No.

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

MICHAEL ANDREW GARY

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a defendant who pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a), is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings.

**RELATED PROCEEDINGS**

United States District Court (D. S.C.):

*United States* v. *Gary*, No. 17-CR-809 (July 30, 2018)

United States Court of Appeals (4th Cir.):

*United States* v. *Gary*, No. 18-4578 (Mar. 25, 2020)

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### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 954 F.3d 194. The order of the court of appeals denying rehearing (App., *infra*, 24a-32a) is reported at 963 F.3d 420.

### JURISDICTION

The judgment of the court of appeals was entered on March 25, 2020. A petition for rehearing was denied on July 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS AND RULE INVOLVED

The pertinent statutory provisions and rule are reprinted in the appendix to this petition. App., *infra*, 33a-35a.

**STATEMENT**

Following a guilty plea in the United States District Court for the District of South Carolina, respondent was convicted on two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). App., *infra*, 3a. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals vacated and remanded. See App., *infra*, 1a-23a.

1. On January 17, 2017, respondent was driving with his cousin when police pulled them over after seeing respondent run a red light. C.A. J.A. 43; see App., *infra*, 2a. Respondent volunteered that he was driving on a suspended license, and was placed under arrest. C.A. J.A. 43-44; see App., *infra*, 2a. During an inventory search of his car, officers found a loaded gun and nine grams of marijuana. App., *infra*, 2a. Respondent admitted to possessing both, and was charged under state law with possession of a firearm by a convicted felon. *Ibid.*

Five months later, police encountered respondent and his cousin outside a motel room during a routine patrol. App., *infra*, 2a. The officers smelled marijuana as they approached the men, who entered a car as the officers neared. *Ibid.* The police observed that respondent's cousin had a marijuana cigarette in his lap. *Ibid.* Respondent and his cousin each consented to a personal search, and officers found large amounts of cash on both respondent and his cousin and a digital scale in his cousin's pocket. *Ibid.* The officers then obtained permission to search the car. *Id.* at 3a. During that search, they discovered a stolen firearm, ammunition, and a large amount of marijuana. *Ibid.* Respondent admitted that the firearm was his, and was arrested and charged

under state law with possession of a stolen firearm. *Ibid.*

2. A federal grand jury in the District of South Carolina indicted respondent on two counts of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). App., *infra*, 3a. The state charges were subsequently dropped, and respondent elected to plead guilty to the two federal charges without a plea agreement. *Id.* at 3a & n.1.

a. During the plea colloquy required by Federal Rule of Criminal Procedure 11(b), the district court advised respondent (among other things) that if he proceeded to trial, the government would be required to prove four elements: (1) respondent had "been convicted of a crime punishable by imprisonment for a term exceeding one year"; (2) he then "possessed a firearm"; (3) the firearm had "travelled in interstate or foreign commerce"; and (4) respondent "did so knowingly; that is that [respondent] knew the item was a firearm and [his] possession of that firearm was voluntar[y] and intentional." App., *infra*, 3a (citation omitted; second set of brackets in original); see C.A. J.A. 31. Consistent with the courts of appeals' uniform interpretation of the felon-in-possession offense at that time, the district court did not advise respondent that the government would also need to prove that he was aware that he was a felon. App., *infra*, 3a; see *United States* v. *Langley*, 62 F.3d 602, 604-605 (4th Cir. 1995) (en banc) (holding that knowledge of status is not an element of an offense under 18 U.S.C. 922(g) and 924(a)(2)), cert. denied, 516 U.S. 1083 (1996), abrogated by *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019); see also *Rehaif*, 139 S. Ct. at 2195 (noting prior uniformity).

Following the district court's description of the charges, the prosecutor summarized the evidence supporting them. C.A. J.A. 43-46. She stated that with respect to each felon-in-possession count, respondent had admitted to possessing the firearm in question, that each firearm had traveled in interstate commerce, and that at the time of each arrest respondent had several prior felony convictions for which he had not been pardoned. *Id.* at 44, 46. Respondent agreed with the prosecutor's summary of the facts. *Id.* at 47. The court accepted respondent's plea. App., *infra*, 3a.

b. The Probation Office's presentence report recounted that at the time of his offense conduct, respondent had three final felony convictions under South Carolina law. Presentence Investigation Report (PSR) ¶¶ 30, 33; C.A. J.A. 111-113. First, on April 7, 2014, respondent had been convicted of second-degree burglary. PSR ¶ 30; C.A. J.A. 111. For that offense, he had been sentenced to an eight-year term of imprisonment and two years of probation, with the final five years of his prison sentence suspended upon his service of three years (including time already served). *Ibid.* Second, on November 9, 2015, while still on probation for his burglary conviction, respondent had been convicted on two counts of second-degree assault and battery. PSR ¶ 33; C.A. J.A. 112-113. He was sentenced to concurrent three-year terms of imprisonment on each count. *Ibid.* The state court also revoked respondent's probation on the burglary conviction and imposed a further three-year prison sentence, to be served concurrently with the assault-and-battery sentences. PSR ¶ 30; C.A. J.A. 111-112.

Respondent did not dispute any of the facts in the presentence report about his prior convictions, and he

acknowledged in his sentencing memorandum that he "was aware that he was not supposed to have a weapon." C.A. J.A. 59; see *ibid.* (asserting that a lighter sentence was warranted because he "simply had [the weapon] for his protection"). Respondent likewise acknowledged during allocution that "I know I was wrong for having the firearm." *Id.* at 81. The district court sentenced respondent to concurrent terms of 84 months of imprisonment on each count. App., *infra*, 3a.

3. Respondent appealed his sentence, but did not challenge the conviction itself. While respondent's appeal was pending, this Court decided *Rehaif* v. *United States*, *supra*. In that decision, the 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, 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"—*e.g.*, that he was a felon—"when he possessed it." 139 S. Ct. at 2194; see *United States* v. *Lockhart*, 947 F.3d 187, 196 (4th Cir. 2020) (en banc) (recognizing abrogation).

Nearly four months later, respondent submitted a letter under Federal Rule of Appellate Procedure 28(j) citing *Rehaif*. Although respondent had not previously challenged or sought to withdraw his guilty plea, either in the district court or in his opening or reply briefs on appeal, respondent asserted that *Rehaif* "is extremely relevant to his case" because his indictment had not alleged that he was aware of his status as a felon, and because he "was not informed of all the elements of the offenses of conviction at his plea colloquy." C.A. Doc. 36, at 1-2 (Oct. 9, 2019).

4. After inviting the parties to file supplemental briefs addressing the relevance of *Rehaif* to respondent's appeal, the court of appeals vacated his convictions and remanded to the district court for further proceedings. App., *infra*, 1a-23a.

Because respondent had not challenged the validity of his plea in the district court, the court of appeals recognized that its review was subject to the plain-error framework that this Court described in *United States* v. *Olano*, 507 U.S. 725 (1993). See App., *infra*, 5a. The court of appeals explained that, under *Olano*, "a defendant must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights." *Ibid.* (citing *Olano*, 507 U.S. at 732). The court further recognized that even where a defendant makes all three showings, a court of appeals may correct the error only "if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Ibid.* (quoting *Olano*, 507 U.S. at 732).

The court of appeals took the view that the omission of the knowledge-of-status element from respondent's plea colloquy, in and of itself, conclusively established all four of those requirements. See App., *infra*, 5a ("We answer today * * * 'whether a standalone *Rehaif* error requires automatic vacatur of a defendant's guilty plea.'") (brackets and citation omitted).[*] As to the first two, it accepted the government's concession that the district court had erred by not advising respondent that knowledge of his status as a felon was an element of the

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[*] The court of appeals declined to address whether respondent would be independently entitled to relief on the ground that his indictment was defective for failure to allege that respondent knew he was a felon at the time he possessed the firearms. See App., *infra*, 6a n.4.

charged offenses, and that the error had become plain following this Court's decision in *Rehaif*. *Id.* at 8a-9a. And notwithstanding that "numerous circuits applying *Olano*'s plain error standard have determined that there is no effect on a defendant's substantial rights where the evidence shows that the defendant knew of his status as a prohibited person at the time of his gun possession," *id.* at 7a; see *ibid.* & n.6 (collecting cases from seven other circuits), the court concluded that the other two requirements were satisfied as well.

The court of appeals recognized that as a general matter, "to establish that a Rule 11 error has affected substantial rights" under the third element of the plain-error test, "a defendant must 'show a reasonable probability that, but for the error, he would not have entered the plea and satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine the confidence in the outcome of the proceeding.'" App., *infra*, 11a (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004)) (brackets, ellipsis, and internal quotation marks omitted). But the court characterized the particular error here as "structural" error and applied circuit precedent holding that structural error inherently satisfies the third requirement for plain-error relief, irrespective of whether the defendant can show case-specific prejudice. *Id.* at 16a; see *id.* at 15a-19a.

