No. 20-7083

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IN THE SUPREME COURT OF THE UNITED STATES

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JEREMY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

JOSHUA K. HANDELL
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

## QUESTION PRESENTED

Whether, on collateral review, the court of appeals erred in denying petitioner a certificate of appealability on his unpreserved claim that his conviction and sentence for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), should be vacated based on Rehaif v. United States, 139 S. Ct. 2191 (2019).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Tenn.):

United States v. Brown, No. 16-cr-20143 (June 22, 2017)

Brown v. United States, No. 18-cv-2568 (Dec. 18, 2019)

United States Court of Appeals (6th Cir.):

United States v. Brown, No. 17-5718 (Apr. 25, 2018)

Brown v. United States, No. 20-5090 (Nov. 25, 2020)

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## OPINION BELOW

The order of the court of appeals (Pet. App. A1-A9) is unreported. The order of the district court (Pet. App. B1-B27) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on November 25, 2020. The petition for a writ of certiorari was filed on January 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). 16-cr-20143 Judgment 1. He was sentenced to 109 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. 888 F.3d 829, 831. Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. 18-cv-2568 D. Ct. Doc. 1 (Aug. 14, 2018). The district court denied that motion, Pet. App. B1-B26, and denied petitioner's request for a certificate of appealability (COA), id. at B26-B27. The court of appeals similarly denied a COA. Id. at A1-A9.

1. Early on Christmas morning 2015, petitioner and his then-romantic partner, Kimberly, began to argue on the phone about Kimberly's whereabouts. 888 F.3d at 831. Kimberly told petitioner that she was at her aunt's house, and petitioner indicated that he was coming over. Ibid. Petitioner called Kimberly when he arrived, but she refused to let him into the house or leave with him, telling petitioner that doing so would set off the home security system while her aunt was sleeping. Id. at 831-832. Petitioner told her that, if she did not come out of the house, he

was going to "set it off." Id. at 832. Kimberly again declined to come out of the house and hung up on petitioner. Ibid.

Shortly after their call ended, Kimberly heard gunshots, glass breaking, and her aunt's security alarm going off. 888 F.3d at 832. She discovered that someone had fired two bullets into the house -- one hitting the ceiling and the other breaking the living-room window and striking the oven. Presentence Investigation Report (PSR) ¶ 5. She called the police, and, upon arriving at the scene, responding officers recovered a loaded 9mm pistol near the storm door outside the residence. 888 F.3d at 832; PSR ¶ 6. She told the officers that the gun was hers and that she had previously reported it stolen (by petitioner). 888 F.3d at 832.

2. A federal grand jury in the Western District of Tennessee indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1. At trial, petitioner stipulated "that as of the date of the charged conduct, December 25th, 2015, [petitioner] was a convicted felon." 3/1/17 Tr. 617. The jury found him guilty on the single count charged in the indictment. 16-cr-20143 Judgment 1.

In preparation for sentencing, the Probation Office compiled petitioner's criminal history, including prior convictions for,

inter alia, aggravated robbery (on two separate occasions), evading arrest, and domestic assault. PSR ¶¶ 33-38. Based in part on that criminal history, the Probation Office calculated an advisory Sentencing Guidelines range of 97 to 120 months of imprisonment. PSR ¶ 83. The district court sentenced petitioner to 109 months in prison and three years of supervised release. 16-cr-20143 Judgment 2-3.

The court of appeals affirmed. 888 F.3d at 839. Petitioner asserted two claims on appeal: (1) that the government had offered insufficient evidence to establish "the element of possession" of the firearm, id. at 833, and (2) that the district court had abused its discretion by admitting "evidence referencing [petitioner's history of] domestic violence at trial," id. at 835. The court of appeals rejected petitioner's first contention, determining that "[c]ircumstantial evidence sufficiently supports the jury's finding that [petitioner] possessed the gun on December 25, 2015." Id. at 833. And although the court of appeals "conclude[d] that the district court abused its discretion in declining to redact * * * tapes that reference[d] domestic violence," it determined "that this wrongly admitted evidence constitute[d] harmless error." Id. at 838.

