioner's criminal history that appeared exclusively in his PSR. App. 3, 6. Based on these sources, the Eleventh Circuit surmised that Petitioner "knew he was a felon." App. 6.

Petitioner filed a petition for rehearing *en banc*, arguing *inter alia* that the Eleventh Circuit erred when it looked beyond the trial record for the purpose of assessing the effect of the trial errors on his substantial rights. On June 22, 2020, the Eleventh Circuit summarily denied the rehearing petition. App. 8.

REASONS FOR GRANTING THE PETITION

In *Rehaif*, this Court narrowed the reach of 18 U.S.C. § 922(g) by holding that, to secure a conviction, the government must prove not only that "the defendant knew he possessed a firearm," but also "that he knew he had the relevant status when he possessed it." 139 S.Ct. at 2194. The "relevant status" material to this case is that the defendant must have a prior conviction of "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(l).

When *Rehaif* was decided, Petitioner had been convicted by jury trial of violating § 922(g)(l), and he was pursuing review of his conviction. Numerous persons across the country were in the same position, and federal appellate courts therefore have been called upon to review *Rehaif* errors for plain error in a multitude of cases. In performing this plain-error review, the appellate courts have taken different approaches regarding the nature and scope of information they will consider when assessing whether plain *Rehaif* errors have affected a defendant's substantial rights.

At this time, the circuits are irreconcilably divided on the question of whether a reviewing court must limit its consideration to trial evidence when determining if a defendant's substantial rights were affected by *Rehaif* error, or whether it may consider information outside the scope of the trial record.

In the decision below, the Eleventh Circuit affirmed Petitioner's § 922(g)(1) conviction in reliance on information about his criminal record that had not been presented to the jury. App. 3, 6. From this information, the Eleventh Circuit inferred that Petitioner knew he previously had been convicted of an offense punishable by a sentence exceeding one year. App. 6. The Eleventh Circuit concluded that Petitioner's substantial rights therefore were not affected by the failure of indictment to allege his

knowledge of his status, or by the district court's failure to require the jury to find Petitioner knew of his status. App. 6.

Nine circuits have issued published decisions on the question presented here. Some have agreed with the approach taken by the Eleventh Circuit, while others have placed narrower boundaries on the information they will consider when analyzing the effect of *Rehaif* error. This irreconcilable split among the circuits strongly supports review by this Court.

The Eleventh Circuit erred by considering information about Petitioner's criminal record that was not proven to a jury. The Eleventh Circuit's reliance on information outside of the trial record squarely implicates the Sixth Amendment. *See United States v. Maez*, 960 F.3d 949, 961 (7th Cir. 2020) (noting Sixth Amendment concerns and limiting review to the evidence admitted at trial for the purpose of determining whether the defendant's substantial rights were affected by *Rehaif* error) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). Additionally, the Eleventh Circuit's reliance on information outside of the trial record demonstrates that the trial evidence alone was not sufficient to establish that the *Rehaif* error did not affect Petitioner's substantial rights. Thus, a new trial is warranted. For these reasons, Petitioner requests this Court's review.

I. The Circuits Are Expressly Divided on an Important and Recurring Question.

Before *Rehaif*, the courts of appeals agreed uniformly that, while the government was required in a § 922(g) prosecution to prove the defendant knew he possessed a firearm, it was not required to prove he knew he belonged to a category of persons barred from possessing a firearm. *See, e.g., United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997); *see also Rehaif*, 139 S.Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing decisions). Numerous § 922(g) convictions were in the appellate pipeline when *Rehaif* was decided, triggering numerous requests for relief under *Rehaif*.

"Courts across the nation are grappling with how *Rehaif* affects cases pending on direct appeal when it came down." *United States v. Maez*, 960 F.3d 949, 953 (7th Cir. 2020). Nine circuits have issued published decisions addressing *Rehaif* in § 922(g)(1) cases where defendants were tried to juries before *Rehaif* was decided.[3] The

[3] *E.g.*, App. 1–7 (Eleventh Circuit decision in this case); *United States v. Lara*, 970 F.3d 68 (1st Cir. 2020); *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020); *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020), *reh'g en banc granted*, No. 18-4789, 2020 WL 6689728 (4th Cir. Nov. 12, 2020); *United States v. Huntsberry*, 956 F.3d 270 (5th Cir. 2020); *United States v. Raymore*, 965 F.3d 475 (6th Cir. 2020); *United States v. Ward*, 957 F.3d 691 (6th Cir. 2020); *United States v. Maez*, 960 F.3d 949 (7th Cir. 2020); *United States v. Haynes*, 958 F.3d 709 (8th Cir. 2020); *United States v. Warren*, 951 F.3d 946 (8th Cir. 2020); *United States v. Heard*, 951 F.3d 920 (8th Cir. 2020); *United States v. Welch*, 951 F.3d 901 (8th Cir. 2020); *United States* (continued...)

circuits have taken three distinctly different approaches regarding the sources of the information they have consulted when determining the effect of *Rehaif* errors under plain-error review.

In four circuits, including the Eleventh Circuit in this case, the courts have considered facts reported in sentencing reports that were not admitted at trial when considering the third prong of plain-error review, which asks whether the error affected the defendant's substantial rights. *See Maez*, 960 F.3d at 960, stating "Four circuits have freely consulted materials not before the jury – in particular, criminal histories from defendants' presentence investigation reports (PSRs) – without discussing the propriety of thus expanding the record" (citing *United States v. Ward*, 957 F.3d 691, 695 & n.1 (6th Cir. 2020); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019); *United States v. Hollingshed*, 940 F.3d 410, 415–16 (8th Cir. 2019); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019)). In each of these circuits, the courts concluded the defendants could not show their substantial rights were affected by plain *Rehaif* error.