The court of appeals further concluded that the error here satisfied *Olano*'s fourth requirement—that "the error seriously affect affect[s] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736. See App., *infra*, 19a-22a. The court declared that "justice is not *only* a result," and that "the

integrity of our judicial process demands that each defendant who pleads guilty receive the process to which he is due." *Id.* at 20a, 22a. The court stated that it could not "envision a circumstance where, faced with such constitutional infirmity and deprivation of rights as presented in this case, [it] would not exercise [its] discretion to recognize the error and grant relief." *Id.* at 22a.

5. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 24a-32a. Judge Wilkinson, joined by Judges Niemeyer, Agee, Quattlebaum, and Rushing, explained that he "concur[red] in the denial of rehearing en banc for one reason and one reason only"—namely, that "[t]he panel's holding is so incorrect and on an issue of such importance that I think the Supreme Court should consider it promptly." *Id.* at 25a; see *id.* at 25a-32a.

**REASONS FOR GRANTING THE PETITION**

The Fourth Circuit erred in concluding that "a standalone *Rehaif* error requires automatic vacatur of a defendant's guilty plea" on plain-error review, even when the error had no practical effect. App., *infra*, 5a (brackets and citation omitted). Where a defendant has not shown a reasonable probability that he would in fact have gone to trial had the district court informed him of the requirement to prove knowledge of status, that omission did not "affect[] his substantial rights." *United States* v. *Olano*, 507 U.S. 725, 736 (1993). Nor does such an omission "seriously [undermine] the fairness, integrity, or public reputation of judicial proceedings," *ibid.*, when the record as a whole demonstrates that the defendant knew he was a felon. The Fourth Circuit's approach—which effectively eliminates both the third and fourth requirements for plain-error relief—conflicts with the approach of every other court

of appeals to address the issue. And because guilty pleas to violations of 18 U.S.C. 922(g)(1) and 924(a)(2) are among the most common sources of criminal convictions in the federal system, the decision below would, if allowed to stand, result in the vacatur of a substantial number of convictions in the Fourth Circuit. This Court should accordingly grant the petition for a writ of certiorari and reverse the decision below.

**A. The Court Of Appeals' Decision Is Wrong**

As the court of appeals recognized (App., *infra*, 5a), because respondent raised his claim for the first time on appeal, it is reviewable only for plain error. See Fed. R. Crim. P. 52(b). To prevail on plain-error review, respondent must show (1) "an error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation and internal quotation marks omitted). This Court's decision in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), suffices to establish the first two requirements, because it shows an error that was clear or obvious at the "the time of appellate review." *Henderson* v. *United States*, 568 U.S. 266, 269 (2013). But the court of appeals erred twice over in deeming the third and fourth requirements—which are case-specific—to both inherently be satisfied as well.

***1. The error in respondent's plea colloquy did not affect substantial rights***

a. This Court has explained that to satisfy the third plain-error requirement—that an error affected "sub-

stantial rights"—a defendant "ordinar[ily]" must establish a reasonable probability that the error "'affected the outcome of the district court proceedings.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting *Olano*, 507 U.S. at 734). Accordingly, where a defendant seeks "reversal of his conviction after a guilty plea" based on an error in the plea colloquy, he "must * * * satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004) (citation omitted). Specifically, he "must show a reasonable probability that, but for the error, he would not have entered the plea." *Ibid.*

No sound reason exists to presume such a reasonable probability whenever a district court has omitted to advise a defendant that conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), requires proof that he knew his felon status. To the contrary, such an omission is highly unlikely to have made any difference to the defendant's plea decision. "Convicted felons typically know they're convicted felons." *United States* v. *Lavalais*, 960 F.3d 180, 184 (5th Cir. 2020), petition for cert. pending, No. 20-5489 (filed Aug. 20, 2020). And a jury, which can bring into deliberations its "own general knowledge," *Head* v. *Hargrave*, 105 U.S. 45, 49 (1882), and its "commonsense understanding," *Parker* v. *Matthews*, 567 U.S. 37, 44 (2012) (per curiam), is likely to recognize that someone convicted of a felony knew about it. See *Rehaif*, 139 S. Ct. at 2209 (Alito, J., dissenting) ("Juries will rarely doubt that a defendant convicted of a felony has forgotten that experience."). Although it is not inconceivable

that a defendant who previously received a sentence of less than a year might be unaware that a longer sentence had been possible, see *id.* at 2198, the various stages of the criminal process that led to the earlier conviction—including arraignment, plea or trial, and sentencing—and consultations with counsel during those proceedings will typically have provided ample notice of the maximum sentence. Accordingly, a defendant who subsequently is willing to admit all of the other elements of a felon-in-possession charge—including the fact of his felon status—will rarely view the knowledge-of-status element as a reason to go to trial.

This case exemplifies the point. The record as a whole showed that respondent had served multiple years in prison for his prior felony convictions—a fact that no jury could realistically believe that he had forgotten. See p. 4, *supra*. Indeed, respondent acknowledged in his sentencing memorandum that he had been "aware that he was not supposed to have a weapon," C.A. J.A. 59—a degree of knowledge even greater than what *Rehaif* requires and that necessarily subsumes knowledge of felon status. See *id.* at 81 ("I know I was wrong for having the firearm."). Moreover, by the time of the second arrest at issue here, respondent had already been charged as a felon-in-possession under state law as a result of the arrest five months earlier, driving home to him that he had a prior felony conviction. See App., *infra*, 2a. Given that record, this is not the rare case in which a defendant could carry his affirmative burden to show a reasonable probability that the district court's failure to advise him of the knowledge-of-status element affected his plea decision. And respondent has never even tried to make such a showing.

b. The court of appeals, however, exempted respondent from making such a showing. In its view, *Rehaif* error need not "be reviewed for prejudice under *United States v. Olano* * * * because such an error is structural." App., *infra*, 5a (brackets, citation, and internal quotation marks omitted). That view cannot be squared with this Court's precedents.

A "structural error" is a constitutional error that "'affects the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (brackets and citation omitted). Although most constitutional errors, even when preserved in the trial court, can be disregarded where "the government can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *ibid.* (citation and internal quotation marks omitted), structural errors cannot "be deemed harmless beyond a reasonable doubt." *Ibid.* For two independent reasons, the structural-error doctrine does not support the Fourth Circuit's excision of the requirement that a defendant like respondent show a reasonable probability that the omission from the plea colloquy affected his decision to plead.

First and foremost, the error here is not structural. This Court has found structural errors "only in a very limited class of cases." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citations and internal quotation marks omitted). That limited class—which includes, for example, denial of counsel of choice, denial of self-representation, denial of a public trial, and denial of a reasonable-doubt instruction, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-149 (2006)—does not include the omission of the knowledge-of-status element from a plea colloquy

in a felon-in-possession case. The Court has observed that the erroneous omission of one of the plea-colloquy warnings required by Federal Rule of Criminal Procedure 11 is not even "colorably structural," *Dominguez Benitez*, 542 U.S. at 81 n.6, and the error here is analogous to those and others as to which "relief for error is tied in some way to prejudicial effect," *id.* at 81.

In the context of guilty pleas, the Court has held that review for prejudicial effect is appropriate for a violation of the bar on judicial participation in plea negotiations, see *United States* v. *Davila*, 569 U.S. 597, 605, 611 (2013), a failure to advise the defendant that he would be unable to withdraw his plea if he was dissatisfied with his sentence, see *Dominguez Benitez*, 542 U.S. at 82-83, and a failure to advise the defendant that he would be entitled to the assistance of counsel if he proceeded to trial, see *United States* v. *Vonn*, 535 U.S. 55, 60 (2002). In each case, the Court held that notwithstanding the deviation from the requirements of Federal Rule of Criminal of Procedure 11—which are designed to ensure pleas are made knowingly and intelligently, see *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969)—it was appropriate to ask whether, "but for the error, [the defendant] would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 76. The error here is not meaningfully different simply because the omitted advisement concerned an element of the offense. To the contrary, the Court has held that harmless-error review applies even to the omission of an offense element from jury instructions at trial, thereby recognizing that the absence of a finding of or admission on that element does not automatically require reversal. See *Neder*, 527 U.S. at 8-20.

Contrary to the court of appeals' conclusion, App., *infra*, 15a-19a, none of the features that sometimes justify classifying an error as "structural" is present here. As with other plea-colloquy errors, this is not a circumstance where "the effects of the error are simply too hard to measure," "the error always results in fundamental unfairness," or "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908. The likely effect on the defendant's plea decision of omitting an advisement of an offense element can be measured by (among other things) looking to the "government's evidence" and the "defendant's admissions," *United States* v. *Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020), and will often be even easier to evaluate than the omission of an advisement about a matter whose importance depends on the defendant's own unique priorities, see, *e.g.*, *Dominguez Benitez*, 542 U.S. at 83-84 (requiring prejudice analysis of advisement about circumstances allowing for plea withdrawal). Similarly, a defendant who cannot show a reasonable probability that an advisement about the offense element would have led him to insist on a trial has no more basis to complain of "unfairness"—let alone "fundamental unfairness"—than any other defendant whose plea colloquy was incomplete. And although the court of appeals correctly noted a defendant's "autonomy" interest in ensuring that he alone decides whether to plead guilty, App., *infra*, 16a, the plea decision does not become someone else's simply because the colloquy was deficient. Cf. *McCoy* v. *Louisiana*, 138 S. Ct. 1500, 1508 (2018) (distinguishing a structural error arising from a lawyer's decision to concede guilt over his cli-

ent's objection from a more mundane "strategic dispute[] about whether to concede an element of a charged offense").