3. In August 2018, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. 18-cv-2568 D. Ct. Doc. 1.

Petitioner asserted several grounds in his pro se motion, including "[c]onstructive [a]mendment" of the indictment, "[i]nsufficient [e]vidence to [c]onvict," "[p]rosecutorial [m]isconduct," and "[i]mproper [j]ury [i]nstructions." Id. at 4-8.

In November 2019 -- while his Section 2255 motion remained pending before the district court -- petitioner amended that motion to add a claim that he was entitled to relief under this Court's then-recent decision in Rehaif v. United States, 139 S. Ct. 2191 (2019). 18-cv-2568 D. Ct. Doc. 35, at 4 (Nov. 6, 2019). In Rehaif, this Court concluded that the courts of appeals had erred in their interpretation of the mens rea required to prove unlawful firearm possession under 18 U.S.C. 922(g) and 924(a)(2). Abrogating the precedent of every circuit to have addressed the issue, the Court held that the government not only "must show that the defendant knew he possessed a firearm," but "also that he knew he had the relevant status when he possessed it." Rehaif, 139 S. Ct. at 2194.

The district court rejected petitioner's collateral attack. Pet. App. B26. With respect to petitioner's Rehaif claim, the court identified two impediments to relief. First, the court stated that the petitioner in this case was "not similarly situated" to the petitioner in Rehaif, because "Rehaif was an immigrant who overstayed his visa, not a felon," whereas petitioner

"stipulated that he was a convicted felon and did not require the United States to prove that element of his crime." Id. at B13-B14. Second, the court stated that "Rehaif did not announce a new rule of constitutional law made retroactive to cases on collateral review" and concluded that "Rehaif does not provide [petitioner] with any relief in this collateral proceeding." Id. at B14. The district court declined to grant a COA on the Rehaif claim or any other claim raised in petitioner's Section 2255 motion. Id. at B26-B27.

A judge of the court of appeals likewise denied a COA, but on different grounds than those upon which the district court had relied. Pet. App. A1-A9. "[A]ssum[ing] that Rehaif applies retroactively to cases on collateral review," the circuit judge determined that petitioner's "claim does not deserve encouragement to proceed further" because petitioner had "stipulated at trial that he was a convicted felon on the date of this offense, having previously been convicted of two counts of aggravated robbery, for which he was sentenced to eight years in prison," and those facts were "sufficient to establish knowledge of his status as a felon." Id. at A8 (citing United States v. Raymore, 965 F.3d 475, 485 (6th Cir. 2020); United States v. Ward, 957 F.3d 691, 695 (6th Cir. 2020)).

ARGUMENT

Petitioner renews his contention (Pet. 8-21) that his claim of error under Rehaif v. United States, 139 S. Ct. 2191 (2019), entitles him to vacatur of his conviction and sentence under 28 U.S.C. 2255. Because petitioner did not raise that claim during his direct appeal and has not demonstrated cause and prejudice or actual innocence so as to overcome that procedural default in a collateral attack, the court of appeals did not err in denying a COA. Further review is unwarranted.

1. Once a federal prisoner's conviction becomes final on appeal, he may file a motion under Section 2255 to "move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. 2255(a). If the district court denies relief, the prisoner must obtain a COA from "a circuit justice or judge" before he may appeal that decision. 28 U.S.C. 2253(c)(1); accord Fed. R. App. P. 22(b)(1) ("[T]he applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a [COA]."). A COA may issue only if the prisoner has made "a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), and must "indicate which specific issue or issues satisfy the showing required by paragraph (2)," 28 U.S.C. 2253(c)(3). The "substantial showing" requirement is satisfied only when the prisoner demonstrates "that reasonable jurists could

debate" that the resolution of any procedural issues or merits issues was correct. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

When a prisoner fails to raise a claim on direct appeal, the claim is procedurally defaulted for purposes of collateral review. A court generally may not consider a defaulted claim raised in a Section 2255 motion unless the prisoner establishes both "cause" for the default and "prejudice" from the asserted error. United States v. Frady, 456 U.S. 152, 167-168 (1982). This Court has also recognized a narrow alternative, under which a procedural default may be excused if the prisoner can show that he is "'actually innocent'" of the underlying offense. Bousley v. United States, 523 U.S. 614, 622 (1998) (citation omitted).

