

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

EMMANUEL FEASTER,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Andrew Levchuk
Counsellor at Law
11 Amity Street
PO Box 810
Amherst, MA 01004
Tel: 413-461-4530
Attorney for Petitioner

QUESTIONS PRESENTED

Title 18, United States Code, Section 922(g)(1), “[i]t shall be unlawful” for certain individuals to possess firearms that have traveled in interstate commerce. The provision lists nine categories of persons subject to the prohibition, including those previously convicted of a crime punishable by a term exceeding one year. A separate provision in 18 U.S.C. § 924(a)(2) adds that anyone who “knowingly violates” the first provision shall be fined or imprisoned for up to 10 years. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court held that in a prosecution under § 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. The issues presented in this case relating to Sections 922 and 924 are:

1. Whether the district court committed plain error in failing to instruct the jury that the evidence must establish both that petitioner Emmanuel Feaster knew he possessed a firearm and ammunition and that he knew he belonged to the relevant category of persons barred from possessing a firearm and ammunition.

In conflict with the decision below, the Fourth Circuit in *United States v. Medley*, 972 F.3d 399 (4th Cir.), *reh’g en banc granted*, 828 Fed. Appx. 923 (Mem) (2020), and the Third Circuit in *United States v. Nasir*, 982 F.3d 144 (4th Cir. 2020) (*en banc*), reversed for plain error based on a failure to instruct the jury per *Rehaif*.

2. Whether, when applying plain-error review based upon an intervening United States Supreme Court decision, a circuit court of appeals may review matters outside the trial record to determine whether the error affected a defendant’s substantial rights or impacted the fairness, integrity, or public reputation of the trial?

This Court has granted certiorari on this issue in the pending case of *Greer v. United States*, No. 19-8709.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases pending in any court.

TABLE OF CONTENTS

OPINION BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
CONCLUSION.....	9
INDEX TO APPENDICES.....	10
APPENDIX A	11

TABLE OF AUTHORITIES

<i>Dunn v. United States</i> , 442 U.S. 100 (1979)	6
<i>Johnson v. United States</i> , 318 U.S. 189 (1943)	7
<i>Molina-Martinez v. United States</i> , 136 S. Ct. 1338 (2016)	6
<i>Rehaif v. United States</i> , 139 S. Ct. 2191 (2019)	<i>passim</i>
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	6
<i>United States v. Gary</i> , 954 F.3d 194, <i>reh'g en banc denied</i> , 963 F.3d 420 (4th Cir. 2020), <i>cert granted</i> , 2021 WL 77245 (Jan. 8, 2021)	7-8
<i>United States v. Medley</i> , 972 F.3d 399 (4th Cir.), <i>reh'g en banc granted</i> , 828 Fed. Appx. 923 (Mem) (2020)	<i>passim</i>
<i>United States v. Miller</i> , 954 F.3d 551 (2d Cir. 2020)	5
<i>United States v. Nasir</i> , 982 F.3d 144 (4 th Cir. 2020) (<i>en banc</i>)	8
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	6
<i>United States v. Prado</i> , 815 F.3d 93 (2d Cir. 2016)	4
<i>United States v. Young</i> , 470 U.S. 1 (1985)	7

STATUTES

18 U.S.C. § 922(g)	<i>passim</i>
18 U.S.C. § 924(a)	<i>passim</i>
28 U.S.C. § 1254(1)	1

OPINION BELOW

The summary order of the United States Court of Appeals for the Second Circuit, 833 Fed. Appx. 494 (December 1, 2020), is not reported and is found at Appendix A.