In any event, even if the error here *were* structural, that would not excuse respondent from satisfying the prejudice requirement for plain-error relief. This Court has held that structural errors warrant reversal "without regard to the mistake's effect on the proceeding" only in the context of "*preserved* error." *Dominguez Benitez*, 542 U.S. at 81 (emphasis added). In the context of forfeited error, in contrast, the Court has repeatedly "declined to resolve whether 'structural' errors * * * automatically satisfy the third prong of the plain-error test." *Puckett*, 556 U.S. at 140. In concluding that plain-error review required no prejudice analysis if the error here were structural, the Fourth Circuit applied its own precedent, not this Court's. See App., *infra*, 15a-16a. But "[d]espite its name, the term 'structural error' carries with it no talismanic significance as a doctrinal matter." *Weaver*, 137 S. Ct. at 1910.

Giving effect to the label in a new context, like plain-error review, requires an analysis of "the systemic costs of remedying the error" at issue, *Weaver*, 137 S. Ct. at 1912 (declining to presume prejudice for "structural" error involving public-trial right in context of ineffective-assistance-of-counsel claim). Here, the many systemic benefits of guilty pleas—prompt resolution of criminal charges, conservation of judicial and prosecutorial resources, and the potential for more favorable sentencing terms—"can be secured * * * only if dispositions by guilty plea are accorded a great measure of finality." *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Those benefits would be substantially curtailed if a defendant were automatically entitled to relief based on a later

statutory-interpretation decision that would not actually have affected his decision to enter the plea.

c. The court of appeals attempted to ground its automatic-vacatur rule in three decisions of this Court involving deficient guilty pleas—*Henderson* v. *Morgan*, 426 U.S. 637 (1976), *Bousley* v. *United States*, 523 U.S. 614 (1998), and *Dominguez Benitez*, *supra*. See App., *infra*, 11a-12a. None of those decisions supports its conclusion that the sort of error at issue here is a structural error, let alone one that triggers automatic relief on plain-error review.

In *Henderson*, this Court held that a particular state defendant's guilty plea to second-degree murder was involuntary because he had not been advised that conviction required that he have the intent to cause the death of the victim. 426 U.S. at 644-647. Because *Henderson* involved a state-court conviction on collateral review, this Court had no occasion to address the requirements to show plain error in the federal system. In any event, if anything, *Henderson* indicates that the omission of an element from a plea colloquy, even when it amounts to constitutional error, is *not* structural. In explaining why granting relief in that case would not "invite countless collateral attacks on judgments entered on pleas of guilty," the Court noted, among other things, that the defendant's "unusually low mental capacity * * * forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder." *Id.* at 646-647. That statement suggests that similar claims by other defendants *could* be rejected on harmless-error grounds—the hallmark of ordinary, non-structural error.

The court of appeals' reliance on *Bousley* was similarly misplaced. *Bousley* concerned the showing that a prisoner must make to raise for the first time on collateral review a claim that his plea was not knowingly and intelligently made. 523 U.S. at 616, 622-624. The prisoner contended "that neither he, nor his counsel, nor the [district] court correctly understood the essential elements of the crime with which he was charged," and the Court stated that, "[w]ere this contention proved, petitioner's plea would be * * * constitutionally invalid." *Id.* at 618-619. The Court, however, "did not discuss plain error or structural error," *United States* v. *Coleman*, 961 F.3d 1024, 1030 n.4 (8th Cir. 2020), much less indicate that the error that the prisoner claimed was of the latter type. And the showing that *Bousley* required for the prisoner to obtain collateral relief notwithstanding his earlier procedural default—a showing of "actual innocence," such that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him," 523 U.S. at 623 (citations and internal quotation marks omitted)—would necessarily suffice to show case-specific prejudice.

Finally, *Dominguez Benitez* likewise does not support the court of appeals' automatic-vacatur approach. Indeed, that approach is a departure from the holding of *Dominguez Benitez*, under which a defendant who forfeited a "claim of Rule 11 error" at his plea colloquy is entitled to plain-error relief only if he "show[s] a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 76. The court of appeals pointed (App., *infra*, 11a) to a footnote in *Dominguez Benitez* where the Court "contrast[ed]" the issue in that case (involving a plea-colloquy error) with "the constitutional question whether a defendant's

guilty plea was knowing and voluntary," *Dominguez Benitez*, 542 U.S. at 84 n.10. But in that footnote, the Court simply disavowed any "suggest[ion]" that a conviction like the one in *Boykin* v. *Alabama*, 395 U.S. 238 (1969)—in which "the record * * * contains no evidence that a defendant knew of the rights he was putatively waiving"—"could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Dominguez Benitez*, 542 U.S. at 84 n.10. The footnote has no bearing on a case like this, which does not involve a conviction like the one in *Boykin*, where the "silent record" contained no indication that the defendant had been advised of, or knowingly waived, *any* of the constitutional rights that he gave up through his plea. 395 U.S. at 243; see *id.* at 239. It instead involves only a discrete plea-colloquy error akin to the one that *Dominguez Benitez* itself recognizes to be amenable to prejudice analysis.

***2. The error in respondent's plea colloquy did not seriously affect the fairness, integrity, or public reputation of judicial proceedings***

Even if omission of the knowledge-of-status element from a guilty-plea colloquy invariably satisfied the "substantial rights" requirement of plain-error review, plain-error relief would still be inappropriate unless "the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Marcus*, 560 U.S. at 265 (citation and internal quotation marks omitted). The court of appeals erred in suggesting that this fourth requirement for plain-error relief will almost always (or perhaps even always) be met in cases where the knowledge-of-status element was omitted from the plea colloquy. See App., *infra*, 21a-22a. To the contrary, in this case—as will be true in many cases—the

record affirmatively refutes any suggestion that the error affected the fairness or integrity of these proceedings.

This Court has twice made clear that even if an error is structural, and even if structural errors automatically satisfy the substantial-rights component of the plain-error test, the fourth plain-error requirement can by itself preclude relief. In *Johnson* v. *United States*, 520 U.S. 461 (1997), a defendant who had forfeited his objection to the omission of an offense element from the jury instructions argued that the error was structural and automatically satisfied the third plain-error requirement. *Id.* at 468-469. Although the Court would hold in a later case that such an error is not structural, see *Neder*, 527 U.S. at 8-20, it assumed away that issue in *Johnson* and held that relief was in any event foreclosed by the fourth plain-error requirement, see 520 U.S. at 469-470. Noting the "overwhelming" and "essentially uncontroverted" evidence of the omitted offense element, the Court found "no basis for concluding that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 470 (brackets, citation, and internal quotation marks omitted). And the Court similarly relied on the fourth plain-error requirement to deny relief in *United States* v. *Cotton*, 535 U.S. 625 (2002), where the defendant claimed that the omission of an allegation of drug quantity from an indictment was structural error and inherently prejudicial. *Id.* at 633-634.

The fourth plain-error requirement similarly forecloses relief in this case, irrespective of whether respondent's bare claim of *Rehaif* error is sufficient to satisfy the prejudice component of the plain-error test. Here, as in *Johnson*, the record provides "no basis for

concluding that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." 520 U.S. at 470 (brackets and internal quotation marks omitted). Respondent served multiple years in prison for his prior felony convictions; admitted in connection with his sentencing that he had known that he was not supposed to possess a firearm; and, by the time of the second offense at issue, had already been charged as a felon-in-possession under state law as a result of the earlier conduct. See p. 11, *supra*. Thus, as in *Cotton* and *Johnson*, "[t]he real threat" to the fairness and integrity of judicial proceedings, *Cotton*, 535 U.S. at 634, would be to grant relief. Fairness and integrity are impeded, not advanced, by allowing a defendant who has pleaded guilty to vacate that plea automatically based on a court's subsequent addition or clarification of an offense element that would have been uncontestable in his case.

The court of appeals failed to provide any sound basis for finding the fourth plain-error requirement to be satisfied on this record. Indeed, it did not meaningfully engage with the record at all. Although it nominally acknowledged that the third and fourth requirements are distinct, its holding on the latter was premised on the same process-based rationale that undergirded its structural-error holding. App., *infra*, 19a-22a. "We cannot envision," the court stated, "a circumstance where, faced with such constitutional infirmity and deprivation of rights as presented in this case, we would not exercise our discretion to recognize the error and grant relief." *Id.* at 22a. But this Court has emphasized that the fourth plain-error requirement "is meant to be applied on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142. And the facts here do not call into

question that respondent's convictions rest on the unlawful possession of a firearm when he not only was, but knew that he was, a felon.

**B. The Question Presented Warrants This Court's Review**

The court of appeals' error "creates a circuit split of yawning proportions" on a frequently arising issue of significant practical importance. App., *infra*, 25a (Wilkinson, J, concurring in the denial of rehearing en banc). It accordingly warrants this Court's immediate review.

