

No. _____

IN THE
Supreme Court of the United States

EMMANUEL RAVELL

Petitioner,

versus

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner asks this Court to grant review to determine whether a guilty plea to possessing a firearm as a felon in violation of 18 U.S.C. 922(g)(1) and 924(a) that was entered before *Rehaif v. United States*, 139 S.Ct 2191 (2019) is structural error warranting automatic relief under plain error review.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. This Opinion is attached to this Petition as Appendix A and is reported at 821 Fed. Appx. 362 (5th Cir. 2020) (unpublished). The District Court's judgment is attached to this Petition as Appendix B.

STATEMENT OF THE JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 2020. No petition for rehearing was filed. Petitioner's petition is

timely filed pursuant to Supreme Court Rule 13 because on March 19, 2020, the Court extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The jurisdiction of this Court is thus invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, & GUIDELINE PROVISIONS INVOLVED

Petitioner was convicted of possessing a firearm as a felon in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). The constitutional and statutory provisions relevant to this petition are set forth in relevant part as follows:

The Fifth Amendment provides:

No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation

18 U.S.C. § 922(g) states in relevant part:

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 . . .

18 U.S.C. § 924(a)(2) states in relevant part:

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

A. Factual Background

At the age of 17, Petitioner assaulted a police officer.¹ Petitioner was thereafter convicted of aggravated assault against a public servant, and sentenced to five years of probation. The following year, in February 2010, Petitioner stole a motor vehicle. While out on bond for that offense, Petitioner stole two more cars and was sentenced to two years imprisonment on each car theft charge (to run concurrently), and his probationary term for his prior aggravated assault was revoked and he was sentenced to a term of imprisonment on that charge. Petitioner was released in 2015 after serving several years in prison and committed the instant offense in May 2017.

On May 17, 2017, a licensed firearms dealer in Brownsville, Texas told federal agents that Petitioner had made a suspicious purchase involving 30 high-capacity AR-type rifle magazines. Agents told Customs and Border Patrol (“CBP”) officers to be on the lookout for Petitioner’s vehicle, which they located entering an outbound inspection lane at the Brownsville and Matamoros International Port of Entry in Texas. Petitioner was traveling with three passengers at the time of his interaction with the CBP.

¹ Petitioner suffers from a mental health condition, possibly bipolar disorder.

When first asked whether he had any firearms or ammunition, Petitioner told CBP that he did not. Petitioner, however, changed his answer when CBP officers asked him to get out of the vehicle. He thereafter advised CBP officers that he had rifle magazines, which officers located inside Petitioner's vehicle. CBP officers found 30 PMAG 5.56 x 45mm rifle magazines inside a large Victoria's Secret bag located on the floorboard of the front passenger area of Petitioner's vehicle.

Homeland Security Investigation ("HSI") agents interviewed Petitioner after he waived his Miranda rights. Petitioner told HSI agents that he had purchased the magazines at an Academy store earlier that day and planned to take them to his uncle's ranch in Matamoros, Mexico. He told the agents that he believed it was not illegal for him to possess ammunition, but purportedly knew that being a felon prohibited him from carrying a firearm. Petitioner also reportedly told the agents that he owned one .22 caliber rifle. When Petitioner ended the interview, he was released pending investigation.

HSI agents seized four cell phones belonging to Petitioner and the other occupants of his vehicle. Data from the phones suggested Petitioner and two other individuals had purchased nearly 1,500 magazines over a four-month period. There were also videos and photos on one phone showing Petitioner holding and firing guns. Some of the

geotagged photos were taken at a firing range in Brownsville, Texas, while others showed Petitioner holding a weapon in front of a car, in front of his house, and inside his house.

A video on one of the phones showed Petitioner firing an Israel Military Industries LTD IMI Desert Eagle Pistol at a Brownsville firing range. HSI agents found a photograph depicting Petitioner with a high-capacity GGI 308 caliber rifle, which they later determined Petitioner had purchased from another man, Jose Serna, for \$2,500. They also determined Petitioner had also purchased a Desert Eagle pistol from Serna, who identified Petitioner in a photo lineup as the purchaser. Based on the evidence and Petitioner's own admissions, agents indicted Petitioner in September 2017 on two counts of possessing a firearm following a felony conviction.

On September 19, 2017, a grand jury returned a two-count Indictment charging Petitioner as follows:

Count 1: On or about May 2, 2017 in the Southern District of Texas and within the jurisdiction of the Court, Defendant, EMMANUEL RAVELL, having been convicted on December 28, 2009, in the 445th Judicial District Court, Cameron County, Texas, in Cause No. 09-CR-2099-1, of the felony offense of Aggravated Assault Against Public Servant, a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce a firearm, namely, a GGI, Model 1919A7, 308 caliber, firearm, serial number G1418. In violation

of Title 18, United States Code, Section 922(g)(1) and 924(a)(2).