JURISDICTION

The court of appeals issued its opinion and judgment on December 1, 2020. This petition is filed within 90 days of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18, United States Code, Section 922 provides in relevant part:

- (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;
 - (2) who is a fugitive from justice;
 - (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
 - (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
 - (5) who, being an alien—
 - (A) is illegally or unlawfully in the United States; or
 - (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
 - (6) who has been discharged from the Armed Forces under dishonorable conditions;
 - (7) who, having been a citizen of the United States, has renounced his citizenship;
 - (8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18, United States Code, Section 924(a) provides in relevant part:

(2) 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

1. Petitioner Emmanuel Feaster was indicted on one count charging both possession of a firearm and possession of ammunition in interstate commerce after he had been convicted of a crime punishable by more than a year in prison. C.A. App. A18-A19. Prior to his jury trial in United States District Court for the Western District of New York, Mr. Feaster determined to proceed pro se. The district court appointed stand-by counsel. Mr. Feaster was convicted on the one-count indictment and was sentenced to a total of 60 months' imprisonment. C.A. App. A209-A215.

2.a. The evidence at trial showed that on September 27, 2015, Rochester Police Officer Jason Mueller was monitoring a surveillance camera. He observed an individual on an ATV proceeding on the wrong side of Jefferson Avenue. C.A. App. A26-A27. Officer Robert Trosinski responded to Officer Mueller's call. C.A. App. A32-A34. Officer Trosinski located and confronted Mr. Feaster. C.A. App. A35.

Officer Trosinski requested Mr. Feaster's driver's license, and according to Trosinski, Feaster put his hand in his pocket as if to retrieve a license but then ran off. Trosinski pursued him. Id. Mr. Feaster tripped and fell on a curb, allowing Officer Trosinski to overtake him. C.A. App. A36. As they struggled on the ground, Officer Trosinski "observed [Feaster] make a movement with his right arm reaching from his waistband and then moving it up over his head while he was on the ground." Id. It looked like Mr. Feaster "was throwing something," and Officer Trosinski "heard what sounded like metal hitting the pavement." Id.

After Feaster was handcuffed and placed in another officer's vehicle, Officer Trosinski looked in the area where he heard the sound of metal hitting pavement. C.A. App. A37. He "observed a handgun underneath the front passenger tire of a vehicle that was parked in the street." Id. An evidence technician arrived and secured and unloaded the handgun, a Bryco .380 pistol. C.A. App. A48-A49. There was one round in the chamber and five rounds in the magazine. C.A. App. A57-A58.

The technician later swabbed the Bryco for DNA. C.A. App. A60. The major component of the DNA profile obtained from the swab of the Bryco matched the DNA profile of Mr. Feaster. C.A. App. A126. The government's evidence further showed that the Bryco was manufactured in California, and the ammunition was also manufactured outside of the State of New York. C.A. App. A98-A99.

Finally, the parties stipulated that “on or about November 4, 2013, the defendant, Emmanuel Feaster, was convicted in County Court, Monroe County, New York of a crime punishable by imprisonment for a term exceeding one year.” C.A. App. A129.

b. The district court charged the jury as follows as to the elements:

First, the defendant was convicted in any court of a crime punishable by imprisonment for a term exceeding one year as charged.

Second, the defendant knowingly possessed a firearm or ammunition as charged.

And, third, that the possession charged was in or affecting interstate commerce.

C.A. App. A172. The district court did not instruct the jury that the government was required to prove beyond a reasonable doubt that Mr. Feaster was aware of his prohibited status.

3. The court of appeals affirmed. The court noted that at the time of trial, this Court had not yet decided *United States v. Rehaif*, in which it held that “the word ‘knowingly’ [in § 922(g)] applies both to the defendant’s conduct and to the defendant’s status.” App. at __, quoting 139 S. Ct. 2191, 2194 (2019). Under *Rehaif*, “[t]o convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.” *Id.*

Because Feaster did not object to the jury instructions at trial, the court of appeals reviewed his challenge for plain error. App. 4, citing *United States v. Prado*, 815 F.3d 93, 100 (2d Cir. 2016). Under plain error review, the Second Circuit will reverse only if “(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant’s substantial rights . . . ; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* The government conceded that Feaster has satisfied the first two prongs of the plain error standard.