1. As the Fourth Circuit recognized (App., *infra*, 7a & n.6), its decision conflicts with the approach of every other court of appeals that has addressed a forfeited *Rehaif* claim by a defendant who pleaded guilty. With the exception of the Fourth Circuit, "the circuits have uniformly held that a defendant cannot show an effect on his substantial rights where the evidence shows that the defendant knew of his status as a felon at the time of his gun possession." *Id.* at 25a n.* (Wilkinson, J, concurring in the denial of rehearing en banc); see, *e.g.*, *United States* v. *Burghardt*, 939 F.3d 397, 403-405 (1st Cir. 2019), cert. denied, 140 S. Ct. 2550 (2020); *United States* v. *Balde*, 943 F.3d 73, 97 (2d Cir. 2019); *Lavalais*, 960 F.3d at 187-188 (5th Cir.); *United States* v. *Hobbs*, 953 F.3d 853, 857-858 (6th Cir. 2020), petition for cert. pending, No. 20-171 (filed Aug. 13, 2020); *United States* v. *Williams*, 946 F.3d 968, 973-975 (7th Cir. 2020); *Coleman*, 961 F.3d at 1029 n.3 (8th Cir.); *Trujillo*, 960 F.3d at 1205-1207 (10th Cir.); *United States* v. *Bates*, 960 F.3d 1278, 1296 (11th Cir. 2020); see also *United States* v. *Sanabria-Robreno*, 819 Fed. Appx. 80, 83-84 (3d Cir. 2020).

The Fourth Circuit attempted to minimize the significance of its deviation on the ground that no other circuit had "yet addressed the question of whether this error is a structural error that affects the substantial rights of the defendant." App., *infra*, 8a. But although other circuits had not considered the issue in depth before the panel's decision in this case, they now have. Since the decision here, three courts of appeals—the Fifth, Eighth, and Tenth Circuits—have expressly rejected the Fourth Circuit's structural-error holding in precedential opinions. *Lavalais*, 960 F.3d at 187-188 (5th Cir.); *Coleman*, 961 F.3d at 1029 n.3 (8th Cir.); *Trujillo*, 960 F.3d at 1205-1207 (10th Cir.). And now that the Fourth Circuit has denied the government's petition for rehearing en banc in this case, see App., *infra*, 24a, only this Court can resolve the conflict.

2. The circuit conflict concerns an important and recurring issue that warrants immediate review. Any defendant in the Fourth Circuit who entered a guilty plea to unlawful firearm possession, in violation of 18 U.S.C. 922(g) and 924(a)(2), before *Rehaif* will be able to rely on the decision below to vacate his conviction on direct appeal. The decision here "answer[s] * * * the question * * * whether a standalone *Rehaif* error requires automatic vacatur of a defendant's guilty plea or whether such error should be reviewed for prejudice under *United States v. Olano*" in favor of automatic vacatur and against prejudice review under *Olano*. App., *infra*, 5a (brackets, citation, and internal quotation marks omitted). And it leaves no discernible room for application of the fourth plain-error requirement in future cases. Not only does the decision rely on generalized reasoning to reject the application of that requirement,

but the court declares that it "cannot envision a circumstance where, faced with such constitutional infirmity and deprivation of rights as presented in this case, we would not exercise our discretion to recognize the error and grant relief." *Id.* at 22a; see *id.* at 19a-22a.

Even when considered only in relation to claims based on *Rehaif*, resolution of the question presented affects convictions for one of the most frequently prosecuted federal offenses, a significant number of which were obtained by guilty plea. See App., *infra*, 25a (Wilkinson, J., concurring in the denial of rehearing en banc) (observing that "[m]any, many cases await resolution of this question"); see also *Rehaif*, 139 S. Ct. at 2212-2213 (Alito, J., dissenting); United States Sentencing Commission, *Quick Facts, Felon in Possession of a Firearm* (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_ In _Possession_FY19.pdf (reporting that approximately 10% of cases reported to the Sentencing Commission in Fiscal Year 2019 involved convictions under 18 U.S.C. 922(g)). And the implications of the decision below potentially extend beyond *Rehaif*-related error, to other circumstances in which this Court, or the court of appeals, construes a federal criminal statute in a manner that increases the proof required to satisfy the elements of the offense. Those statutory-interpretation decisions, too, may presage automatic relief for any defendant in the Fourth Circuit who pleaded guilty and whose case is on direct review, irrespective of whether the defendant was prejudiced.

Allowing the court of appeals' rule to remain in effect would therefore add "major burdens to our system" of justice. App., *infra*, 31a (Wilkinson, J., concurring in the denial of rehearing en banc). The effect of the

court's decision is to unravel final guilty pleas and require a do-over—likely including a trial—in every case. Such relief is warranted in the minority of cases where the defendant was in fact prejudiced in his plea decision and where a failure to correct the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. But in the mine run of cases, it is simply a windfall for the defendant. The court of appeals' categorical rejection of the final two requirements for plain-error relief eliminates the traditional tools for separating out those two classes of cases, instead requiring courts to reopen them all indiscriminately. This Court should intervene to put a stop to that overly burdensome and misguided approach.

3. This case is an ideal vehicle for further review. The question is squarely presented, was thoroughly considered below, and provided the sole basis for the court of appeals' decision. Furthermore, the government has filed this petition at a time calculated to allow for the Court to grant certiorari and decide the case on the merits during the current Term.

As might be expected in light of the Fourth Circuit's outlier status, several pending petitions for writs of certiorari implicate the same or related questions. See *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). As the government explains in its response in *Lavalais*, *supra* (No. 20-5489), that case would also provide an acceptable, albeit

less ideal, vehicle for addressing the question presented, and the Court could grant that petition instead. Alternatively, the Court could grant both petitions and consolidate the cases for argument. But given the number of cases that are potentially affected, the Court should consider and decide the question presented this Term.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2020

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 18-4578

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

MICHAEL ANDREW GARY, DEFENDANT-APPELLANT

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Argued: Dec. 11, 2019
Decided: Mar. 25, 2020

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Appeal from the United States District Court
for the District of South Carolina at Columbia
Joseph F. Anderson, Jr., Senior District Judge
(3:17-cr-00809-JFA-1)

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Before: GREGORY, Chief Judge, FLOYD, and THACKER, Circuit Judges.

GREGORY, Chief Judge:

Michael Andrew Gary appeals his sentence following a guilty plea to two counts of possession of a firearm and ammunition by a person previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). Gary contends that two recent decisions—the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), where the Court held that the government must prove not only that a defendant charged pursuant to § 922(g) knew he possessed a firearm, but also that he knew he belonged to a class of persons barred from possessing a firearm,

and this Court's *en banc* decision in *United States v. Lockhart*, 947 F.3d 187 (4th Cir. 2020), in which this Court considered the impact of *Rehaif* on a defendant's guilty plea—require that his plea be vacated.

Upon consideration of the parties' arguments, we hold that Gary's guilty plea was not knowingly and intelligently made because he did not understand the essential elements of the offense to which he pled guilty. Because the court accepted Gary's plea without giving him notice of an element of the offense, the court's error is structural. We therefore vacate his guilty plea and convictions and remand the case to the district court for further proceedings.

## I.

On January 17, 2017, Gary was arrested following a traffic stop for driving on a suspended license. Gary's cousin, Denzel Dixon, was a passenger in the vehicle. During an inventory search of the vehicle, officers recovered a loaded firearm and a small plastic bag containing nine grams of marijuana. Gary admitted to possession of both the gun and marijuana and was charged under state law with possession of a firearm by a convicted felon.

Five months later, on June 16, 2017, officers encountered Gary and Dixon outside a motel room while patrolling the motel's parking lot. The officers detected the odor of marijuana, and as they approached, Gary and Dixon entered the back seat of a vehicle. Dixon had a marijuana cigarette in his lap. The men consented to a personal search, and the officers found large amounts of cash on both men and a digital scale in Dixon's pocket.

After receiving permission to search the vehicle, the officers found a stolen firearm, ammunition, "a large amount" of marijuana in the trunk, and baggies inside a backpack. J.A. 105. Gary claimed the gun was his and admitted that he regularly carried a firearm for protection. Dixon claimed ownership of the marijuana. Gary was arrested and charged under state law with possession of a stolen handgun. Gary had, at the time of his arrests, a prior felony conviction for which he had not been pardoned.

Gary was indicted in federal court and later pled guilty without a plea agreement to two counts of possession of a firearm and ammunition after having been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).[1] During his Rule 11 plea colloquy, the government recited facts related to each of his firearm possession charges. The court also informed Gary of the elements it understood the government would be required to prove if he went to trial: (1) that Gary had "been convicted of a crime punishable by imprisonment for a term exceeding one year;" (2) that he "possessed a firearm;" (3) that the firearm "travelled in interstate or foreign commerce;" and (4) that he "did so knowingly; that is that [he] knew the item was a firearm and [his] possession of that firearm was voluntarily [sic] and intentional." J.A. 31. Gary was not informed that an additional element of the offense was that "he knew he had the relevant status when he possessed [the firearm]." *Rehaif*, 139 S. Ct. at 2194. The district court accepted Gary's plea and sentenced him to 84 months on each count, to run concurrently.