2. In this case, the court of appeals "assumed that Rehaif applies retroactively to cases on collateral review" but determined that petitioner's "claim does not deserve encouragement to proceed further" because the record evidence established that petitioner knew he was a felon at the time he possessed a firearm. Pet. App. A8; see id. at A2 (observing that a COA may not issue unless "'jurists could conclude the issues presented are adequate to deserve encouragement to proceed further'" (quoting Miller-El v. Cockrell, 547 U.S. 322, 327 (2003))). The court pointed out that petitioner (1) "stipulated at trial that he was a convicted felon on the date of this offense," and (2) had "previously been

convicted of two counts of aggravated robbery, for which he was sentenced to eight years in prison." Id. at A8; see PSR ¶¶ 34-35 (recounting aggravated-robbery convictions, eight-year custodial sentence imposed, and three-year prison term served). Because those aspects of the record were "sufficient to establish [petitioner's] knowledge of his status as a felon," Pet. App. A8, the court appropriately denied a COA.

Petitioner argues that "nearly every defendant convicted under 18 U.S.C. 922(g) and 924(a)(2) prior to this Court['s] decision in Rehaif is unconstitutional and invalid," Pet. 9 (emphasis added), but he does not address the issue of procedural default. As petitioner acknowledged in his amended Section 2255 motion, he "did not raise this claim on direct appeal." 18-cv-2568 D. Ct. Doc. 35-1, at 39. He must thus establish cause and prejudice to excuse that procedural default or, alternatively, actual innocence of criminal conduct. See p. 8, supra. Petitioner has not made either of those showings.

As cause for his procedural default, petitioner argued below that "the substantive rule announced in Rehaif is new," 18-cv-2568 D. Ct. Doc. 35-1, at 39 (emphasis added), and observes that, "[p]rior to this Court['s] decision in Rehaif, every federal circuit court of appeals that ha[d] addressed this issue relieved the Government of its burden of proving the essential element

announced in Rehaif," Pet. 8 (collecting cases) (emphasis added). But this Court has explained that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" Bousley, 523 U.S. at 623 (citations omitted). The question presented in Rehaif was thoroughly and repeatedly litigated in the courts of appeals over the last several decades, and as such, it does not qualify under the novelty exception. See, e.g., United States v. Games-Perez, 695 F.3d 1104, 1124 (10th Cir. 2012) (Gorsuch, J., dissenting from the denial of rehearing en banc) ("In one form or another, [the] position [ultimately embraced in Rehaif] has, as well, won endorsement from the lengthy en banc dissent in [United States v. Langley, 62 F.3d 602 (4th Cir. 1995),] joined by four judges, and from at least two district courts, * * * and its strength has been acknowledged explicitly or implicitly by at least two other circuits." (citations and emphasis omitted)).

Accordingly, petitioner cannot overcome this procedural default and have his Rehaif claim considered on the merits without making a threshold showing of "actual[] innocen[ce]." Smith v. Murray, 477 U.S. 527, 537 (1986) (citation omitted); see Bousley, 523 U.S. at 622-623. The "actual innocence" exception requires a Section 2255 movant to show that it was "more likely than not that no reasonable juror would have convicted him" had an error not

occurred. Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). As this Court has emphasized, "'actual innocence' means factual innocence, not mere legal insufficiency." Ibid.