The court of appeals relied on its prior decision in *United States v. Miller*, 954 F.3d 551, 559-60 (2d Cir. 2020), in which it “affirmed the lower court's conviction and sentence under the fourth prong of plain error review.” App. 5. *Miller* reasoned that because the defendant would have likely sought to exclude—and been successful in excluding—the details pertaining to his prior offense as an “unnecessary and prejudicial embellishment” on his stipulation to his § 922(g) qualifying status, it would not penalize the government for failing to introduce evidence that, “prior to *Rehaif*, it would have been precluded from introducing.” *Id.*

The court of appeals, as it had in *Miller*, relied on “the defendant's PSR [Presentence Report] showed that the defendant's prior conviction resulted in a term of imprisonment greater than one year, thereby removing any doubt that the defendant was aware of his § 922(g) qualifying status.” *Id.* The court of appeals noted that “Feaster's PSR indicates that he pled guilty to a felony -- attempted criminal possession of a weapon -- and that he was sentenced to two years' imprisonment.” App. 5. The court of appeals noted Feaster's stipulation that he was convicted of a crime punishable by imprisonment for a term exceeding one year. App. 5, citing C.A. App. at 129. The court of appeals speculated that had the government “attempted to introduce evidence about his prior felony conviction, Feaster likely would have sought to exclude such evidence and been successful in doing so.” Accordingly, the court of appeals found that the district court's erroneous jury instruction did not rise to the level of reversible plain error because it did not “seriously affect[] the fairness, integrity or public reputation of judicial proceedings,” App. 6 (cleaned up).

REASONS FOR GRANTING THE PETITION

As noted above, this Court held in *Rehaif* that to convict a defendant of violating § 922(g) and § 924(a)(2), the government must show 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 Court stated: “We conclude 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. Justice Alito’s dissent acknowledged that “[t]hose [defendants] for whom direct review has not ended will likely be entitled” to reversal of their convictions. *Id.* at 2213.

The jury instructions at Feaster’s trial were not in accord with *Rehaif*. C.A. App. A172. Although the defense did not object, the failure to instruct the jury on an element of the offense amounts to plain error under *United States v. Olano*, 507 U.S. 725 (1993), and its progeny for the reasons stated in *Nasir* and *Medley*. *See also Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). The court of appeals in this case arrogated to itself the determination of whether Feaster knew that he belonged to the relevant category of persons barred from possessing a firearm. In doing so, it credited information contained in the presentence report prepared after the jury rendered its verdict. App. 5. Petitioner submits that a plain error analysis may not uphold a jury verdict based on “evidence” that was never presented to the jury. In these circumstances, “[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, ‘the wrong entity judge[s] the defendant guilty.’” *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). *See also Dunn v. United States*, 442 U.S. 100, 107 (1979) (“[A]ppellate courts are not free to revise the basis on which a

defendant is convicted simply because the same result would likely obtain on retrial.”) Although a court must “relive the whole trial imaginatively” on plain error review, *United States v. Young*, 470 U.S. 1, 16 (1985) (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)), a court is not free to imagine a different trial altogether, which is what the court of appeals did here.

Since *Rehaif*, multiple courts of appeals exceeded their authority, looked beyond the trial record, and considered evidence that was not before the factfinder during the original trial. But the correct approach was taken by the Fourth Circuit in *United States v. Medley*, 972 F.3d 399, *reh’g en banc granted*, 828 Fed. Appx. 923 (Mem) (4th Cir. 2020). In *Medley*, the Fourth Circuit vacated the conviction of a defendant who—like petitioner Feaster—went to trial and was convicted of a Section 922(g)(1) charge before the Court’s decision in *Rehaif*. The Fourth Circuit held the defendant’s trial was marred by two separate plain errors: (1) the indictment did not allege he was aware of his felon status, and (2) Medley’s substantial rights were violated “by the district court’s failure to instruct the jury that it had to find Medley knew his prohibited status, and the Government’s failure to present sufficient evidence on that point at trial.” 973 F.3d at 411. This instruction error was “independently” sufficient to satisfy the third plain-error prong. The opinion stated: “Applying plain-error review, we conclude that the asserted *Rehaif* errors violated Medley’s substantial rights. Sustaining Medley’s conviction under the present circumstances would deprive Medley of several constitutional protections, prohibit him from ever mounting a defense to the knowledge-of-status element, require inappropriate appellate factfinding, and do serious harm to the judicial process.” *Id.* at 403.