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[1] The state law charges against Gary were nolle prossed.

Gary appealed his sentence to this Court.[2] During the pendency of his appeal, Gary filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) asserting that the Supreme Court's recent decision in *Rehaif*, 139 S. Ct. at 2191, is relevant to his appeal. *See* Fed. R. App. P. 28(j). Gary further noted that this Court, sitting *en banc*, heard oral argument in *Lockhart*, in which counsel argued the impact of *Rehaif* on the defendant's guilty plea. Gary asserted that *Rehaif*, as well as this Court's opinion in *Lockhart*, would likely impact his case because he pled guilty to two counts of possession of a firearm after having been convicted of a felony in violation of 18 U.S.C. § 922(g)(1) without being informed, as required by *Rehaif*, that an element of his offense was that he knew his prohibited status at the time he possessed the firearm.

We invited the parties to file supplemental briefs addressing what impact, if any, *Rehaif* may have on Gary's convictions.[3] This Court has since decided *Lockhart*,

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[2] At sentencing, the district court, over Gary's objection, imposed a four-level specific offense enhancement for possessing a gun in connection with another felony offense—possession with intent to distribute marijuana—based on the "large amount" of marijuana Dixon possessed on June 16, 2017. Gary objected to the enhancement on the grounds that (1) he had no knowledge of the marijuana, (2) Dixon, not Gary, was charged with possession with intent to distribute the marijuana, and (3) Dixon admitted the marijuana was his. Because we find that the invalidity of Gary's guilty plea is dispositive of this appeal, we cannot and do not address the appropriateness of any sentence imposed based on the plea.

[3] "[W]hen an intervening decision of this Court or the Supreme Court affects precedent relevant to a case pending on direct appeal, an appellant may timely raise a new argument, case theory, or claim based on that decision while his appeal is pending without triggering the abandonment rule." *United States v. White*, 836 F.3d 437, 443-

but limited its holding to its unique facts, finding that the two errors committed in Lockhart's case—the failure to properly advise him of his sentencing exposure under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and the *Rehaif* error—"in the aggregate" were sufficient to establish prejudice for purposes of plain error review. *Lockhart*, 947 F.3d at 197. We answer today the question *Lockhart* did not: "whether a standalone *Rehaif* error requires automatic vacatur of a defendant's [guilty] plea, or whether such error should be reviewed for prejudice under [*United States v.*] *Olano*[, 507 U.S. 725, 732 (1993)]." *Lockhart*, 947 F.3d at 196. We find that a standalone *Rehaif* error satisfies plain error review because such an error is structural, which per se affects a defendant's substantial rights. We further find that the error seriously affected the fairness, integrity and public reputation of the judicial proceedings and therefore must exercise our discretion to correct the error.

## II.

Because Gary did not attempt to withdraw his guilty plea in the district court, we review his plea challenge for plain error. *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018). To succeed under plain error review, a defendant must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights. *Olano*, 507 U.S. at 732; *United States v. Knight*, 606 F.3d 171, 177 (4th Cir. 2010). We retain the discretion to correct such an error but will do so only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507

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44 (4th Cir. 2016), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018).

U.S. at 732 (internal quotation marks omitted). With this standard in mind, we turn to the instant case.

Gary argues the first two prongs of plain error analysis are established by the decision in *Rehaif* itself—that an error occurred and that it was plain. He contends that the third prong, which requires Gary to show an effect on his substantial rights, is satisfied as well. Without notice that the government was required to prove an additional element not previously disclosed at the time of his guilty plea, Gary argues that he could not have knowingly and intelligently pled guilty, rendering his plea constitutionally invalid.[4]

The government concedes that the district court committed plain error in failing to inform Gary of the *Rehaif* element, but contends that omission of this element from the plea colloquy did not affect Gary's substantial rights because there is overwhelming evidence that he

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[4] Gary also states that the government's omission of the knowledge-of-status element from his indictment further supports a finding that he was not informed of the true nature of the offense and therefore could not knowingly and intelligently plead guilty. Appellee's Supp. Br. 7. He contends that a conviction based on an indictment where neither the grand jury nor the defendant was informed of all the elements of the offense, together with the omission of the same element from both the indictment and the plea colloquy, affected his substantial rights. *Id.* at 8. Beyond these statements, however, Gary presents no argument regarding the sufficiency of his indictment or whether it constitutes a separate ground for the vacatur of his guilty plea. As "[i]t is not the practice of this court to consider an argument that has not been developed in the body of a party's brief," Gary's failure to address the validity of the indictment is deemed an abandonment of the issue. *Kinder v. White*, 609 F. App'x 126, 133 (4th Cir. 2015); *see also* Fed. R. App. P. 28(a)(8)(A); *White*, 836 F.3d at 443.

knew of his felony status prior to possessing the firearms.[5] The government also notes that since *Rehaif* was decided, numerous circuits applying *Olano*'s plain error standard have determined that there is no effect on a defendant's substantial rights where the evidence shows that the defendant knew of his status as a prohibited person at the time of his gun possession. *See, e.g.*, *United States v. Burghardt*, 939 F.3d 397, 404 (1st Cir. 2019) (plain error did not affect substantial rights where there was "overwhelming proof" defendant had previously been sentenced to more than one year in prison).[6]

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[5] In support of its argument, the government notes that Gary's presentence report lists a 2014 conviction for second degree burglary, for which Gary was sentenced to eight years suspended upon service of three years. Three of those eight suspended years were later revoked for a probation violation. And at the time of that conviction, Gary had already served 691 days in custody and received credit for time served for the burglary charge. J.A. 107-113.

[6] *See also, e.g.*, *United States v. Denson*, 774 F. App'x 184, 184-85 (5th Cir. 2019) (unpublished) (error did not affect substantial rights where defendant stipulated he had been convicted of a felony offense before possessing a firearm); *United States v. Bowens*, 938 F.3d 790, 797 (6th Cir. 2019) ("defendants cannot show that but for the error, the outcome of the proceeding would have been different"); *United States v. Williams*, 946 F.3d 968, 973 (7th Cir. 2020) (finding no effect on substantial rights where defendant served over a decade in prison for murder before committing firearm offense); *United States v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019) (substantial rights not affected where defendant sentenced to 78 months and served four years and thus had to have been aware of his felony status); *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019) (substantial rights prong not met where defendant spent nine years in prison on various felony convictions before his firearm arrest); *United States v. Reed*, 941 F.3d 1018, 1021-22 (11th Cir. 2019) (defendant failed to establish errors affected his substantial rights where he had eight previous felony convictions and had served at

But the decisions cited by the government are distinguishable from Gary's case in at least one key respect—the courts did not consider whether the district court's acceptance of a guilty plea without informing the defendant of every element of the offense was a constitutional error that rendered his guilty plea invalid. Consequently, no circuit has yet addressed the question of whether this error is a structural error that affects the substantial rights of the defendant. We find that Gary did not knowingly and intelligently plead guilty because he was not fully informed during his plea colloquy of the elements the government had to prove to convict him of the § 922(g) offenses, and that this type of error—this denial of due process—is a structural error that requires the vacatur of Gary's guilty plea and convictions.

## III.

### A.

We agree with the parties that the first two prongs of *Olano* plain error review have been met by the district court's failure to give Gary notice of the *Rehaif* element of the § 922(g) offense. First, the district court's acceptance of Gary's plea was error. Federal Rule of Criminal Procedure 11 requires that before accepting a plea of guilty, the court must inform a defendant of, and confirm that he understands, the nature of the charge to which he is pleading. Fed. R. Crim. P. 11(b)(G). Rule 11's purpose is to ensure that a defendant is fully informed of the nature of the charges against him and the consequences of his guilty plea. *See* Fed. R. Crim. P. 11(b). Certainly, the district court's acceptance of Gary's

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least 18 years in prison before he was arrested for possession of a firearm).

plea without informing him the government was required to prove an additional element was error that violated the requirements of Rule 11. *See Lockhart*, 497 F.3d at 196.

Moreover, the error was plain. To be "plain," an error must be "clear or obvious at the time of appellate consideration." *Ramirez-Castillo*, 748 F.3d at 215 (citations and internal quotation marks omitted); *see also Olano*, 507 U.S. at 734; *Henderson*, 133 S. Ct. at 1130 (internal quotation marks omitted). An error is clear or obvious "if the settled law of the Supreme Court or this circuit establishes that an error has occurred." *Ramirez-Castillo*, 748 F.3d at 215 (citing *United States v. Carthorne*, 726 F.3d 503, 516 (4th Cir. 2013)).