Petitioner has not even attempted to make that showing with respect to his Rehaif claim. He never asserted in his amended Section 2255 motion that he was, in fact, unaware of his prior felony conviction when he possessed a firearm in December 2015, and he has not made such a claim in his petition for a writ of certiorari. Petitioner instead simply contends that his conviction is invalid under Rehaif because "the Government did not present any evidence in support of the essential [knowledge-of-status] element and the jurors [were] not instructed to find the essential element." Pet. 21; accord 18-cv-2568 D. Ct. Doc. 35-1, at 40 ("[T]he Government did not present any evidence at trial supporting an inference that [petitioner] 'knew' of his 'status' as a felon. * * * The jurors [were] not instructed on the element announced in Rehaif. * * * Ultimately, the Government has not proved its case beyond a reasonable doubt.") (emphasis added). But any deficiency of proof or erroneous verdict on an element of the offense not "factual innocence." Bousley, 523 U.S. at 623.

Moreover, no sound basis exists to conclude that petitioner could have made out a claim of actual innocence as to the

knowledge-of-status element had he attempted to do so. As recounted by the court of appeals, petitioner had sustained two convictions for aggravated robbery, resulting in an eight-year sentence, Pet. App. A8, and over three years of actual incarceration, PSR ¶¶ 34-35. A rational factfinder could, at a minimum, have inferred from petitioner's serious felony record that he knew of his felon status at the time of his offense. To the government's knowledge, no court of appeals has granted a federal prisoner collateral post-conviction relief under Section 2255 based on Rehaif in comparable circumstances, and the court of appeals did not err in denying that relief here.

3. On April 20, 2021, this Court heard argument in Greer v. United States, No. 19-8709, to consider whether, on direct appeal of an unpreserved Rehaif trial error, a court of appeals may appropriately consult the entire record when conducting the plain-error inquiry, or is instead restricted to reviewing only those parts of the record that were placed before the jury. Greer does not bear on the actual-innocence showing necessary to overcome procedural default in the collateral-review context, where this Court's precedents already make clear that the habeas court appropriately considers the entire universe of evidence adduced in support of or opposition to the motion. See Schlup, 513 U.S. at 328 ("The habeas court must make its determination concerning the

petitioner's innocence 'in light of all the evidence, including * * * evidence * * * [that] bec[a]me available only after the trial.'") (citation omitted); cf. Rehaif, 139 S. Ct. at 2213 (Alito, J., dissenting) ("If a prisoner asserts that he lacked that knowledge and therefore was actually innocent, the district courts * * * may be required to hold a hearing, order that the prisoner be brought to court from a distant place of confinement, and make a credibility determination as to the prisoner's subjective mental state at the time of the crime, which may have occurred years in the past."). Accordingly, no reason exists to hold this petition pending the decision in Greer.

On the same day, this Court also heard argument in United States v. Gary, No. 20-444, to consider whether a defendant who pleaded guilty to possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a), is automatically entitled to plain-error relief on direct appeal if the district court did not advise him of the knowledge-of-status element recognized in Rehaif. Although the respondent in Gary forfeited his claim in the district court, he has argued that the harmless-error standard of Federal Rule of Criminal Procedure 52(a), not the plain-error standard of Rule 52(b), should govern the court of appeals' review because "uniform precedent foreclosed the claim" prior to Rehaif. Resp. Br. at 11, Gary, supra (No. 20-

444); but see Johnson v. United States, 520 U.S. 461, 467-468 (1997); U.S. Reply Br. at 10-15, Gary, supra (No. 20-444). That argument is specific to the text and putative history of Rule 52, and does not bear on petitioner's ability to show "cause" for his procedural default in the collateral-review context by arguing that it would have been futile to raise an objection at the time of his trial. See Bousley, 523 U.S. at 623; pp. 9-10, supra. Accordingly, no reason exists to hold this petition for a writ of certiorari pending the decision in Gary.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

JOSHUA K. HANDELL
Attorney

MAY 2021