The decision below is also in tension with *United States v. Gary*, 954 F.3d 194, *reh’g denied*, 963 F.3d 420 (4th Cir. 2020), *cert granted*, 2021 WL 77245 (Jan. 8, 2021). The panel

held that where the Section 922(g)(1) plea colloquy did not properly explain the elements per *Rehaif*, and “[b]ecause the court accepted Gary’s plea without giving him notice of an element of the offense, the court’s error is structural.” 954 F.3d at 198. Although *Gary* was decided in the context of a plea, it highlights the essential requirement of informing a criminal defendant of each and every element of an offense prior to his conviction, whether by plea or by jury trial. The panel below gave no weight to the district court’s failure to charge or the jury’s failure to return a verdict on a critical element of the offense.

The court of appeals’ decision is in conflict with the Third Circuit’s *en banc* decision in *Nasir*. There the Third Circuit rejected the notion that courts have “free rein to speculate whether the government *could have proven* each element of the offense beyond a reasonable doubt at a *hypothetical* trial that established a different trial record.” *Nasir*, 982 F.3d at 163 (emphasis in original). Accordingly, “even on plain-error review, basic constitutional principles require us to consider only what the government offered in evidence at the trial, not evidence it now [on appeal] wishes it had offered.” *Id.* at 162.

The Court has granted review in *Greer v. United States*, 753 F. App’x 886 (11th Cir. 2020), *cert granted*, No. 19-8709 (Jan. 8, 2021), on whether, when applying plain-error review based upon an intervening Supreme Court decision, a court of appeals may review matters outside the trial record to determine whether the error affected a defendant’s substantial rights or impacted the fairness, integrity, or public reputation of the trial. The present case squarely presents that question, and the Court should grant review here as well.

CONCLUSION

The Court should grant the petition for a writ of certiorari and vacate the decision of the court of appeals.

Dated: March 1, 2021

Respectfully submitted,

/s/ Andrew Levchuk
Andrew Levchuk
Counsellor at Law
11 Amity Street
PO Box 181
Amherst, Massachusetts 01002
alevchuk@agllegalnet.com
Attorney for Petitioner

APPENDIX A

<i>United States v. Emmanuel Feaster,</i> United States Court of Appeals for the Second Circuit, No. 18-1928	<u>Page</u>
Summary Order and Judgment, December 1, 2020.....	1

18-1928-cr
United States v. Feaster

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of December, two thousand twenty.

PRESENT: BARRINGTON D. PARKER,
DENNY CHIN,
Circuit Judges,
TIMOTHY C. STANCEU,
*Judge.**

-----x

UNITED STATES OF AMERICA,
Appellee,

-v-

18-1928-cr

EMMANUEL FEASTER,
Defendant-Appellant.

-----x

* Chief Judge Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

FOR APPELLEE:

SEAN C. ELDRIDGE, Assistant United States Attorney, *for* James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, New York.

FOR DEFENDANT-APPELLANT:

ANDREW LEVCHUK, Andrew Levchuk, Counsellor at Law, LLC, Amherst, Massachusetts.

Appeal from the United States District Court for the Western District of New York (Geraci, *Ch. J.*).

UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-appellant Emmanuel Feaster appeals from a final judgment entered June 26, 2018 convicting him, following a jury trial, of possession of a firearm and ammunition following a felony conviction in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He was sentenced principally to 60 months' imprisonment. On appeal, Feaster argues that (i) the district court erred in instructing the jury on § 922(g)(1) and (ii) his sentence was both procedurally and substantively unreasonable. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Just after midnight on September 27, 2015, Feaster was pulled over by a Rochester police officer after he was observed driving an all-terrain vehicle ("ATV") --

without a license plate and headlights off -- against traffic. When the police officer asked Feaster for his driver's license, Feaster ran off, but he tripped over a curb and fell. After Feaster attempted to get up, the pursuing officer pushed him to the ground. A struggle ensued, and the officer observed Feaster reach for his waistband and throw an object. The officer then heard what sounded like metal hitting the pavement. After Feaster was arrested, a specialist on the police force recovered a loaded handgun from the area where the officer heard metal hit the pavement. Feaster, who was 19 years old and had at least one prior felony conviction, was indicted for possession of a firearm and ammunition after a felony conviction.

Feaster represented himself at trial, with the assistance of standby counsel. He stipulated that prior to the events in question, he was convicted "of a crime punishable by imprisonment for a term exceeding one year." App'x at 129. He also admitted that he understood that his prior conviction, which resulted in a sentence of two years in state prison, was a felony. When the district court instructed the jury, it did not explain that the jury, to return a guilty verdict, had to find that Feaster knew he possessed a firearm and also knew at the time of his possession that he had been convicted of a felony punishable by a year or more of incarceration. At the time, the Supreme Court had not yet decided *United States v. Rehaif*, in which it held that "the word 'knowingly' [in § 922(g)] applies both to the defendant's conduct and to the defendant's status." 139 S. Ct. 2191, 2194 (2019). Under *Rehaif*, "[t]o convict a defendant,

the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* The jury returned a guilty verdict.

At sentencing, the district court explained how it arrived at Feaster's offense level, reviewed Feaster's criminal history and characteristics, and explained that it was required to "consider a number of factors, including the seriousness of [Feaster's] offense." App'x at 201. The court adopted the Findings of Fact and Guidelines calculation set forth in the presentence investigation report (the "PSR") with one minor correction that is not relevant to this appeal. The district court sentenced Feaster principally to 60 months' imprisonment, which it acknowledged was an upward variance from the Guidelines range of 27-33 months' imprisonment. The court explained that it imposed an above-Guidelines sentence "based upon the defendant's history and based upon the seriousness of his conduct in this case as well as in the previous case." App'x at 202. It also noted its sentence was intended to deter Feaster's conduct and the conduct of others. This appeal followed.

1. *Jury Instructions*

Because Feaster did not object to the jury instructions at trial, we review his challenge for plain error. *United States v. Prado*, 815 F.3d 93, 100 (2d Cir. 2016). Under plain error review, we will reverse only if "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the

appellant's substantial rights . . . ; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* The government concedes that Feaster has satisfied the first two prongs of the plain error standard, but it argues that Feaster's claim fails on the third and fourth prongs.

In *United States v. Miller*, which involved a *Rehaif* claim on similar facts as those presented here, this Court affirmed the lower court's conviction and sentence under the fourth prong of plain error review. 954 F.3d 551, 559-60 (2d Cir. 2020). We reasoned that because the defendant would have likely sought to exclude -- and been successful in excluding -- the details pertaining to his prior offense as an "unnecessary and prejudicial embellishment" on his stipulation to his § 922(g) qualifying status, we would not penalize the government for failing to introduce evidence that, "prior to *Rehaif*, it would have been precluded from introducing." *Id.* We also considered that the defendant's PSR showed that the defendant's prior conviction resulted in a term of imprisonment greater than one year, thereby removing any doubt that the defendant was aware of his § 922(g) qualifying status. *Id.* Here, the same is true, as Feaster concedes. *See* Appellant's Reply Br. at 2. Feaster's PSR indicates that he pled guilty to a felony -- attempted criminal possession of a weapon -- and that he was sentenced to two years' imprisonment. Moreover, he stipulated that he was convicted "of a crime punishable by imprisonment for a term exceeding one year." App'x at 129. Additionally, if the government had attempted to introduce evidence about his prior

felony conviction, Feaster likely would have sought to exclude such evidence and been successful in doing so. Accordingly, the district court's erroneous jury instruction did not rise to the level of reversible plain error because it did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," *Prado*, 815 F.3d at 100, and we affirm his conviction.