This was the case here. At the time of Gary's guilty plea, the parties and the district court relied on this Court's decision in *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (*en banc*), *abrogated by Rehaif*, 139 S. Ct. at 2191, wherein this Court had held that knowledge of one's prohibited status was not a required element of a § 922(g) offense. But after the Supreme Court rendered its decision in *Rehaif*, and while Gary's appeal was pending, this Court decided *Lockhart*, holding that it is plain error to accept a guilty plea based on a pre-*Rehaif* understanding of the elements of a § 922(g)(1) offense. *Lockhart*, 947 F.3d at 196. These cases now represent the settled law by which this Court must measure whether the error is "plain" at the time of Gary's appeal. *Ramirez-Castillo*, 748 F.3d at 215. In light of the Supreme Court's decision in *Rehaif*, and this Court's determination in *Lockhart*, we conclude the error in this case is plain.

B.

Having established that the first two prongs have been met, we must consider whether Gary has established the third prong of an *Olano* inquiry—that the error affected his substantial rights. *See Olano*, 507 U.S. at 732.

1.

The government argues that although the court's failure to inform Gary of the additional element of the offense was error, it did not affect his substantial rights because there is 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, including a felony burglary conviction for which he served 691 days in custody. Thus, according to the government, Gary has not demonstrated a reasonable probability that, but for the error, he would not have pled guilty.

In response, Gary argues that his guilty plea is "constitutionally invalid" because the court misinformed him regarding the elements of his offense. Relying on Supreme Court precedent, he contends that a constitutionally invalid plea affects substantial rights as a *per se* matter and supports the conclusion that a defendant need not make a case-specific showing of prejudice even in the face of overwhelming evidence that he would have pled guilty.

Further, Gary asserts that the district court's error in accepting his unintelligent guilty plea is structural because it infringed upon his autonomy interest in "mak[ing] his own choices about the proper way to protect his own liberty." *Weaver v. Massachusetts*, 137 S. Ct.

1899, 1907-08 (2017). He contends this violation is comparable to the infringement that occurs when a defendant is denied the right to self-representation or the right to the counsel of his choice—and therefore affects his substantial rights regardless of the strength of the prosecution's evidence or whether the error affected the ultimate outcome of the proceedings.

We find Gary's argument persuasive. "In most cases," the phrase "affects substantial rights" means that "the error must have been prejudicial"—that is, "[i]t must have affected the outcome of the district court proceedings." *Ramirez-Castillo*, 748 F.3d at 215 (*citing Olano*, 507 U.S. at 734). Stated differently, to establish that a Rule 11 error has affected substantial rights, a defendant must "show a reasonable probability that, but for the error, he would not have entered the plea . . . [and] satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine the confidence in the outcome' of the proceeding." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

But the Supreme Court has recognized that a conviction based on a constitutionally invalid guilty plea cannot be saved "even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Dominguez Benitez*, 542 U.S. 74, 84 n.10. For example, in *Bousley v. United States*, 523 U.S. 614 (1998), the Supreme Court held that a guilty plea is constitutionally valid only to the extent it is "voluntary" and "intelligent." *Id.* at 618. A plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally

recognized requirement of due process." *Id.* (citing *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Similarly, in *Henderson v. Morgan*, 426 U.S. 637, 645 (1976), the Supreme Court invalidated a guilty plea to second degree murder where the defendant was not informed of the *mens rea* requirement. Such a plea, the Court held, could not support a judgment of guilt unless it was "voluntary in a constitutional sense," and the plea could not be voluntary, i.e. an intelligent admission that he committed the offense, unless the defendant received "real notice of the true nature of the charge against him." *Id.* at 645-46. The Court assumed the prosecutor had overwhelming evidence of the defendant's guilt, but found that nothing in the record, not even the defendant's admission that he killed the victim, could substitute for a finding or voluntary admission that he had the requisite intent. *Id.* at 646; *see also United States v. Mastrapa*, 509 F.3d 652, 660 (4th Cir. 2007) (defendant's misunderstanding of what was necessary to find him guilty of the offense "resulted in a flawed guilty plea that affected [his] substantial rights.").

Gary's argument is supported by the Supreme Court's long-held view that there is "a special category of forfeited errors that can be corrected regardless of their effect on the outcome," and that "not in every case" does a defendant have to "make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong. . . . " *Olano*, 507 U.S. at 735. This Court has recognized that this language refers to "structural errors." *United States v. David*, 83 F.3d 638, 647 (4th Cir.1996); *see also United States v. Marcus*, 560 U.S. 258, 263 (2010) (certain "structural errors" might affect substantial rights regardless of their actual impact on an appellant's trial); *United States v. White*, 405 F.3d 208, 221

(4th Cir. 2005) (*Olano* recognizes a "special category of unpreserved errors . . . that may be noticed 'regardless of their effect on the outcome'"). Such errors are referred to as "structural" because they are "fundamental flaws" that "undermine[] the structural integrity of [a] criminal tribunal." *See Vasquez v. Hillery*, 474 U.S. at 263-64.

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver*, 137 S. Ct. at 1907-08 (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Structural errors are "defects in the constitution of the trial mechanism which defy analysis by 'harmless-error' standards," *Fulminante*, 499 U.S. at 309, and "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

The Supreme Court has identified a "limited class" of errors as structural. *Johnson v. United States*, 520 U.S. 461, 468-69 (1997). *See, e.g.*, *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (attorney admission of defendant's guilt over defendant's objection); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction); *Vasquez*, 474 U.S. at 254 (racial discrimination in selection of grand jury); *Waller v. Georgia*, 467 U.S. 39 (1984) (violation of the right to a public trial);

*McKaskle v. Wiggins*, 465 U.S. 168 (1984) (right to self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (lack of an impartial trial judge). "The precise reason why a particular error is not amenable to [harmless error] analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error," *Weaver*, 137 S. Ct. at 1907-08, but the Supreme Court has adopted at least three broad rationales for identifying errors as structural.

First, an error has been deemed structural in instances where "'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.'" *McCoy*, 138 S. Ct. at 1511 (quoting *Weaver*, 137 S. Ct. at 1908). Deprivations of the Sixth Amendment right to self-representation are structural errors not subject to harmless error review because "[t]he right is either respected or denied; its deprivation cannot be harmless." *McCoy*, 138 S. Ct. at 1511 (quoting *McKaskle*, 465 U.S. at 177 n.8).

Second, an error has been deemed structural if the effects of the error are simply too hard to measure; i.e. where "the precise 'effect of the violation cannot be ascertained.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (quoting *Vasquez*, 474 U.S. at 263). Such is the case where the consequences of a constitutional deprivation "are necessarily unquantifiable and indeterminate," *Gonzalez-Lopez*, 548 U.S. at 150. For example, when a defendant is denied the right to select his or

her own attorney, the government will, as a result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt." *Weaver*, 137 S. Ct. at 1908 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

"Third, an error has been deemed structural if the error always results in fundamental unfairness," such as in the denial of the right to an attorney in *Gideon*, 372 U.S. at 343-45, or in the failure to give a reasonable doubt instruction as in *Sullivan*, 508 U.S. at 279. In these circumstances, it "would therefore be futile for the government to try to show harmlessness." *Weaver*, 137 S. Ct. at 1908.

These three categories are not rigid; more than one of these rationales may be part of the explanation for why an error is deemed structural. *Weaver*, 137 S. Ct. at 1908. Thus, an error can count as structural even if the error does not lead to fundamental unfairness in every case. *Id.*, s*ee Gonzalez-Lopez*, 548 U.S. at 149, n.4 (rejecting the idea that structural errors "always or necessarily render a trial fundamentally unfair and unreliable").

2.

The Supreme Court has expressly reserved the question of whether structural errors automatically satisfy the third prong of *Olano*, s*ee Puckett v. United States*, 556 U.S. 129, 140-41 (2009), but this Court has held that such errors necessarily affect substantial rights, satisfying *Olano*'s third prong.[7] *See David*, 83 F.3d at 647

[7] We acknowledge that not every Rule 11 violation resulting in a constitutional error requires the automatic reversal of a conviction. But a Rule 11 error is not harmless when it affects a defendant's

(failure to instruct jury on an element of the offense is within the "special category" of forfeited errors). Therefore, if an error is determined to be structural, the third prong of *Olano* is satisfied. *Ramirez-Castillo*, 748 F.3d at 215. Against this backdrop, we must determine whether the constitutional error in this case is a structural error that satisfies the third prong of an *Olano* inquiry.

Under each of the Supreme Court's rationales, we find the district court's error is structural. First, the error violated Gary's right to make a fundamental choice regarding his own defense in violation of his Sixth Amendment autonomy interest. Indeed, 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. *McCoy*, 138 S. Ct. at 1508.

Gary had the right to make an *informed* choice on whether to plead guilty or to exercise his right to go to trial. In accepting Gary's guilty plea after misinforming him of the nature of the offense with which he was charged, the court deprived him of his right to determine the best way to protect his liberty. Gary need not demonstrate prejudice resulting from the error because harm to a defendant is irrelevant to the principles underlying his autonomy right and liberty interests.

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substantial rights. *See Fulminante*, 499 U.S. at 306 (citing *Chapman*, 386 U.S. at 21-22); *see* Fed. R. Crim P. 11(h). Indeed, structural errors affect the "entire conduct of the trial from beginning to end," and therefore cannot be harmless. *Fulminante*, 499 U.S. at 309.