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[3](...continued)
v. Hollingshed, 940 F.3d 410 (8th Cir. 2019), *cert. denied*, 140 S.Ct. 2545 (2020); *United States v. Benamor*, 937 F.3d 1182 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 818 (2020); *United States v. McLellan*, 958 F.3d 1110 (11th Cir. 2020); *United States v. Moore*, 954 F.3d 1322 (11th Cir. 2020); *United States v. Reed*, 941 F.3d 1018 (11th Cir. 2019).

In Petitioner's case, the Eleventh Circuit cited its prior decision in *Reed*, 941 F.3d at 1021, to support its "whole record" approach to considering the effect of plain error. App. 4–5. *Reed*, in turn, cited to this Court's guilty-plea decisions in *United States v. Vonn*, 535 U.S. 55 (2002), and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), to support its decision to consider the "whole record" to affirm a trial conviction on plain-error review. *Reed*, 941 F.3d at 1021. In *Vonn*, 535 U.S. at 74–75, this Court decided that a court of appeals may review the "entire" record to assess the effect of plain error under Federal Rule of Criminal Procedure 11. In *Dominguez Benitez*, 542 U.S. at 83, the Court held that a defendant raising a nonconstitutional Rule 11 error in his guilty plea must show a reasonable probability he would not have pleaded guilty but for the error, a claim that is "informed by the entire record."

Two circuits, the First and Fifth, opted to take judicial notice of defendants' prior felony convictions. *Lara*, 970 F.3d at 88 (1st Cir.); *Huntsberry*, 956 F.3d at 284 (5th Cir.). Based on judicially-noticed facts, these courts concluded the defendants in *Lara* and *Huntsberry* could not meet either prongs three or four of plain-error review. 970 F.3d at 88–90; 956 F.3d at 286–87.

Courts in the Second and Seventh Circuits have expressly rejected the approach taken by the Eleventh Circuit in Petitioner's case and *Reed* (and by the Sixth, Eighth, and Ninth Circuits). *Miller*, 954 F.3d at 558–60 & n.24 (2d Cir.); *Maez*, 960 F.3d at

959–62 (7th Cir.). In the Second and Seventh Circuits, the courts have limited their review to the trial evidence when determining whether plain *Rehaif* error affects the defendant's substantial rights. *Miller*, 954 F.3d at 558–59 ("[W]e appropriately limit ourselves to the evidence actually presented to the jury"); *Maez*, 960 F.3d at 961(approving the approach taken in *Miller*).

The Seventh Circuit's decision in *Maez* extensively analyzed the various approaches taken by the different circuits. *Maez*, 960 F.3d at 959–62. In rejecting the Eleventh Circuit's approach, the Seventh Circuit held that this Court's decision in *Sullivan* mandated restricting consideration to trial evidence. *Maez*, 960 F.3d at 961. "The inquiry...is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279, *quoted in Maez*, 960 F.3d at 961.

The Seventh Circuit also observed that this Court's decisions in *Vonn* and *Dominguez Benitez*, cited by the Eleventh Circuit, had permitted a review of the entire record for a different purpose—to conduct a "cost-benefit analysis" in the context of a defendant's decision about whether to plead guilty—rather than to affirm a conviction based on evidence never admitted at trial. *Maez*, 960 F.3d at 961. Both the Second and Seventh Circuits declined to rely on evidence that had not been admitted

at trial for purposes of considering the third prong of plain-error review. *Miller*, 954 F.3d at 559; *Maez*, 960 F.3d at 960–61. Nevertheless, both circuits concluded they could appropriately rely on facts about the defendant's prior convictions, including information not admitted at trial, to decide whether to exercise their discretion at the fourth prong of plain-error review. *Miller*, 954 F.3d at 559; *accord Maez*, 960 F.3d at 961.

The circuits are thus divided on how to apply plain-error review in cases that were tried to a jury before this Court decided *Rehaif*. This question of whether appellate courts may consider information the government did not present at trial, and against which the defendant had no opportunity to defend before the jury, presents a significant constitutional issue for the many cases being reviewed in light of *Rehaif*.

II. The Decision Below Is Wrong and Resulted in a Violation of Petitioner's Constitutional Rights.

The Eleventh Circuit's decision to affirm Petitioner's conviction after trial based on information not admitted at trial has no support in this Court's precedents and raises significant Sixth Amendment issues.

The Eleventh Circuit consulted information beyond the trial record in reliance on a prior Eleventh Circuit decision, which in turn cited decisions of this Court. But this Court's decisions do not support the Eleventh Circuit's decision. In this case, the Eleventh Circuit cited to its prior decision in *Reed*, 941 F.3d at 1021, for the

proposition that it could "consult the whole record to determine whether the [error] affects substantial rights." App. 4–5. *Reed* cited three Supreme Court decisions to support its reliance on the "whole" or "entire" record: *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004); *United States v. Vonn*, 535 U.S. 55, 59 (2002); and *United States v. Young*, 470 U.S. 1, 16 (1985). *Reed*, 941 F.3d at 1020, 1021. Only one of these decisions, *Young*, involved a trial. In that case, the Court examined the propriety of the prosecutor's closing argument in view of the entirety of the closing arguments and the trial evidence. 470 U.S. at 16-20. In doing so, the Court did not expand the record to consider information that had not been admitted at trial. *See id.*

Regarding *Vonn* and *Dominguez Benitez,* the Seventh Circuit recognized that this Court's decisions in those cases permit a review of the entire record for a different purpose – to conduct a cost-benefit analysis to determine whether the defendant would have declined to enter a guilty plea in the absence of Rule 11 error. *Maez*, 960 F.3d at 960 (citing *Vonn*, 535 U.S. at 74-75; *Dominguez Benitez*, 542 U.S. at 80, 83). These guilty-plea decisions do not support the Eleventh Circuit's decision to affirm Petitioner's conviction after trial based on information that was not admitted at trial.