Count 2: On or about May 12, 2017 in the Southern District of Texas and within the jurisdiction of the Court, Defendant, EMMANUEL RAVELL, having been convicted on December 28, 2009, in the 445th Judicial District Court, Cameron County, Texas, in Cause No. 09-CR-2099-1, of the felony offense of Aggravated Assault Against Public Servant, a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce a firearm, namely, a Israel Military Industries L TO (IMI) pistol. In violation of Title 18, United States Code, Section 922(g)(1) and 924(a)(2).

Petitioner decided to forego a trial, opting to pleaded guilty to Count 2 of the indictment pursuant to a plea agreement with the Government.

B. Proceedings in the District Court

Petitioner entered his plea of guilty on October 31, 2017. At the outset of the plea proceeding, Petitioner acknowledged his prior criminal record, explaining that he had “picked up some charges as an adult at the age of 17” and “[b]y the age of 18, [he was] heading to prison to the age of 23.” Petitioner confirmed that he had reviewed the indictment with his attorney and that he was pleading guilty voluntarily. After the District Court discussed the consequences of pleading guilty with Petitioner, the Government read the indictment. Petitioner confirmed he was pleading guilty to Count 2. He also agreed with the Government’s recitation of the

facts of the offense, including that he had previously been convicted of a crime punishable by imprisonment for more than a year.

The Government proffered the following factual basis for Petitioner's guilty plea:

The facts will show that on May 17th, 2017, the Defendant, Emmanuel Ravell, was temporarily detained at the Brownsville/Matamoros International port of entry exiting -- exiting the United States driving a vehicle as he attempted to export 30 high-capacity rifle magazines.

During the detention, agents observed photographs and videos of Ravell in possession of one GGI, Model 1919A7, 308 caliber, firearm, with serial number G1418 and one Israeli Military Industries LTD (IMI) pistol.

Photographs depicting Ravell in possession of the GGI, Model 1919A7 indicated that they had been taken on May 2nd, 2017 and geotagged as having been taken at a residence registered to Ravell in Brownsville, Texas.

The video showing Ravell firing the Israeli Military Industries LTD (IMI) pistol was geotagged as taken at South Texas Tactical Shooting Range in Brownsville, Texas on May 12th, 2017.

Business records from South Texas Tactical Shooting Range indicate that Ravell had been at the business on May 12th, 2017.

Agents located the individual that had purchased and sold both firearms to Ravell. The individual indicated that he had sold the GGI, Model 1919A7 to Ravell on May 2nd, 2017 for \$2,500 and that Ravell had taken possession of the firearm in Weslaco, Texas.

The individual also stated that he sold the Israeli Military Industries LTD (IMI) 50 caliber pistol to Ravell for \$1,500 and that Ravell had taken possession of the pistol in Harlingen Texas.

Criminal records indicate that on December 28th, 2009, Ravell was convicted in the 445th Judicial District Court, Cameron County, Texas in Cause Number 09-CR-2099-I of the felony offense of Aggravated Assault Against Public Servant, a crime punishable by imprisonment for a term exceeding one year.²

Both firearms were manufactured outside the State of Texas, thereby affecting interstate commerce.

Additionally, the Israeli Military Industries LTD (IMI) 50 caliber pistol was manufactured outside the United States, thereby also affecting foreign commerce.

Petitioner acknowledged that the facts proffered by the Government are accurate, and the District Court accepted his plea and found Petitioner guilty as to Count 2 of the indictment.

C. Proceedings in the Court of Appeals

On appeal, Petitioner argued the District Court plainly erred by accepting his guilty plea because the factual basis is insufficient to show that he knew on the date alleged in the indictment that “he had been convicted for an offense “punishable by imprisonment for more than one

² Petitioner’s PSR advised that Petitioner received deferred adjudication probation for the aggravated-assault-against-public-servant offense on December 16, 2009, when Petitioner was only 17 years old.

year.” Petitioner argued that without such knowledge, and in light of this Court’s recent opinion in *Rehaif v. United States*, the District Court committed clear error by accepting the plea in the absence of such evidence. He argued that he satisfied the first two prongs of the plain error analysis in light of his plea colloquy failing to establish that he knew he had been convicted of a crime punishable by imprisonment for a term exceeding one year in accordance with *Rehaif*. As for the third and fourth plain error prongs, Petitioner initially asserted that he satisfied these factors because had he realized that the factual basis relied upon to support his plea was insufficient to show that his conduct violated the statute, he would not have pled guilty to an offense for which the Government could not prove. *See, e.g., United States v. Garcia-Paulin*, 627 F.3d 127, 134 (5th Cir. 2010) (“We are satisfied that Garcia-Paulin would not have pled guilty to a statutory offense that subjected him to a prison sentence if he had realized that the factual basis relied on by the court and the government to support the conviction on that count failed to show that his conduct violated the statute.”). He further asserted that a guilty plea based on facts insufficient to support a conviction affects the “fundamental fairness” of a criminal prosecution, warranting a remand for further proceedings under the fourth plain error prong.

United States v. Owens, 224 F. Appx. 429, 430 (5th Cir. 2007) (not designated for publication).