*McKaskle*, 465 U.S. at 177 n.8. Thus, the error is structural regardless of the strength of the prosecution's evidence or whether the error would have affected the ultimate outcome of the proceedings. *Id.*

Further, we find that the district court's error is structural because the deprivation of Gary's autonomy interest under the Fifth Amendment due process clause has consequences that "are necessarily unquantifiable and indeterminate," *see Gonzalez-Lopez*, 548 U.S. at 150, rendering the impact of the district court's error simply too difficult to measure. *See id.* at 149 n.4 (quoting *Vasquez*, 474 U.S. at 263) (finding structural error where "the precise 'effect of the violation cannot be ascertained.'")

Here, as in *Gonzalez-Lopez*, "we rest our conclusion of structural error upon the difficulty of assessing the effect of the error." 548 U.S. at 149 n.4; *see also Waller*, 467 U.S. at 49 n.9 (error not subject to harmless error review where the benefits of the right infringed "are frequently intangible, difficult to prove, or a matter of chance."). The error here 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.'" *Gonzalez-Lopez*, 548 U.S. at 148 (citing *Fulminante*, 499 U.S. at 307-08). And unlike 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, 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. When Gary pled 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 the Supreme Court as structural error, is unquantifiable. It is impossible to know how Gary's counsel, but for the error, would have advised him, what evidence may have been presented in his defense, and ultimately what choice Gary would have made regarding whether to plead guilty or go to trial. With no way to gauge the intangible impact that results from a guilty plea premised on a constitutional violation, s*ee Waller*, 467 U.S. at 49 n.9, we "find it almost impossible to show that the error was 'harmless beyond a reasonable doubt.'" *Weaver*, 137 S. Ct. at 1908 (citing *Chapman*, 386 U.S. at 24).

Finally, we independently find the error is structural on the ground that fundamental 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. Indeed, under the provisions of § 922(g), "the defendant's status is the 'crucial element' separating innocent from wrongful conduct." *Rehaif*, 139 S. Ct. at 2197 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994). Yet the district court failed to inform Gary that knowledge of his prohibited status was an element of the offense, denying him 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.

Thus, in accepting his uninformed plea, the court denied Gary's right to make a knowing and intelligent decision regarding his own defense.

Regardless of evidence in the record that would tend to prove that Gary knew of his status as a convicted felon, it is in the interest of justice that Gary knowingly and intelligently "engag[e] in the calculus necessary to enter a plea on which this Court can rely in confidence." *Lockhart*, 947 F.3d at 197. 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*, 527 U.S. at 8-9 (quoting *Rose*, 478 U.S. at 577-78).

Accordingly, we conclude that the district court's constitutional error is structural and affects Gary's substantial rights, satisfying the third prong of the *Olano* inquiry.

C.

Finally, having found that Gary has satisfied the three prongs under *Olano*, this Court must determine whether it should exercise its discretion to correct the error. 507 U.S. at 732. The fact that the district court's error affected Gary's substantial rights does not alone warrant the exercise of our discretion. We are "not obligated to notice even structural error on plain error review." *Id.* at 737. We exercise our discretion on plain error review only when "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736. "Central to this inquiry is a de-

termination of whether, based on the record in its entirety, the proceedings against the accused resulted in a fair and reliable determination of guilt." *Ramirez-Castillo*, 748 F.3d at 217 (citing *United States v. Cedelle*, 89 F.3d 181, 186 (4th Cir. 1996)).

The Fifth Amendment guarantees a criminal defendant due process in the course of criminal proceedings that could deprive him of life, liberty, or property. U.S. Const., amend. V. Although trial by jury is guaranteed specifically by the Sixth Amendment, the right is often waived through the court's acceptance of a guilty plea. A guilty plea is by far the most common criminal proceeding, rendering it "indispensable in the operation of the modern criminal justice system." *See Dominguez Benitez*, 542 U.S. at 75. Indeed, the vast majority of federal criminal cases are resolved through guilty pleas. In fiscal year 2018, nearly 90% of federal criminal defendants nationwide pled guilty. Judicial Business—September 2018, Table D-4, available at https://www.uscourts.gov/statistics/table/d-4/judicial-business/2018/09/30 (last viewed Mar. 9, 2020) (saved as ECF opinion attachment). Within the Fourth Circuit the percentage is even greater—96.4 percent. *See* U.S. Sentencing Commission, *"Statistical Information Packet, Fiscal Year 2018, Fourth Circuit," Table 2*, available at https://www.ussc.gov/research/data-reports/geography/2018-federal-sentencing-statistics (last viewed Mar. 9, 2020) (saved as ECF opinion attachment).

Accordingly, the integrity of our judicial process demands that each defendant who pleads guilty receive the process to which he is due. It is the duty of the court to ensure that each defendant who chooses to plead guilty enters a knowing and voluntary plea.

The impact of a guilty plea upon a defendant's fundamental rights cannot be overstated. An individual's choice to plead guilty is his alone to make—after he has been fully informed by the nature of the charges against him and the consequences of his plea. The waiver of Fifth and Sixth Amendment trial rights based on a constitutionally invalid plea undermines the credibility and public reputation of judicial proceedings and fails to foster confidence that they will result in a "fair and reliable determination of guilt" rather than a conviction obtained contrary to constitutional principles. Even where evidence in the record might tend to prove a defendant's guilt, his right to due process when pleading guilty must remain paramount. *See Cedelle*, 89 F.3d at 186 n.4 (recognizing that "circumstances may exist where the proceedings contain an error that seriously affects the fairness, integrity, or public reputation of the judiciary even though the record demonstrates that the defendant is guilty").

We recognize that there is an importance in respecting the finality of guilty pleas and the laudable purpose they serve as part of our criminal justice system. Indeed, our system encourages guilty pleas; they benefit both defendants, for whom they may result in lesser penalties and the dismissal of additional charges, and the government, which favors judicial economy. Accordingly, we must proceed with caution when permitting their vacatur. But the structural integrity of the judicial process is not only at stake but undermined when we permit convictions based on constitutionally invalid guilty pleas to stand. There should be no instance where such a plea is accepted for the sake of obtaining a conviction, particularly where a defendant who did not

receive notice of the true nature of an offense might unknowingly forgo the opportunity to raise an available defense.

As *Olano* makes clear, a reviewing court should exercise its discretion to grant plain error review "in those circumstances in which a miscarriage of justice would otherwise result." 507 U.S. at 736. But justice is not *only* a result. In criminal proceedings where life and liberty are at stake, it is certainly our *intent* that "justice" be achieved in the result, but it is our *mandate* that "justice" be achieved in the process afforded the accused. To allow a district court to accept a guilty plea from a defendant who has not been given notice of an element of the offense in violation of his Fifth Amendment due process rights "would surely cast doubt upon the integrity of our judicial process. . . . " *See Mastrapa*, 509 F.3d at 661. We cannot envision a circumstance where, faced with such constitutional infirmity and deprivation of rights as presented in this case, we would not exercise our discretion to recognize the error and grant relief.

We therefore hold that the district court's erroneous acceptance of a constitutionally invalid guilty plea "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. Accordingly, we exercise our discretion to notice the error and vacate Gary's guilty plea and convictions.

## IV.

For these reasons, we vacate Gary's plea and convictions, and remand the case to the district court for further proceedings.

*VACATED AND REMANDED*

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 18-4578
(3:17-cr-00809-JFA-1)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

MICHAEL ANDREW GARY, DEFENDANT-APPELLANT

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Filed: July 7, 2020

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**ORDER**

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Appellee filed a petition for rehearing en banc, and Appellant filed a response in opposition. The petition and response were circulated to the full Court. Judge Richardson recused himself from the case. No member of the Court requested a poll on the petition for en banc review. Therefore, the petition for rehearing en banc is denied.

Entered at the direction of Chief Judge Gregory.

For the Court

/s/ PATRICIA S. CONNOR, Clerk
PATRICIA S. CONNOR

WILKINSON, Circuit Judge, with whom Judges NIEMEYER, AGEE, QUATTLEBAUM, and RUSHING join, concurring in the denial of rehearing en banc:

I concur in the denial of rehearing en banc for one reason and one reason only. The panel's holding is so incorrect and on an issue of such importance that I think the Supreme Court should consider it promptly. Any en banc proceedings would only be a detour. Many, many cases await the resolution of this question.

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.[*]

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[*] Until now, no other circuit has treated a *Rehaif* error as structural when applying plain-error review. Rather, the circuits have uniformly held that a defendant cannot show an effect on his substantial rights where the evidence shows that the defendant knew of his status as a felon at the time of his gun possession. See *United States v. Burghardt*, 939 F.3d 397, 403-05 (1st Cir. 2019); *United States v. Balde*, 943 F.3d 73, 97 (2d Cir. 2019); *United States v. Denson*, 774 F. App'x 184, 185 (5th Cir. 2019); *United States v. Hobbs*, 953 F.3d 853, 857-58 (6th Cir. 2020); *United States v. Williams*, 946 F.3d 968, 973-75 (7th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410, 415-16 (8th Cir. 2019); *United States v. Fisher*, 796 F. App'x 504, 510-11 (10th Cir. 2019); *United States v. McLellan*, 2020 WL 2188875, at *6-7 (11th Cir. May 6, 2020); see also *United States v. Benamor*, 937 F.3d 1182, 1189 (9th Cir. 2019). Indeed, the Fifth Circuit has only recently rejected this court's structural error holding. *United States v. Hicks*, – F.3d –, 2020 WL 2301461, at *2 (5th Cir. May 8, 2020).

