

IN THE  
**Supreme Court of the United States**

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DAMIAN ROBERT GUTHARY,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether Petitioner satisfies *Greer's* plain error standard for relief from *Rehaif* error arising from his guilty plea under 18 U.S.C. § 922(g) where there is a reasonable probability that he would not have pled guilty had he been informed of the essential *mens rea* element of the offense.

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Petitioner Damian Guthary respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

**OPINION BELOW**

The Fourth Circuit's unpublished opinion is available at 2022 U.S. App. LEXIS 21720, 2022 WL 3136938 (4th Cir. Aug. 5, 2022); *see also infra*, Pet. App. 1a.

**LIST OF PRIOR PROCEEDINGS**

- (1) *United States v. Damian Robert Guthary*, United States District Court, Eastern District of North Carolina, No. 5:19-CR-160-FL-1 (final judgment entered October 8, 2019).
- (2) *United States v. Damian Robert Guthary*, United States Court of Appeals for the Fourth Circuit, No. 19-4787 (decision issued August 5, 2022).

## JURISDICTION

The Fourth Circuit issued its opinion on August 5, 2022. Pet. App. 1a. This Court’s jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

1. Title 18, United States Code, Section 922(g)(1) 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;

....

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.

2. Federal Rule of Criminal Procedure 52 provides:

(a) **Harmless error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(a) **Plain error.** A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.

## INTRODUCTION

Petitioner’s guilty plea is unconstitutional and must be vacated because “the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged.” *Bousley v. United States*, 523 U.S. 614, 618 (1998). “The requirement that a defendant understand the essential elements of the offense to which he pleads guilty is rooted in fundamental principles of due process.” *United States v. Lockhart*, 947 F.3d 187, 196 (4th Cir. 2020) (en banc) (citing *Bousley*). As Petitioner was never informed of the essential

elements of the crime to which he pled guilty, the plea is not voluntary and intelligent and thus violates due process. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). The plea likewise violates Rule 11 of the Federal Rules of Criminal Procedure because there is no factual basis to support the plea. The district court thus plainly erred in accepting the guilty plea.

Had the court properly informed Petitioner of the essential *mens rea* element, there is a reasonable probability that he would have proceeded to trial rather than plead guilty. *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021). Although Petitioner has three prior felony convictions, he pled guilty to all three on the same day and received suspended sentences. He was a teenager at the time. Having never served any time in prison, Petitioner believed his sentences were probationary only. He thus did not understand that he had been convicted of a crime punishable by a term of imprisonment of over one year. Petitioner's significant drug addiction and mental health problems may have also contributed to his misunderstanding. These facts cast reasonable doubt on whether the government could prove the *mens rea* element at trial. Now that Petitioner understands "the nature of the offense to which he is admitting guilty and the consequences of his plea," he can, for the first time, "engag[e] in the calculus necessary to enter a plea on which this Court can rely in confidence." *Lockhart*, 947 F.3d at 197. If his plea is vacated, Petitioner has informed appellate counsel that he intends to go to trial rather than plead guilty. Under these circumstances, there is a reasonable probability that Petitioner would not have pled guilty "if the District Court had correctly advised him of the *mens rea*

element of the offense.” *Greer*, 141 S. Ct. at 2097. For these reasons, Petitioner requests that this Court vacate the plea and conviction and remand this case to the district court for a new plea hearing.

## STATEMENT OF THE CASE

### A. District Court Proceedings

On April 9, 2019, a federal grand jury in the Eastern District of North Carolina indicted the Petitioner, Damian Robert Guthary, on a single count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Although the indictment alleged that Petitioner had been convicted of a crime punishable by imprisonment for a term exceeding one year, the indictment did not allege that Petitioner knew he had been so convicted. Pet. C.A. Opening Br. 11-12.

Petitioner pled guilty to the indictment under a plea agreement with the government. When setting forth the elements of the offense, the plea agreement did not include a *mens rea* element. Likewise, at the arraignment hearing on June 20, 2019, the court did not inform Petitioner of the *mens rea* element. Pet. App. 1A 2-3. The following day, on June 21, 2019, this Court issued *Rehaif v. United States*, holding that to convict a defendant under § 922(g), the government “must show that the defendant knew he possessed a firearm *and also* that he knew he had the relevant status when he possessed it.” 139 S. Ct. 2191, 2194 (2019) (emphasis added). The government did not obtain a superseding indictment in the wake of *Rehaif*.



At sentencing, Petitioner was sentenced to 70 months' imprisonment. Pet. App. 1A 1. Because of his substance abuse, the district court recommended Petitioner "for the most intensive treatment program for addiction or dependency" while incarcerated, as well as mental health treatment. The court also imposed drug and mental health treatment as special conditions of supervision. Pet. C.A. Supp. Opening Br. 11-12.

### **B. Court of Appeals Proceedings**

Petitioner appealed his conviction to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court. Although the Fourth Circuit agreed that the district court committed *Rehaif* error in failing to advise Petitioner of the elements of the § 922(g)(1) charge, it held there was "not a reasonable probability that, but for the court's failure to fully advise Guthary of the mens rea element of § 922(g), the outcome of the district court proceeding would have been different." Pet. App. 1A 4-5. This petition followed.