2. *Sentence*

Generally, "[t]his court reviews the procedural and substantive reasonableness of a sentence under a deferential abuse-of-discretion standard." *United States v. Richardson*, 958 F.3d 151, 153 (2d Cir. 2020) (internal quotation marks and brackets omitted). Where, as here, a defendant did not object to his sentence below, we review for plain error. *United States v. Erskine*, 717 F.3d 131, 135 (2d Cir. 2013).

In reviewing the procedural reasonableness of a sentence, this Court considers whether the district court committed a "significant procedural error." *United States v. Rosa*, 957 F.3d 113, 117 (2d Cir. 2020) (internal quotation marks omitted). A district court commits procedural error where it "fails to calculate the Guidelines range," "makes a mistake in its Guidelines calculation," "treats the Guidelines as mandatory," or "does not consider the [18 U.S.C.] § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). "A sentence is substantively unreasonable if it is manifestly unjust or shocks the conscience." *Richardson*, 958 F.3d at 153-54 (internal quotation marks and brackets

omitted). When a district court imposes a sentence outside of the recommended Guidelines range, it "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Cavera*, 550 F.3d at 189. "[A] district court's decision to vary from the Guidelines may attract greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply." *Id.* at 192 (internal quotation marks omitted). "Where, instead, the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case, . . . [a] closer review may be in order." *Id.* (internal quotation marks omitted).

Feaster's sentence was procedurally reasonable. The district court properly calculated Feaster's Guidelines range and considered the § 3553(a) sentencing factors, including defendant's characteristics, the seriousness of his crime, and the need to deter such conduct. *See Rosa*, 957 F.3d at 119 (noting that "[w]e have declined to insist that the district court . . . discuss every § 3553(a) factor individually" (internal quotation marks omitted)). Moreover, "[a] district court may satisfy [its] obligation" to make factual findings supporting a sentence enhancement "by adopting the factual findings in the PSR, either at the sentencing hearing or in the written judgment." *United States v. Espinoza*, 514 F.3d 209, 212 (2d Cir. 2008). Shortly after the district court imposed an upward variance, it explicitly adopted the findings in the PSR, which outlined, *inter alia*,

the defendant's past conduct. Accordingly, Feaster's sentence was procedurally reasonable.

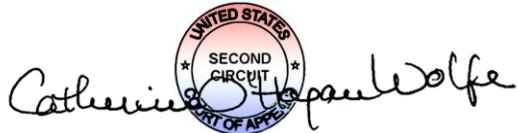
Feaster's sentence was also substantively reasonable. It does not "shock the conscience," *Richardson*, 958 F.3d at 155, that Feaster's conduct -- namely, driving recklessly, resisting arrest, and carrying and throwing a loaded handgun -- would be punishable by 60 months' imprisonment, in light of his criminal history. Importantly, the district court explained on the record why it decided to give an above-Guidelines sentence: It was concerned about Feaster's past criminal conduct and the seriousness of the offense. The district court noted that the instant conviction was Feaster's second serious illegal firearm conviction, his criminal history category was a level IV, and he committed this offense while on parole for a prior offense. Further, the district court noted the dangers posed by Feaster's behavior; by removing the loaded weapon from his waistband and throwing it away, Feaster could have seriously injured himself or the law enforcement officer. The district court explicitly stated that it needed to deter such future conduct. These justifications were "sufficiently compelling to support the degree of the variance," *Cavera*, 550 F.3d at 189, and Feaster's challenge cannot overcome plain error review. Accordingly, we affirm the district's court's judgment.

* * *

We have considered Feaster's remaining arguments and conclude they are without merit. For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe