

No. _____

IN THE
Supreme Court of the United States

ROBBULL BRYANT
Petitioner,

vs.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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i.

QUESTIONS PRESENTED

Whether the Second Circuit Court of Appeals erred, in violation of U.S. Const. V and VI and this Court's decision in *Rehaif* when it denied Bryant's constitutional challenges to his guilty plea to a violation of 18 U.S.C. § 922(g) and departed from the sound reasoning of the Fourth Circuit Court of Appeals in *United States v. Gary* which found such error *per se* harmful requiring vacatur?

ii.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Robbull Bryant, defendant-appellant below. Respondent is the United States, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR CERTIORARI

Petitioner Robbull Bryant respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was filed in a published opinion on September 24, 2020. A three-judge panel of the Second Circuit issued an opinion affirming the judgment of the district court. *See United States v. Bryant*, 976 F.3d 165 (2d Cir. 2020). The opinion is attached as Appendix A.

On November 6, 2020, Mr. Bryant filed a petition for rehearing and suggestion for rehearing *en banc*. The Second Circuit denied his petition on November 25, 2020. That order is attached as Appendix B.

JURISDICTION

On September 24, 2020, a three-judge panel for the Second Circuit denied Petitioner's appeal and affirmed his sentence in the aforementioned opinion.¹ This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

¹ The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2. If the due date falls on a Saturday, Sunday, federal holiday, or day the Court is closed, it is due the next day the Court is open. Sup. Ct. R. 30.1. The petition for rehearing in this case was denied on November 25, 2020, making the petition for writ of *certiorari* due on February 23, 2020. However, an order issued by this Court on March 19, 2020 in response to the COVID-19 pandemic extended the due date to 150 days instead of 90 days making this petition for writ of certiorari due by April 24, 2021.

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const. Amend. V:

“No person shall . . . be deprived of life, liberty, or property, without due process of law.”

U.S. Const. Amend. VI:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...”

I.

STATEMENT OF THE CASE

On September 24, 2020, a three-judge panel of the Court of Appeals for the Second Circuit issued an opinion affirming Mr. Bryant’s sentence and judgment. *See United States v. Bryant*, 976 F.3d 165 (2d Cir. 2020).

Before the Second Circuit, Mr. Bryant appealed from his judgment of conviction following his guilty plea to one count of conspiring to distribute cocaine base in violation of 21 U.S.C. §§ 846, 841(b)(1)(B), and one count of possession of a firearm as a convicted felon in violation of 18 U.S.C. §§ 922(g), 924(a)(2). Mr. Bryant was sentenced to 90 months’ imprisonment on each count to run concurrently and to be followed by a four-year term of supervised release. On appeal, Bryant argued that his 90-month term of imprisonment was procedurally and substantively unreasonable, and challenged the imposition of two supervised release conditions—namely, the notification-of-risk condition and the condition restricting his communications with known felons.

While Bryant's appeal was pending, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Rehaif* held that in a federal prosecution for a felon in possession of a firearm, the government must prove that the defendant knew of his prohibited status. *Id.* at 2195. After *Rehaif*, Bryant requested permission to provide supplemental briefing that his § 922(g) conviction was constitutionally invalid. That request was granted and the parties provided supplemental briefing to the Second Circuit.

As is relevant to this petition, Bryant argued there was no dispute that he, the lawyers, and the district court all misunderstood the scienter element of the § 922(g) offense during the proceedings below. *Bryant*, 976 F.3d at 173. Likewise, the government conceded that the factual basis in the record for the scienter element was inadequate as required by Rule 11(b)(3) of the Federal Rules of Criminal Procedure. *Id.* at 174. It therefore followed, Bryant argued, that “[w]ithout being fully informed of the nature of the offense, and without an established factual basis for finding that one of its elements was satisfied, it is hard to imagine how a defendant's plea could be knowing and voluntary.” *United States v. Balde*, 943 F.3d, 73 95 (2d Cir. 2019) (holding the district court committed plain error in failing to advise the defendant at his plea colloquy that the government would need to establish beyond reasonable doubt at trial that he knew that he was illegally present in United States and such error seriously affected the fairness, integrity, or public reputation of judicial proceedings).