### **REASONS FOR GRANTING THE PETITION**

Petitioner satisfies the standard for plain error from *Rehaif* error. "To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements." *Greer*, 141 S Ct. at 2096. "First, there must be an error. Second, the error must be plain. Third, the error must affect substantial rights, which generally means that there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id.* (cleaned up). If these three prongs are satisfied, an appellate court will exercise its discretion to remedy

an error that “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *United States v. Olano*, 507 U.S. 725, 736 (1993) (cleaned up).

In the guilty plea context, a defendant meets the plain *Rehaif* error burden by “showing that, if the District Court had correctly advised him of the *mens rea* element of the offense, there is a ‘reasonable probability’ that he would not have pled guilty.” *Greer*, 141 S. Ct. at 2097. Although a felon “ordinarily knows he is a felon,” *id.*, “[t]here are many reasons a defendant might not know a prior conviction could have led to a sentence of more than a year in prison.” *Id.* at 2103 (Sotomayor, J., concurring in part and dissenting in part). For example, as *Rehaif* posits, “a person who was convicted of a prior crime but sentenced only to probation [may] not know that the crime [was] punishable by imprisonment for a term exceeding one year.” 139 S. Ct. at 2198.

Here, there is no question that Petitioner meets the first two prongs of plain error review, as the Fourth Circuit concluded. The indictment charging Petitioner with violating § 922(g)(1) does not allege that he knew he had been previously convicted of a crime punishable by imprisonment for a term exceeding one year and thus understood that he could not possess a firearm. Likewise, the factual basis entered in this case and accepted by the district court does not show that Petitioner knew his prohibited status. The plea agreement signed by the parties and approved by the court does not include this essential scienter element. And Petitioner was not advised at the plea hearing that the government was required to prove that he knew his prohibited status. Thus, there was error under *Rehaif*, and that error was

plain. *See Greer*, 141 S. Ct. at 2097 (“[A]ll agree that *Rehaif* errors occurred during both defendants’ district court proceedings and that the errors were plain, thus satisfying the first two prongs of the plain-error test.”).

Petitioner likewise satisfies the third prong of plain error, because there is a reasonable probability that, but for the *Rehaif* error, he would not have entered the plea. When he pled guilty, Petitioner understood that the government would only have to prove: (1) that he knowingly and intentionally possessed a firearm; (2) that at the time he possessed the firearm, he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; and (3) the possession was in and affecting interstate commerce. Now, however, the government must prove that Petitioner “*actually knew*—not should have known or even strongly suspected but *actually knew*” that he had been previously convicted of an offense punishable by imprisonment for more than one year and thus could not legally possess a firearm. *Rehaif*, 137 S. Ct. at 2208 (Alito, J., dissenting) (emphasis in original).

Had Petitioner understood that the government would have to prove this additional *mens rea* element, it is reasonably probable that he would have elected to go to trial rather than plead guilty. Although Petitioner has three felony convictions, he pled guilty and was sentenced to all three on the same day. He was a teenager at the time. He received suspended sentences for these convictions and served no active time in custody. Petitioner believed that these were probationary sentences. Although Petitioner was incorrect in his belief, his confusion is

understandable, given that he never served an active term of incarceration. *See Rehaif*, 139 S. Ct. at 2198 (noting that “a person who was convicted of a prior crime but sentenced only to probation [may] not know that the crime [was] punishable by imprisonment for a term exceeding one year”).

That Petitioner has never served a day in prison could provide sufficient doubt about the *mens rea* element for a jury to acquit him of the § 922(g)(1) charge. To be sure, as Justice Sotomayor pointed out in her concurring opinion, at least one felon, Jesmene Lockhart, who previously served an active six-year term of incarceration, successfully litigated a *Rehaif* claim at trial and was found not guilty after this Court vacated his plea. *See Greer*, 141 S. Ct. at 2103 n.2 (Sotomayor, J., concurring in part and dissenting in part) (citing *United States v. Lockhart*, 947 F.3d 187 (4th Cir. 2020 (en banc))).

In addition to having never been incarcerated, Petitioner has a serious drug addiction and mental health problems, as the district court expressly recognized. Because of his substance abuse, the district court recommended Petitioner “for the most intensive treatment program for addiction or dependency.” The court added: “And this record evidences to the Court a need for mental health treatment, and I’m going to recommend that as well.” The court also imposed drug and mental health treatment as special conditions of supervision. Petitioner’s drug addiction and mental health difficulties may have impeded his understanding of his status and casts additional doubt on the government’s ability to prove the *mens rea* element.

Finally, Petitioner has unequivocally informed appellate counsel that if his plea is vacated, he intends to proceed to trial rather than plead guilty again.

*Lockhart*, 947 F.3d at 195 (“And importantly . . . Lockhart’s appellate counsel has represented to this Court that if we vacate Lockhart’s guilty plea, Lockhart will proceed to trial in the district court.”). Under these circumstances, Petitioner meets the plain error standard.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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