Although Petitioner argued that the Sixth Amendment precluded consideration of information outside of the trial record, the Eleventh Circuit did not address the Sixth Amendment implications of its decision to rely on such information. App. 1–7.

Instead, as the Seventh Circuit observed with respect to *Reed*, the Eleventh Circuit "freely consulted materials not before the jury – in particular, criminal histories from [defendant's PSRs] – without discussing the propriety of thus expanding the record." *Maez*, 960 F.3d at 960. The Eleventh Circuit relied on sentencing facts, which are subjected to a lesser preponderance-of-evidence standard, to infer an element the government is required to prove under *Rehaif* beyond a reasonable doubt to support a conviction under § 922(g).

By relying on information gleaned from the PSR, the Eleventh Circuit implicitly acknowledged that the trial evidence was not sufficient to sustain Petitioner's conviction in light of *Rehaif*. The trial evidence consisted of two stipulations: an *Old Chief* stipulation, wherein Petitioner agreed that he had been convicted of a felony offense, *i.e.*, a crime punishable by imprisonment for a term exceeding one year,[4] and a stipulation stating that Petitioner was convicted in 2015 in a Florida court of "the felony offense of knowingly possessing a firearm after having been convicted of a felony." App. 2. Petitioner entered into these stipulations with the benefit of counsel and in light of then-binding precedent requiring the government to

[4] In accordance with this Court's ruling in *Old Chief v. United States*, 519 U.S. 172, 174 (1997) (addressing Fed. R. Evid. 403), it is common for defendants charged with violating § 922(g)(1) to stipulate at trial that they previously had been convicted of a crime punishable by imprisonment for a term exceeding one year.

prove the defendant's knowledge only as to the possession element, and not the status element. *See Jackson*, 120 F.3d at 1229. The stipulations accordingly did not address whether Petitioner knew at the time of the firearm possession that he previously had been convicted of a crime punishable by a term of imprisonment exceeding one year.

Moreover, multiple factors undermine any assumption that the prior Florida conviction for possessing a firearm after a felony conviction demonstrated knowledge of a prior conviction for a crime punishable by a term of imprisonment exceeding one year. Petitioner's PSR showed he was adjudicated guilty simultaneously of resisting an officer without violence and possessing a firearm as a felon. It is plausible that Petitioner was not aware that he had been convicted of both charges. Additionally, the record does not reflect that Petitioner knew that every felony under Florida law was punishable by a term of imprisonment exceeding one year.

The Eleventh Circuit's reliance on information outside the trial evidence to review the *Rehaif* error demonstrates that the Court did not deem the trial evidence sufficient in itself to establish that Petitioner knew his status at the time of the firearm possession. The Eleventh Circuit's reliance on sentencing information, which was not tested at trial, violated Petitioner's Sixth Amendment right to have his guilt or innocence determined at trial.

Given all of these circumstances, Petitioner's case presents an excellent opportunity to resolve a question of great importance that divides the circuits.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.
Counsel for Petitioner

Miami, Florida
November 2020

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10140
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20582-JEM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RAKEEM ASAAD DAVIS,
a.k.a. Poo Poo,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(April 20, 2020)

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before ROSENBAUM, MARCUS, and JULIE CARNES, Circuit Judges.

PER CURIAM:

This appeal returns to us on remand from the Supreme Court of the United States. After we affirmed Davis's conviction and sentence for unlawfully possessing a firearm and ammunition after a felony conviction, *United States v. Davis*, 777 F. App'x 360 (11th Cir. 2019), the Supreme Court issued its decision in *Rehaif v. United States*, 588 U.S. —, 139 S. Ct. 2191 (2019). The Court then granted Davis's petition, vacated our judgment, and remanded his appeal for further consideration in light of *Rehaif*. For the reasons that follow, we conclude that Davis is not entitled to relief from his conviction based on *Rehaif*. We therefore affirm his conviction.

I.

Davis's indictment alleged that he, "having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g)(1) and (2)." Davis pled not guilty and proceeded to trial.

At trial, the government introduced stipulations stating that Davis previously had been convicted of two felony offenses, including a conviction for "the felony offense of knowingly possessing a firearm after having been convicted of a felony." After both parties rested, the district court instructed the jury that in order to return a verdict of guilty, it had to find beyond a reasonable doubt that Davis "knowingly possessed" a firearm or ammunition and that he "had been convicted of a felony,

which is a crime punishable by imprisonment of more than one year." The jury returned a guilty verdict.

Davis raised no objections to his presentence investigation report ("PSR"). The PSR reported that Davis had several prior felony convictions, including a conviction for possessing a firearm as a convicted felon. It appears that the longest period Davis served in custody for these offenses was 366 days in jail, only three days of which occurred after sentencing, with the remainder credited as time served.