Bryant further argued that the state larceny offense which served as a predicate to his § 922(g) conviction was over fourteen years old at the time of his plea and he had not served even a single day in prison for that fourteen-year-old offense. *Id.* at 174. For that larceny, the state court imposed a three-year custodial sentence but that sentence was totally suspended and Mr. Bryant was placed on probation for one year only. *Id.* Given these circumstances, the government would have had significant difficulty convincing a jury that Mr. Bryant knew and remembered he had been convicted of a crime punishable by a term of imprisonment exceeding one year.

Id.

Bryant further argued that this Court in *Rehaif* offered this very scenario as an example of potential harm to a defendant if the knowledge-of-status element was not required. *Id.* at 175. *Rehaif* noted that, without the scienter element, a § 922(g) prosecution “might apply to a person who was convicted of a prior crime but was sentenced only to probation, who does not know that the crime is punishable by imprisonment for a term exceeding one year.” *Rehaif*, 139 S.Ct at 2198 (citing *United States v. Games-Perez*, 667 F.3d 1136, 1138 (10th Cir. 2012)).

Bryant pointed out that the government’s evidence supporting the scienter element was sparse. On appeal, the government relied on a single document as its evidence that the *Rehaif* errors in Bryant’s case were not impactful. *Bryant*, 976 F.3d at 175. That document was a state judicial order

related to the state larceny offense that the government appended to its responsive appellate brief. *Id.* at 175-76. That state judicial order, however, was never part of the record before the district court. *Id.* at 175, n.6. Even so, Bryant argued, the state judicial order, untested by litigation, did not provide any insight into what Mr. Bryant knew and/or remembered about his prohibited status at the time he possessed a gun in his federal case over a decade later. *Id.* at 178. Further, there was no evidence that Mr. Bryant ever saw the state judicial order at or near the time it was created or that he ever agreed it was truthful, complete, and/or accurate.

Finally, Mr. Bryant argued that *Rehaif* error was impactful despite having negotiated a favorable plea with the government that allowed him to avoid more serious charges. *Id.* at 177-78. His settlement came well after his case was bound for trial. Mr. Bryant filed numerous motions challenging various aspects of the government's case against him. And, Bryant argued, the case had been on a trial track from the outset despite the specter of more serious charges that would increase his sentencing exposure if he proceeded to trial. While Mr. Bryant eventually agreed to plead and benefited from his negotiated settlement (as is typical for all defendants who enter into guilty pleas instead of pursuing trial), the settlement also allowed the government to avoid expending further time and resources in further litigation and a trial. Bryant submitted that when the negotiated settlement is placed in context, it did not demonstrate a lack of prejudice. Had Mr. Bryant been aware of the

Rehaif element, he would have been aware of a broader defense to the §922(g) charge than was available to him at the time of the plea. *Id.* at 178. Moreover, he would have been in a superior negotiating position during his dealings with the government because his understanding about his status as a prohibited person would have been in play as a defense. *Id.*

The Second Circuit rejected all of these arguments and held that Bryant's guilty plea remained valid, despite *Rehaif*. It found that Mr. Bryant knew of his unlawful status when he possessed the firearm based on the extra state judicial record that was never before the district court. *Id.* at 175-76. The panel also relied on the fact of his negotiated plea to support its conclusion that there was no reasonable probability that he would have not pled guilty had he been properly informed that such knowledge was a requirement for conviction under § 922(g).² *Id.* at 177-78.

On November 6, 2020, Bryant filed a petition for rehearing and/or suggestion for rehearing *en banc*. Bryant argued that the panel should have found plain error and its failure to do so deepened an inter-circuit split with *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020) *cert granted* --- S.Ct. ---- 2021 WL 77245 (U.S. Jan. 8, 2021). In *Gary*, the defendant pleaded guilty to felon-in-possession in violation of § 922(g) and his prior criminal history included a felony for which he served 691 days in custody. *Id.* at 202. *Gary*

² It also concluded that there was no error at sentencing in the district court's consideration of potential sentencing disparities among similarly situated defendants, Mr. Bryant's 90-month sentence was not procedurally or substantively unreasonable and remanded two disputed conditions of supervised release.

challenged his conviction as unconstitutional under *Rehaif*. The Fourth Circuit vacated Gary’s guilty plea per *Rehaif* because: (1) such error violates a defendant’s right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest; (2) the consequences of this type of constitutional deprivation are necessarily unquantifiable and indeterminate; and (3) the defendant waived his valuable trial rights after he was misinformed regarding the true nature of a § 922 offense and the elements the government needed to prove to find him guilty robbing him of the opportunity to mount a defense to this element of his § 922 (g) charges—as was his sole right. As such, the Fourth Circuit concluded that *Rehaif* error was structural in nature and met all of the criteria of plain error review. Bryant urged the Second Circuit to follow suit in light of *Gary*’s well-reasoned conclusion and exhaustive review of this Court’s structural error jurisprudence. On November 25, 2020, the Second Circuit denied the petition.

Mr. Bryant’s petition should be granted by this Court because *Bryant* has become part of a larger inter-circuit split with the Fourth Circuit. This Court should bring the Second Circuit in line with *Gary*. As mentioned above, this Court granted government’s petition for certiorari in *Gary* on January 8, 2021.

Furthermore, a case like Mr. Bryant’s is provides a strong factual vehicle to examine harm resulting from *Rehaif* error. Unlike the defendant in *Gary*, Mr. Bryant suffered a single prior felony offense that was over fourteen

years old at the time of his § 922(g) guilty plea and he did not serve a single day in custody for that fourteen-year-old offense. As noted above, this Court in *Rehaif* warned that such circumstances could result in a conviction of a defendant who did not know of his prohibited status. *Rehaif*, 139 S.Ct at 2198 (internal citation omitted). Granting *certiorari* here would provide the Court an opportunity to examine prejudice in the context of someone like Mr. Bryant who embodies the harm against which *Rehaif* warned could happen.

II.

ARGUMENT

- A. This Court should grant this petition to bring the Second Circuit in line with the sound reasoning of the Fourth Circuit in *Gary* because Mr. Bryant's lack of notice of *Rehaif*'s essential knowledge-of-status element during his guilty plea meets all plain error criteria requiring vacatur of his conviction.**

As noted above, recently, this Court granted certiorari in *Gary*, a case upon which Bryant relied heavily in his petition for rehearing and suggestion for rehearing *en banc* below. In *Gary*, the defendant challenged his guilty plea as constitutionally invalid because the district court omitted the *Rehaif* element of the offense during his plea colloquy. *Gary*, 954 F.3d at 199. In response, the government argued that the district court's *Rehaif* error did not affect Gary's substantial rights because there was overwhelming evidence in the record that he was aware he had been convicted of a crime punishable by imprisonment for a term exceeding one year at the time he possessed the firearms. *Id.* at 202. Gary's prior criminal history included a felony conviction

for which he served 691 days in custody. *Id.* Thus, according to the government, Gary failed to demonstrate a reasonable probability that, but for the error, he would not have pled guilty. *Id.* The Fourth Circuit rejected the government's argument. After exhaustively reviewing this Court's precedent, the *Gary* court reasoned that a constitutionally invalid plea *per se* affects substantial rights requiring vacatur. *Id.* at 203.

Gary observed that the this Court has adopted at least three broad rationales for identifying errors as structural. *Id.* at 204. First, an error is structural when “the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,’ such as ‘the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.” *Id.* (citing and quoting *McCoy v. Louisiana*, ----U.S.----, 138 S.Ct. 1500, 1511 (2018) and *Weaver v. Massachusetts*, ----U.S.----, 137 S. Ct 1899, 1908 (2017)).