In *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019), the Supreme Court held that the government must prove that a defendant knew about his felony status as an element of an 18 U.S.C. § 922(g) offense. Now our court holds that *Rehaif* error is a structural error that is not amenable to harmless or to plain-error review. *United States v. Gary*, 954 F.3d 194, 200 (4th Cir. 2020). Facts are so often the foundation of law. But the panel opinion, put simply, takes flight from the facts in each and every case.

The retreat from the facts is especially egregious here. There is not a chance that Gary's claim would survive the third or fourth prongs of *Olano* or satisfy the reasonable-probability test of *Dominguez Benitez*. Prior to the instant felon-in-possession offenses, Gary was convicted of second-degree burglary and two counts of assault, each punishable by more than one year in prison. For these offenses, he spent upwards of nine years in prison. Moreover, at his sentencing hearing in 2017, Gary admitted that he knew it was wrong for him to have a firearm. The *Rehaif* error could thus not have affected his substantial rights because there is no possibility, not to mention a reasonable probability, that Gary would not have pled guilty had he been informed of that which the government could so easily have proven. And as to the fourth prong of *Olano*, the question simply answers itself. In other words, considering the facts here, nothing about Gary's *Rehaif* claim has so much as a grain of merit.

The Supreme Court has made clear that structural errors are few and far between. This point has been made not once but repeatedly. The Court has found structural error only in a "very limited class of cases,"

*Johnson v. United States*, 520 U.S. 461, 468 (1997), and has instead "adopted the general rule that a constitutional error does not automatically require reversal of a conviction," *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991).

The narrow band of structural errors is distinct because they inherently taint the integrity of a trial from beginning to end. See, *e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (denial of right to counsel); *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (defective reasonable-doubt instruction); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (racial discrimination in grand jury selection); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (lack of impartial judge).

Structural errors are to be limited, in other words, to the kind of error that by itself invalidates the criminal proceeding. See *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (defining structural error as one that "affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself") (internal markings and quotation omitted). A denial of the right to counsel, racial bias in criminal justice proceedings, and an infirm reasonable doubt instruction are easily identified as the category of error that sweeps across any particular offense, and speaks overarchingly to the kind of flaws that any citizen would instinctively know to be both unlawful and unfair. Put otherwise, structural errors are *innately* infectious, necessarily impugning each part of a trial, rather than *potentially* consequential, depending on the facts and circumstances of a given case. Because such errors lack a ready way to quantify their impact, they defy analysis by harmless or plain-error review.

A *Rehaif* error comes nowhere near this level. It is not even close. Rather, it belongs with the large category of errors that the Court has deemed non-structural, in recognition of the fact that the illusory search for perfection in the criminal justice process can so easily, as the saying goes, become the enemy of the good. See, *e.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 681-82 (1986) (holding that a restriction on defendant's ability to cross-examine witness in violation of Sixth Amendment was non-structural error); *United States v. Hasting*, 461 U.S. 499, 509 (1983) (same for improper remark regarding defendant's silence at trial in violation of Fifth Amendment); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (same for admission of evidence taken in violation of Fourth Amendment); see also *Fulminante*, 499 U.S. at 306-07 (collecting cases). To borrow from the *Van Arsdall* Court, these cases stand for "the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Van Arsdall*, 475 U.S. at 681.

Nor does *Rehaif* error gain admittance into the gallery of structural error because it pertains to an element of a charge. I intend no disrespect to the Supreme Court's fine decision in *Rehaif* to note that the appearance of what our court now terms a structural defect has come rather late in the day, after many decades of prior practice to the contrary—a fact that should weigh not only against retroactive review, but against recognition of the error as a structural one as well.

To that end, the Supreme Court has plainly resisted the linkage between elements errors and structural error. Take *Neder v. United States*, for example. 527 U.S. 1 (1999). There, the trial court incorrectly omitted from the jury instructions an element of the offense charged against Neder. The Court squarely rejected the argument that such an error was structural, and instead reviewed for harmless error because "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. Indeed, time and again, the Court has applied harmless error review to elements errors. See, *e.g.*, *Johnson*, 520 U.S. at 468-69; *California v. Roy*, 519 U.S. 2, 5 (1996); *Yates v. Evatt*, 500 U.S. 391, 393 (1991); *Carella v. California*, 491 U.S. 263, 266 (1989); *Pope v. Illinois*, 481 U.S. 497, 502-503 (1987).

Moreover, there are many reasons to think that the guilty plea context is an especially poor one for recognizing an elements error as structural. Indeed, the Court has already decided as much. See *Henderson v. Morgan*, 426 U.S. 637, 645-46 (1976) (surveying factual record before vacating defendant's plea on the ground that he was misinformed as to a key element of the charge against him); *Bousley v. United States*, 523 U.S. 614, 622-23 (1998) (applying fact-bound exceptions for excusing procedural default to defendant's claim that his guilty plea was invalid because he was misinformed as to the government's burden of proof at time of his plea).

In fact, the guilty plea context is one in which the Court has assiduously resisted automatic vacatur of a plea. The standard for vacatur is quite fact-dependent. It asks whether there is a "reasonable probability" that

absent the error the defendant would not have entered the plea. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004); see also *id.* at 81 n.6 (noting single Rule 11 error "not colorably structural"). I see no reason whatsoever why this standard, so widely adopted and so pervasively relied upon, should be rendered nugatory on the basis of the kind or character of the error asserted rather than its impact on the particular proceeding. The Supreme Court's standard stands in stark contrast to the novel standard adopted in this case. The reasonable probability standard is conscientiously attentive to facts. Our court's opinion is wholly oblivious to them.

Furthermore, the guilty plea context is one where the Supreme Court, again in contrast to this court, has been especially attentive to finality. *United States v. Davila*, 569 U.S. 597, 608 (2013) (stressing the "particular importance of the finality of guilty pleas") (internal markings and quotation omitted). The reason for the finality of guilty pleas could not be more evident or obvious. Not only are they uniquely susceptible to buyer's remorse; they rest on a well-understood tradeoff—one where the defendant receives the certainty of present benefits in exchange for forgoing the possibility of some future benefit down the road. *Rehaif* is exactly the sort of future decisional benefit a routine guilty plea ordinarily waives. The panel opinion now seeks to undo all this. For if *Rehaif* is deemed structural, it could be used to overturn a wealth of pleas at some future point in time, given that the courts are more likely to give structural errors retroactive application.

The costs to criminal justice of the panel's ruling are immense. If they were offset by some gain in the administration of justice, that would be one thing. But,

as Gary's case shows, the vast majority of defendants who will seek to take advantage of a structural *Rehaif* error are perfectly aware of their felony status. Felony status is simply not the kind of thing that one forgets. It is, after all, a § 922(g) offense that one has pled guilty to, a plea that would wholly lack a factual basis before or after *Rehaif* if the defendant were not a felon. For those very few who claim plausibly to be unaware of their felony status, the reasonable probability standard in *Dominguez-Benitez* stands ready to pick them up.

I hesitate to raise such a mundane consideration as the resources available to judges and litigants in discussing this issue, but it remains the fact that the resources of our system are finite. The erosion of finality in the context of such basic criminal offenses as § 922(g) and 18 U.S.C. § 924(c) will strain the resources of the lower federal courts in no small measure. Not only that, but prosecutorial resources will be tested to the limits by multitudes of defendants seeking to withdraw and renegotiate their pleas. Not only that, but the resources of public defenders will be tested as well, as they try to balance their obligations to existing clients who face serious charges and the legions of defendants who seek to redo past bargains. We are adding not just one, but two major burdens to our system. The first arises from the sheer volume of guilty pleas. The second arises from the fact that § 922(g) is at or near the top of our most frequently charged criminal offenses.

In many instances, the reform of the criminal justice system is salutary. The First Step Act is an example of a long-overdue reform, see Pub. L. No. 115-391, 132 Stat. 5194 (2018), notwithstanding the fact that it adds to the business of our justice system. But there are

limits to the extent that each new twist and turn in decisional law should spark a crisis of volume in criminal justice administration.

Volume diminishes those qualities of conscientious deliberation for which, I suspect, each of us who plays some part in criminal justice proceedings would like to be known. This court's ruling is unfortunate in so many ways. I respect the decisions of my colleagues, but I do hope that the Supreme Court will undo the error here and align us with the other circuits in our country.

## APPENDIX C

1. 18 U.S.C. 922(g) provides:

**Unlawful acts**

(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.

2. 18 U.S.C. 924(a)(2) provides:

**Penalties**

(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.

3. Fed. R. Crim. P. 52 provides:

**Harmless and Plain Error**

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

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