The district court sentenced Davis to 100 months in prison. Davis appealed, arguing that the court erred in these three ways: (1) denying without inquiry his pre-trial motion for substitution of counsel; (2) failing to instruct the jury that it was required to reach unanimity as which firearm Davis possessed; and (3) failing to follow proper procedures at sentencing. We affirmed Davis's conviction and sentence, *see Davis*, 777 F. App'x at 368, and then denied his petition for rehearing.

After *Rehaif* was decided, Davis petitioned for a writ of certiorari. The Supreme Court granted the petition, vacated the judgment, and remanded this case for further consideration in light of *Rehaif*. We asked the parties to file supplemental briefs addressing *Rehaif*'s impact on this appeal. Davis requests that we vacate his conviction because *Rehaif* made plain that errors occurred when his indictment failed to allege, his jury was not instructed to find, and the government did not prove that he knew he was a felon when he possessed the firearm. The government

responds that we should affirm because Davis has not established that these errors affected his substantial rights.

II.

In *Rehaif*, the Supreme 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. at 2200. In so holding, *Rehaif* abrogated *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997), which held that a defendant's knowledge of his status as a convicted felon was not an element of § 922(g)(1).

"We review for plain error [Davis's] new challenges to his indictment, the jury instructions, and the sufficiency of the evidence[]" based on *Rehaif*. *United States v. Reed*, 941 F.3d 1018, 1020 (11th Cir. 2019) (citations omitted); *see United States v. Moore*, — F.3d —, 2020 WL 1527975, at *12 (11th Cir. March 31, 2020) (reviewing materially identical arguments for plain error). To obtain relief, Davis "must prove that an error occurred that was both plain and that affected his substantial rights." *Reed*, 941 F.3d at 1021. If he does so, we may exercise our discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

We may consult the whole record to determine whether the effect affects substantial rights. *Id.* ("[W]e consider proceedings that both precede and postdate the errors about which [the defendant] complaints."). An error affects substantial rights if there is a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Molina-Martinez v. United States*, 578 U.S. —, 136 S. Ct. 1338, 1343 (2016) (citation and quotation marks omitted). If the record clearly establishes that the defendant knew of his status as a felon, he cannot show that his substantial rights were affected. *See Moore*, 2020 WL 1527975, at *12 (holding that *Rehaif* errors did not affect substantial rights because "the record clearly establishes that both Appellants knew they were felons"); *Reed*, 941 F.3d at 1022 ("Because the record establishes that Reed knew he was a felon, he cannot prove that the errors affected his substantial rights or the fairness, integrity, or public reputation of his trial.").

Davis has established errors in his indictment and at his trial that *Rehaif*, which applies in this direct appeal, made plain.[1] *See Johnson v. United States*, 520 U.S. 461, 468 (1997) ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of

[1] To the extent Davis argues that the defective indictment deprived the district court of subject-matter jurisdiction over his case, that argument is foreclosed by *Moore*. *See Moore*, 2020 WL 1527975, at *11 ("[T]he omission of an element in an indictment does not deprive the district court of subject matter jurisdiction.).

appellate consideration."). Specifically, *Rehaif* made clear that the government must prove that a defendant knew he belonged to the relevant category of persons—here, those with a prior felony conviction—that § 922(g) prohibits from possessing a firearm. Because the indictment did not allege, the government was not required to prove, and the jury was not instructed to find that Davis knew he was a felon, these were errors that are plain under *Rehaif*.

Nevertheless, Davis has not demonstrated a reasonable probability that, but for the errors, the outcome of the proceeding could have been different. *See Molina-Martinez*, 136 S. Ct. at 1343. When Davis possessed the firearm, he had been convicted of at least two felony convictions in a Florida court. While the PSR indicates that most of Davis's prior sentences were for terms of less than one year, he cannot plausibly claim ignorance of his status as a felon because, as he stipulated at trial, he previously had been convicted of "the felony offense of knowingly possessing a firearm after having been convicted of a felony." That conviction, along with his other criminal history, clearly establishes that Davis knew he was a felon when he possessed a firearm. "Because the record establishes that [Davis] knew he was a felon, he cannot prove that the errors affected his substantial rights or the fairness, integrity, or public reputation of his trial." *Reed*, 941 F.3d at 1022.

For these reasons, we affirm Davis's conviction in light of *Rehaif*, and we reinstate our previous opinion in this case.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10140-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RAKEEM ASAAD DAVIS,
a.k.a. Poo Poo,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON REMAND FROM THE UNITED STATES SUPREME COURT

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM, MARCUS, and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10140
Non-Argument Calendar

D.C. Docket No. 1:17-cr-20582-JEM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RAKEEM ASAAD DAVIS,
a.k.a. Poo Poo,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 12, 2019)

Before MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Rakeem Davis appeals his conviction and sentence for unlawful possession of a firearm and ammunition. He argues that he is entitled to a new trial for two reasons: (1) the district court failed to conduct an inquiry into his counsel's pretrial motion to withdraw; and (2) the court failed to give a special instruction to the jury to ensure unanimity with respect to the factual grounds of conviction. He also challenges his sentence, arguing that the court procedurally erred by failing both to verify that he and his counsel had reviewed the presentence investigation report and to calculate the guideline range. After careful review, we reject these arguments and affirm.

I.

Davis was indicted in August 2017 for possession of a firearm and ammunition after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). The indictment charged possession of a Browning 9mm handgun and ten rounds of 9mm ammunition on July 29, 2017. Davis pled not guilty.