Second, an error is structural if its effects are too hard to measure; “i.e. where the precise ‘effect of the violation cannot be ascertained.” *Id.* at 205 (citing and quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) and *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). Such is the case where the consequences of a constitutional deprivation “are necessarily unquantifiable and indeterminate.” *Gary*, 954 F.3d at 205 (internal citation omitted).

“Third, an error has been deemed structural if the error always results

in fundamental unfairness.” *Id.* at 205. In these circumstances, it “would therefore be futile for the government to try to show harmlessness.” *Id.* (citing *Weaver*, 137 S. Ct. at 1908.

Finding structural error on all three bases, *Gary* held that a defendant need not make a case-specific showing of prejudice—even when there is overwhelming evidence that he would have pled guilty. *Gary*, 954 F.3d at 205. *Gary* recognized that *Rehaif* error violates a defendant’s right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest. *Id.* *Gary* noted that the Sixth Amendment contemplates that “the accused … is the master of his own defense,” and thus certain decisions, including whether to waive the right to a jury trial and to plead guilty, are reserved for the defendant. *Id.* (citing *McCoy*, 138 S. Ct. at 1508).

Gary also reasoned that *Rehaif* error is structural because the deprivation of a defendant’s autonomy interest under the Fifth Amendment due process clause has consequences that “are necessarily unquantifiable and indeterminate.” *Id.* at 206 (*internal citation omitted*). The error in *Gary*, like the one in *Bryant*, occurred in the context of a guilty plea and thus is not the type of error that “may be quantitatively assessed in the context of other evidence presented [at trial] in order to determine whether [the error was] harmless beyond a reasonable doubt.” *Id.* at 206 (citing *Gonzalez-Lopez*, 548 U.S. at 148 (*internal citation omitted*)). *Gary* noted:

[U]nlike Rule 11 errors amounting to “small errors or defects that have little if any, likelihood of having changed the result of the [proceeding], *see Chapman*, 386 U.S. at 22, 87 S.Ct. 824, the impact of this error—an undisputed constitutional violation where Gary was misinformed about the nature of the charges against him—is instead the type that is fundamental to the judicial process.

Gary, 954 F.3d at 206.

Finally, Gary found structural error because:

[F]undamental unfairness results when a defendant is convicted of a crime based on a constitutionally invalid guilty plea. Gary waived his trial rights after he was misinformed regarding the nature of a § 922 offense and the elements the government needed to prove to find him guilty. As such, he was denied any opportunity to decide whether he could or desired to mount a defense to this element of his § 922 (g)(1) charges—as it was his sole right to do.

Id. Like *Gary*, when Mr. Bryant pleaded guilty, he waived, among other rights, his right to a trial by jury, his privilege against self-incrimination, and his right to confront his accusers. The impact of his unknowing waiver of his trial rights based on an unconstitutional guilty plea, just like the denial of other trial rights previously identified by this Court as structural error, is unquantifiable. It is impossible to know what evidence may have been presented in his defense, and ultimately what choice Mr. Bryant would have made regarding whether to plead guilty or go to trial.

Regardless of evidence that would tend to prove that Mr. Bryant knew of his status as a convicted felon, it is in the interest of justice that Mr. Bryant knowingly and intelligently engage in the calculus necessary to enter a plea.

Any conviction resulting from a constitutionally invalid plea “cannot reliably serve its function as a vehicle for determination of guilt or innocence, ... and no criminal punishment [based on such a plea] may be regarded as fundamentally fair.” *See Neder v. United States*, 527 U.S. 1, 8-9 (1999) (internal citation omitted).

This Court should grant this petition and recognize the sound reasoning of *Gary* because Mr. Bryant’s lack of notice of the essential knowledge-of-status element is structural error and meets all plain error criteria.

B. This Court should grant *certiorari* because Mr. Bryant’s case is a strong factual vehicle to examine prejudice in the context of *Rehaif* error in that he may not have known that his fourteen-year-old state larceny offense, for which he did not serve a single day in custody, was a crime punishable for a term exceeding one year.