During the pendency of Petitioner’s appeal, however, the Fourth Circuit issued its decision in *United States v. Gary* and became the first court of appeals to declare a *Rehaif* error as structural error warranting an automatic remand on plain error review. *United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020), *cert. granted*, No. 20-444, 2021 WL 77245 (U.S. Jan. 8, 2021); *see also* *United States v. Gary*, 963 F.3d 420, 421 (4th Cir. 2020). Defense counsel promptly filed a FRAP 28(j) letter notifying the Court of Appeals of *Gary*, urging the Court to adopt *Gary*’s conclusion “that a standalone *Rehaif* error satisfies plain error review because such an error is structural, which *per se* affects a defendant’s substantial rights.”

The Fifth Circuit rejected all of Petitioner’s contentions, concluding Petitioner satisfied none of the elements under its plain error analysis. *United States v. Ravell*, 821 F. Appx. 362-63 (5th Cir. 2020). The Court of Appeals therefore affirmed the District Court’s judgment in all respects. *Id.* at 363. Petitioner now petitions this Court for relief.

REASONS FOR GRANTING THE WRIT

I. The circuits are split as to whether *Rehaif* error is structural error warranting automatic reversal

The Circuit Courts of Appeals have expressed divergent approaches to the question presented to this Court. *See Gary*, 963 F.3d at 421 (“This court’s decision is far-reaching in its implications. It not only creates a circuit split of yawning proportions, but also an equally profound schism with the Supreme Court’s whole approach to error review and remediation. Is it eight—or nine—circuits that disagree with us? I have lost count, but the ranks are growing.”). There are already multiple petitions for writs of certiorari pending before this Court that implicate the same or related questions as that involved in the present matter. *See, e.g., Hicks v. United States*, No. 20-5959 (filed October 8, 2020); *Rolle v. United States*, No. 20-5499 (filed Aug. 21, 2020); *Lavalais v. United States*, No. 20-5489 (filed Aug. 20, 2020); *Ross v. United States*, No. 20-5404 (filed Aug. 14, 2020); *Hobbs v. United States*, No. 20-171 (filed Aug. 13, 2020); *Sanchez-Rosado v. United States*, No. 20-5453 (filed Aug. 6, 2020); *Stokeling v. United States*, No. 20-5157 (filed July 9, 2020); *Blackshire v. United States*, No. 19-8816 (filed June 22, 2020). Importantly, on January 8, 2021, this Court granted review in one of these cases, *United States v. Gary*, No. 20-444, to resolve once and for all the question of whether *Rehaif* error is structural error that is not

amenable to harmless or plain error review. *See* No. 20-444, 2021 WL 77245, *1 (January 8, 2021).

There is presently a strong division among the circuits as to what must be shown to satisfy the plain error standard as it relates to a *Rehaif* error. In *Gary*, the Fourth Circuit found that “a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant’s substantial rights.” *Gary*, 954 F.3d at 201. The *Gary* decision, however, directly contradicts the approach of not only the Fifth Circuit, but all other circuits that have addressed this issue thus far. According to the Fifth Circuit and the other circuit courts of appeal, *Rehaif* errors are simply not structural so as to warrant automatic reversal. Instead, *Rehaif* errors require defendants to satisfy each prong of the plain error analysis, including that there is a reasonable probability that but for the error they would not have pleaded guilty. *See United States v. Hicks*, 958 F.3d 399, 401 (5th Cir. 2020) (“[w]e have not considered *Rehaif* errors to warrant automatic reversal. And, more generally, in applying plain error review, we have required defendants who claim that they were misadvised of the elements of the offenses to which they pled guilty to show that ‘there is a reasonable probability that but for the error, [they] would not have pleaded guilty.’”); *United States v. Huntsberry*, 956 F.3d 270, 284-85 (5th Cir. 2020) (affirming § 922(g)(1)

conviction after defendant failed to show that the failure to instruct the jury on the knowledge of felon status requirement affected his substantial rights); *United States v. Coleman*, 961 F.3d 1024, 1029–30 & n.3 (8th Cir. 2020) (“The circuit courts that have considered the issue are split, with the Fifth, Sixth, and Tenth Circuits holding that a constitutionally invalid plea is not structural error, while the Fourth Circuit holds otherwise”); *United States v. Trujillo*, 960 F.3d 1196, 1205 (10th Cir. 2020) (disagreeing with the Fourth Circuit’s decision in *Gary*); *United States v. Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020); *United States v. Williams*, 946 F.3d 968, 972–73 (7th Cir. 2020); *United States v. Burghardt*, 939 F.3d 397, 403 (1st Cir. 2019).

Given the clear circuit split over how to treat *Rehaif*-based challenges to the validity of § 922(g) pleas and their resulting convictions, Petitioner asks this Court to grant review to provide guidance as to whether a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant’s substantial rights. Alternatively, Petitioner asks this Court to hold his petition pending its resolution of *Gary*.

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Shane Stolarczyk

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CERTIFICATE OF SERVICE

I, Shane Stolarczyk, do certify that on this date, January 25, 2021, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via UPS as well as electronically by using the electronic filing system in the above-captioned case to the Clerk of the Supreme Court of the United States. The Solicitor General

and the petitioner were each served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The Solicitor General was also served an electronic version of Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari.

The names and addresses of those served are as follows:

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