About two weeks before the trial was scheduled to start in late October 2017, Davis's counsel, Ruben Garcia, who had been appointed in early September 2017 under the Criminal Justice Act, 18 U.S.C. § 3006A, moved to withdraw. Counsel sought withdrawal due to "unreconcilable differences about the conduct of the Defendant's defense and because Mr. Davis does not trust counsel and he wishes to proceed to trial." Counsel explained that he had met with Davis four times and had gone over the evidence, jury instructions, voir dire questions, the government's

intent to introduce Rule 404(b), Fed. R. Evid., evidence, and a plea offer and proposed factual proffer. At the last conference, according to counsel, Davis had "angrily ended" the conversation and asked for Garcia to withdraw. Counsel wrote that "Davis does not believe undersigned counsel is acting in Defendant's best interest and believes that counsel wants the Defendant to plead guilty." Nevertheless, counsel stated that he had informed the government that Davis was going to trial.

The district court denied the motion a few days later at a status conference. The court stated that it had reviewed the motion and the reasons given therein. The court then addressed Davis as follows:

> Mr. Davis, I just want to tell you, you can replace him with any lawyer you want if you can hire a lawyer, but you got a competent lawyer. Mr. Garcia is a competent lawyer that has been tried and tested. We have -- he has tried many cases in front of me. He is a competent lawyer. He may not be telling you what you want to hear, but I bet he's telling you what the law is. And if you find another lawyer, I want to tell you that he better be ready to go to trial next week because that's when the trial is set. Excuse me. A week from Monday.
>
> And whether -- it seems to be the motion du jour over at the prison now that a week or two before trial, they say oh, I don't like my lawyer anymore, he's not giving me good advice and I'm not going to take it anymore, I want a new lawyer and then try to get a continuance. I don't know for what reason, but it's not happening. The case is going to trial.

Without asking to hear from Davis or Garcia, the court found that Garcia was "more than capable of representing [Davis]" in this "very simple case" and denied the motion to withdraw.

The case proceeded to trial. A confidential informant ("CI") testified that he met up with Davis and Emmanuel Duncanson on July 28. According to the CI, Duncanson asked the other two if they had a gun, and Davis said he could get one. The CI further testified that Davis gave directions to an apartment. On the way, Duncanson announced that he wanted to kill a man named Ike for interfering with his sister's drug business. At the apartment, the CI attested, Davis showed Duncanson two handguns and a rifle, which were lying on a bed. Duncanson selected one of the handguns, and Davis carried it out of the house. The CI then drove Duncanson and Davis to an apartment complex where they spotted Ike. The CI explained that when Davis refused to shoot at Ike, Duncanson grabbed the gun and fired several shots out of the car window, which missed, as the CI sped away from the scene.

At 2:00 a.m. the next morning, July 29, federal law-enforcement agents executed a search warrant at the apartment where Davis had retrieved the gun before the shooting. Davis and a woman were present in the apartment. The search revealed two handguns: (1) a Browning 9mm loaded with three rounds of ammunition; and (2) an SCCY 9mm loaded with seven rounds of ammunition.

According to the CI, both guns were present at the apartment before the shooting, but only the SCCY 9mm was used in the shooting. A federal law-enforcement agent testified that Davis was not charged with possession of the SCCY 9mm because there was no evidence it had moved in interstate commerce. The parties stipulated that Davis was not permitted to possess a firearm due to a prior felony conviction.

Based upon the parties' joint proposed jury instructions, the district court informed the jury that "[t]he sole count of the indictment charges the Defendant with being a felon in possession of a firearm and ammunition," and that the jury would be given a copy of the indictment. The court instructed the jury that the offense had two elements: (1) knowing possession of a firearm or ammunition in or affecting interstate commerce, (2) that occurred after having been convicted of a felony. The court cautioned the jury that Davis was "on trial only for the specific crime charged in the indictment" and that it was the jury's job "to determine from the evidence in this case whether the Defendant is guilty or not guilty of that specific crime." The court further advised that the "verdict, whether guilty or not guilty, must be unanimous. In other words, you must all agree." Finally, when going over the general verdict form—which simply asked the jury to find whether Davis was guilty or not guilty—the court reiterated to the jury that the verdict needed to be unanimous. Defense counsel did not object to these instructions.

The jury unanimously found Davis guilty.

Davis's presentence investigation report ("PSR") recommended a total offense level of 24 and criminal-history category of V. This established a recommended guideline imprisonment range of 92 to 115 months. Davis did not file any objections. The government filed a sentencing memorandum.

The district court began sentencing by stating that it had reviewed the PSR, the government's sentencing memorandum, and the addendum to the PSR, and the court noted that no objections had been made. The court then asked the parties for their views on an appropriate sentence. The government asked for a sentence at the "high end of the guidelines," citing the seriousness of the offense conduct and Davis's substantial criminal history. Davis's counsel argued for a sentence at "the low end of the guidelines, 92 months," referencing the PSR and asserting that Davis's criminal history was due to drug abuse, lack of guidance, and other circumstantial factors. Davis personally requested 92 months.

The district court sentenced Davis to 100 months. The court explained that it believed Davis was "a danger to the community" but that it wanted to give Davis an opportunity to reform by sentencing him "toward the low end of the guideline range," though not "all the way down to 92." Davis did not raise any objections at sentencing. He now appeals.

II.