A case like Mr. Bryant’s provides a strong factual vehicle for reviewing *Rehaif* prejudice. The state larceny offense upon which the government relied to make its argument below was over a decade old and took place when Mr. Bryant was a young man in 2006. 976 F.3d at 174. Mr. Bryant did not serve a single day in prison for that fourteen-year old offense. *Id.* While the state court imposed a three-year custodial sentence, that sentence was totally suspended and Mr. Bryant was placed on probation for one year only. *Id.* at n.2. Given these circumstances, the government would have had significant difficulty convincing a jury that Mr. Bryant knew and remembered he had been convicted of a crime punishable by a term of imprisonment exceeding one year. *Id.* at 174. After all, a person’s recollection of such an offense over ten years

ago would likely amount to no more than remembering that he or she served not one day in custody. *Id.*

Further, the government's evidence of Mr. Bryant's knowledge-of-status was nearly non-existent. On appeal, the government to a single document, the aforementioned state judicial record, to supports its argument that Mr. Bryant surely knew of his prohibited status. *Id.* at 175, n.7. The state judicial order was never part of the record before the district court. Nonetheless, the Second Circuit permitted the government to include it on appeal and relied heavily on it in making its decision. *Id.*

That state judicial record, however, did not support the Second Circuit's conclusion. First, the state judicial order did not provide any insight into what Mr. Bryant knew and/or remembered about his prohibited status at the time he possessed a gun in his federal case over a decade later. Further, there was no evidence that Mr. Bryant ever saw the state judicial order at or near the time it was created or that he ever agreed it was truthful, complete, and/or accurate.³ Thus, the government cannot and did not claim that it contained admissions by Mr. Bryant. Moreover, the state judicial order merely established, in rote fashion, that the state court judge believed that Mr. Bryant was advised of the rights and consequences attendant to his plea but it did not state what those rights and consequences actually were. In other words, the record offered by the government did not demonstrate, let alone prove, what

³ Mr. Bryant was not on the list of people served with the state judicial order.

Mr. Bryant knew or believed at the time of his guilty plea for the larceny offense or at the time he possessed the firearm over a decade later.

Finally, the negotiated plea in this case did not render the *Rehaif* errors inconsequential. Below, the government pointed out that Mr. Bryant's guilty plea to drug and gun charges were part of a negotiated settlement in which the government agreed to dismiss a more serious charge and did not bring additional charges. *Id.* at 177-78. The negotiated settlement, however, came well after the case was bound for trial. Mr. Bryant filed numerous motions challenging various aspects of the government's case against him. The case was on a trial track despite the possibility of increased sentencing exposure. Furthermore, the government benefited from the settlement in that it allowed the government to avoid expending further time and resources in litigation and trial. When the negotiated settlement is placed in its proper context, it does not demonstrate a lack of prejudice. Rather, had Mr. Bryant been aware of the *Rehaif* element, he would have been aware of a broader defense to the §922(g) charge than was available to him at the time of the plea. As such, he would have been in a superior negotiating position because his understanding about his status as a prohibited person would have been in play as a defense. *Id.* at 178.

Ultimately, the circumstances in this record indicate that Mr. Bryant would not have pleaded guilty with the benefit of *Rehaif* given that he suffered a single felony conviction over a decade ago in which he received a suspended

sentence and did not serve a single day in prison and the evidence supporting his knowledge-of-status element was paltry. This Court noted in *Rehaif*, without the knowledge-of-status requirement a § 922(g) prosecution “might apply to a person who was convicted of a prior crime but was sentenced only to probation, who does not know that the crime is punishable by imprisonment for a term exceeding one year.” *Rehaif*, 139 S.Ct at 2198 (internal citation omitted). Putting aside the contours of this Court’s jurisprudence surrounding structural error which, presumably, this Court will examine in *Gary*, granting *certiorari* here would provide the Court an opportunity to examine prejudice in the context of a case where the defendant may not have known that his predicate crime was punishable for a term exceeding one year.

III.

CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,



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