Davis first appeals the denial of his counsel's motion to withdraw, which we will characterize as a "substitution motion." Davis argues that the district court erred in failing to conduct an inquiry into why he wanted new counsel and that he was prejudiced by counsel's continued representation during trial.

Substitution motions must be decided "in the interests of justice," 18 U.S.C. § 3006A(c), a standard that "contemplates a peculiarly context-specific inquiry," *Martel v. Clair*, 565 U.S. 648, 663 (2012). In reviewing substitution motions, we consider several factors, including the timeliness of the motion; the adequacy of the court's inquiry into the merits of the motion; and the asserted cause for the motion, including the extent of the conflict or breakdown in communication between the defendant and his counsel. *Id.*; *United States v. Calderon*, 127 F.3d 1314, 1343 (11th Cir. 1997). "Because a trial court's decision on substitution is so fact-specific, it deserves deference[.]" *Martel*, 565 U.S. at 663–64. We may overturn it "only for an abuse of discretion." *Id.* at 664; *Calderon*, 127 F.3d at 1343.

The first factor—the timeliness of the motion—slightly favors denial. While counsel appears to have promptly moved to withdraw when asked by Davis, the substitution motion was filed just two weeks before the trial was scheduled to begin and after a continuance had already been granted. While we see nothing to indicate intentional delay, we also understand the court's concern about the potential for delay. *Cf. Robinson v. Boeing Co.*, 79 F.3d 1053, 1055 (11th Cir. 1996) ("Courts

have long accepted that resulting delay may justify the exercise of a trial judge's discretion to deny substitute counsel in the midst of litigation.").

The second factor—the adequacy of the court's inquiry—cuts in favor of Davis. As the Supreme Court has stated, "courts cannot properly resolve substitution motions without probing why a defendant wants a new lawyer." *Martel*, 565 U.S. at 664. The district court must engage in at least some inquiry about "the source and factual basis" of the defendant's dissatisfaction with an attorney, even if the judge is professionally acquainted with the attorney. *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973)[1]; *see also Brown v. United States*, 720 F.3d 1316, 1336 (11th Cir. 2013) ("The trial court is obliged to explore the extent of the conflict and any breakdown in communication between the lawyer and the client."). Moreover, such "an on-the-record inquiry into the defendant's allegations 'permit[s] meaningful appellate review' of a trial court's exercise of discretion." *Martel*, 565 U.S. at 664.

The district court here addressed the substitution motion at a hearing and considered the reasons for withdrawal listed in the motion. But the court did not probe the extent of the conflict and any breakdown in communication, notwithstanding the court's professional familiarity with Davis's counsel or its

[1] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

doubts about the motivations behind the motion. *See Brown*, 720 F.3d at 1336; *Young*, 482 F.2d at 995.

Nevertheless, we do not believe that the district court's failure to probe more deeply is enough, on this record, to render the court's ruling an abuse of discretion. That's because Garcia, Davis's counsel, listed the reasons for withdrawal in the substitution motion, and the court reasonably could have concluded that further inquiry was unnecessary because the clearly listed reasons did not warrant substitution. *See McKee v. Harris*, 649 F.2d 927, 934 (2d Cir. 1981) ("If the reasons are made known to the court, the court may rule without more."); *cf. Young*, 482 F.2d at 995 (stating that inquiry is necessary when the defendant presents a "seemingly substantial complaint about counsel"). In other words, the third factor—the asserted cause for the motion—strongly favors denial of the motion.

"An indigent criminal defendant has an absolute right to be represented by counsel, but he does not have a right to have a particular lawyer represent him, nor to demand a different appointed lawyer except for good cause." *Thomas v. Wainwright*, 767 F.2d 738, 742 (11th Cir. 1985); *see United States v. Garey*, 540 F.3d 1253, 1263 (11th Cir. 2008) (*en banc*). Whether good cause exists "cannot be determined 'solely according to the subjective standard of what the defendant perceives.'" *Thomas*, 767 F.2d at 742 (quoting *McKee*, 649 F.2d at 932). For that

reason, "[a] defendant's general loss of confidence or trust in his counsel, standing alone, is not sufficient." *Id.*

Here, the substitution motion reveals little more than Davis's "general loss of confidence or trust in his counsel," Garcia. *Id.* According to the motion, the conflict between attorney and client was that Garcia wanted Davis to accept the government's plea offer, but Davis wanted to proceed to trial. As a result, Davis did not trust Garcia and did not believe that Garcia was acting in his best interests. In resolving the motion, the court understood that the nature of the conflict stemmed from Davis's dissatisfaction with Garcia's plea advice, *see* Doc. 85 at 2 ("He may not be telling you what you want to hear, but I bet he's telling you what the law is."), which alone does not constitute good cause, *see McKee*, 649 F.2d at 932–33 (defendant's dissatisfaction with counsel's "frank advice" to plead guilty does not amount to good cause). And the record reflects that Garcia respected Davis's desire to proceed to trial and was prepared for it. Because the clearly listed reasons in the substitution motion did not indicate that Davis could establish good cause, we cannot say that the court abused its discretion in denying the motion without a probing inquiry.

Nevertheless, we acknowledge that our review is inhibited by the district court's lack of a formal inquiry. *See Martel*, 565 U.S. at 664. All we have to go on is the substitution motion itself. And the motion may not fully convey "the extent

of the conflict and any breakdown in communication," which is why further inquiry by the court is generally necessary. *See Brown*, 720 F.3d at 1336.

However, while the district court should have probed the matter more deeply at the status hearing, and even assuming the court erred in failing to do so, we conclude that the failure to conduct an inquiry in this case was harmless.[2] *See McKee*, 649 F.2d at 933 ("[W]hile [the trial judge] should have conducted a formal inquiry, the failure to do so in this case was harmless."). In his briefing on appeal, Davis does not suggest any other reason beyond those listed in the motion that would have been elicited by a formal inquiry. His reply brief merely states that he "lacked confidence in his attorney's ability or willingness to advocate effectively on his behalf," which is not sufficient to warrant substitution. *See Thomas*, 767 F.2d at 742. Nor can we infer a breakdown in communication from the trial errors allegedly committed by counsel—asking a particular question on cross-examination and failing to request a special verdict—since they do not appear to stem in any way from the dispute that precipitated the substitution motion. Aside from those

[2] Our harmlessness inquiry focuses on the state of facts at the time of the substitution motion. While Davis argues that the failure to inquire into a substitution motion warrants a new trial, a remedy some courts have granted in the past, the Supreme Court has now stated that "[t]he way to cure that error" is to remand to the district court "to decide whether substitution was appropriate at the time of [the substitution motion]." *Martel*, 565 U.S. at 666 n.4 (noting that the court of appeals had "ordered the wrong remedy even assuming the District Court had abused its discretion in denying Clair's substitution motion without inquiry"). Because the remedy for a lack of inquiry would be remand for consideration of the substitution motion, we must consider whether Davis could show on remand that substitution was appropriate at the time the motion was filed.

unrelated errors, Davis has pointed us to nothing in the record that would suggest that the conflict between Davis and Garcia affected Davis's trial defense. Accordingly, despite the court's failure to conduct an appropriate inquiry, we cannot conclude that Davis was harmed by that failure.

We therefore affirm the district court's denial of the substitution motion.

III.

Davis next argues that the district court plainly erred by failing to instruct the jury that it was required to reach a unanimous decision about which, if any, firearm or ammunition Davis possessed, and where and when any possession occurred. He says that jurors could have made conflicting findings on these points, in violation of his Sixth Amendment right to a unanimous jury verdict, because the evidence showed possession of guns or ammunition at three separate points: (1) before the shooting, when the guns were at the apartment; (2) during the shooting, when the uncharged gun was used; and (3) after the shooting, when both guns and all associated ammunition were found in separate locations in the apartment.

We review this argument for plain error because Davis did not object to the jury instructions before the district court. *United States v. Felts*, 579 F.3d 1341, 1343 (11th Cir. 2009). Under the "plain error" standard, the defendant must demonstrate that (1) an error occurred, (2) the error was plain, and (3) the error affected substantial rights. *Id.* at 1344. "An error is not plain unless it is contrary to

explicit statutory provisions or to on-point precedent in this Court or the Supreme Court." *United States v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013) (quotation marks omitted). Further, "[j]ury instructions will not be reversed for plain error unless the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice, or the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Starke*, 62 F.3d 1374, 1381 (11th Cir. 1995) (quotation marks omitted).

"[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Richardson v. United States*, 526 U.S. 813, 817 (1999). But "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Id.* For instance, jury disagreement about whether a robber used a knife or a gun—a disagreement about means—would not matter so long as the jury "unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force." *Id.*

Relying on *Richardson*'s distinction between elements and means, several of our sister circuits have concluded that jury unanimity is not required as to the particular firearm or ammunition possessed for purposes of § 922(g). *E.g.*, *United States v. Pollock*, 757 F.3d 582, 587–88 (7th Cir. 2014); *United States v. Talbert*,

501 F.3d 449, 451–52 (5th Cir. 2007); *United States v. DeJohn*, 368 F.3d 533, 542 (6th Cir. 2004); *United States v. Verrecchia*, 196 F.3d 294, 298–301 (1st Cir. 1999). These circuits have reasoned that unanimity is not required because the particular firearm or ammunition possessed is not an element of the crime under § 922(g) but instead the means used to satisfy the element of "any firearm or ammunition." *E.g.*, *DeJohn*, 368 F.3d at 541–42.

Here, Davis has not established plain error. Davis has identified no "on-point precedent in this Court or the Supreme Court" holding that a special unanimity instruction is required in the circumstances presented by this case. *See Hoffman*, 710 F.3d at 1232. Nor is it obvious or clear that the matters he wished to have decided by special verdict are elements of the offense requiring unanimity, as opposed to "possible sets of underlying brute facts [which] make up a particular element" for which unanimity is not required. *Richardson*, 526 U.S. at 817. For example, numerous circuits have held that jury unanimity is not required as to the particular firearm or ammunition possessed. *Pollock*, 757 F.3d at 587–88; *Talbert*, 501 F.3d at 451–52; *DeJohn*, 368 F.3d at 542; *Verrecchia*, 196 F.3d at 298–301. Accordingly, even assuming the court erred, the error was not "plain."

Davis's reliance on *United States v. Garcia-Rivera*, 353 F.3d 788 (9th Cir. 2003), is unavailing. First, that decision is from the Ninth Circuit, so it cannot establish a "plain" error in this Circuit. *See Hoffman*, 710 F.3d at 1232.

Second, even if *Garcia-Rivera* were somehow binding here, it is not on point. The indictment in *Garcia-Rivera* charged possession of a firearm over a time frame between May 19, 2001, and June 7, 2001. 353 F.3d at 790. At trial, the court instructed the jury that, to find the defendant guilty, it must find that the possession occurred (a) uninterrupted between May 19, 2001, and June 7, 2001; (b) about a week after the purchase of the firearm; and (c) on June 7, 2001. *Id.* The court told the jury that it "must unanimously agree that the possession occurred during (a) above, or on (b) or (c) above." *Id.* The Ninth Circuit held that this instruction was "fatally ambiguous" because the "jury could have concluded that they were required to decide unanimously only that possession occurred during any of the three times enumerated, not that they had to unanimously agree on which one." *Id.*

No similar ambiguity is present here. The indictment charged possession of a single firearm and ammunition on a specific date, July 29, which was after the shooting. And the district court's unanimity instructions, though general, were not "fatally ambiguous" like the choose-your-own-adventure instructions in *Garcia-Rivera*. The court here repeatedly instructed the jury that its verdict must be unanimous and the jurors "must all agree." So even assuming there were multiple possible sets of facts on which Davis's conviction could have been based, jurors would have understood from the court's instructions that they were required to "all agree" on which set of facts grounded the conviction. The instructions, considered

as a whole, were not "so clearly erroneous as to result in a likelihood of a grave miscarriage of justice" or to "affect the fairness, integrity, or public reputation of judicial proceedings." *Starke*, 62 F.3d at 1381.

For these reasons, Davis has not shown that the district court plainly erred in failing to give a specific instruction on unanimity.

IV.

Finally, Davis contends that the district court procedurally erred at sentencing in two ways: (1) failing to verify that Davis and his counsel had reviewed the PSR and addendum, as required by Rule 32, Fed. R. Crim. P.; and (2) failing to calculate the applicable guideline range at sentencing. We review these arguments for plain error because they were raised for the first time on appeal. *See United States v. Vandergrift*, 754 F.3d 1303, 1307 (11th Cir. 2014) (applying plain-error review where the defendant failed to object to a claimed procedural error).

Sentencing courts "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," which is "the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007). The failure to calculate the guideline range is a "significant procedural error." *Id.* at 51. Before calculating the guideline range, the district court "must verify that the defendant and the defendant's attorney have read and discussed the [PSR] and any addendum to the report." Fed. R. Crim. P. 32(i)(1)(A). No specific inquiry is required for the

district court to meet its obligation under Rule 32, as long as the record indicates that counsel reviewed the PSR with the defendant. *See United States v. Aleman*, 832 F.2d 142, 144 & n.6 (11th Cir. 1987) (applying a prior version of Rule 32(i)(1)(A)).

Here, Davis has not established plain error. Even assuming that the district court erred by failing to verify that Davis and his counsel had reviewed the PSR and by failing to state the guideline range on the record at sentencing, Davis has not shown that these errors affected his substantial rights. *See Felts*, 579 F.3d at 1343.

First, the sentencing transcript indicates that Davis's counsel had reviewed the PSR. After the court noted that there were no objections to the PSR, counsel argued for a sentence at "the low end of the guidelines, 92 months," which was the range recommended by the PSR, and he cited facts from the PSR in support of that request. Although the court did not verify that Davis personally had reviewed the PSR, nothing in the record indicates that sentencing would have gone any differently had the court personally questioned Davis.

Second, the record is clear that the district court implicitly adopted the PSR's guideline range of 92 to 115 months. And both parties framed their arguments based on that range. The government asked for a sentence at "the high end of the guidelines in this case[,] which is 115 months." Davis's counsel argued for a sentence at "the low end of the guidelines, 92 months." The district court then sentenced Davis "toward the low end of the guideline range," but not "all the way down to 92."

Because there was no confusion about the guideline range on which the sentence was based, Davis has not shown that the court's failure to state the guideline range on the record affected his substantial rights.

V.

We affirm Davis's conviction and sentence.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10140-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RAKEEM ASAAD DAVIS,
a.k.a. Poo Poo,

Defendant - Appellant.

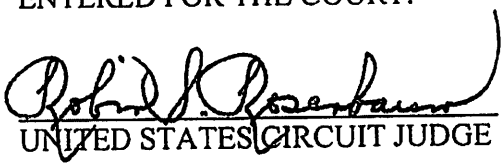
Appeal from the United States District Court
for the Southern District of Florida

BEFORE: MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-41

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.

RAKEEM ASAAD DAVIS

JUDGMENT IN A CRIMINAL CASE

Case Number: **17-20582-CR-MARTINEZ**
USM Number: **14912-104**

Counsel For Defendant: **Ruben Garcia**
Counsel For The United States: **Daniel Marcet**
Court Reporter: **Dawn Whitmarsh**

The defendant was found guilty on count(s) 1 of the indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C.§ 922(g)(1)	possession of a firearm and ammunition by a convicted felon	07/29/2017	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **1/9/2018**

Jose E. Martinez
United States District Judge

Date: 1/10/18

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **100 months** as to Count One.

The court makes the following recommendations to the Bureau of Prisons: The defendant shall be assigned to a facility as close to South Florida as possible commensurate with his background and the offense of which he stands convicted.

The Court also recommends that the defendant be screened for substance abuse problems and be referred to participate in an appropriate drug education/treatment program as deemed appropriate by the Bureau of Prisons. This may include placement in the Residential Drug Abuse Treatment Program (i.e. 500 hour drug treatment program) at a designated Bureau of Prisons institution.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years** as to Count One.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **RAKEEM ASAAD DAVIS**
CASE NUMBER: **17-20582-CR-MARTINEZ**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.