No. 20-444

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

REPLY BRIEF FOR THE PETITIONER

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

In the Supreme Court of the United States

No. 20-444

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

REPLY BRIEF FOR THE PETITIONER

The Fourth Circuit concluded in this case that "a standalone *Rehaif* error requires *automatic* vacatur of a defendant's guilty plea" on plain-error review. Pet. App. 5a (emphasis added; brackets and citation omitted). As the petition for a writ of certiorari explains (Pet. 8-21), that erroneous, categorical rule abdicates the "case-specific and fact-intensive" analysis that plain-error review requires. *Puckett* v. *United States*, 556 U.S. 129, 142 (2009). In particular, it unjustifiably mandates vacatur of a plea irrespective of whether, "but for the error, [the defendant] would not have entered the plea." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004). Accordingly, every other court of appeals to have considered the question has rejected the Fourth Circuit's approach—as respondent himself implicitly acknowledges. See Br. in Opp. 5.

Respondent provides no sound basis for allowing the Fourth Circuit's aberrant decision to go unreviewed.

He asserts that the decision is likely to have "minimal practical import," Br. in Opp. 5 (emphasis omitted), but that assertion is disproven by (among other things) the more than two-dozen petitions currently pending in this Court that raise the same issue. He also suggests (*id.* at 10) that this Court should not review the application of plain-error doctrine to a *Rehaif* claim because "[t]he doctrine should not apply [in that context] at all," but that newly invented merits argument is inconsistent with this Court's precedents, unsupported by the lower-court decisions that respondent invokes, and, in any event, no reason for declining to correct the court of appeals' own errors. Respondent further contends that this case is a poor vehicle for addressing the question presented on the theory that he could satisfy the standard prejudice requirement, but even the court of appeals appeared to recognize that he could not. Pet. App. 19a.

Under the correct approach of every other circuit, respondent—who had received separate sentences to three and eight years in prison, spent 691 consecutive days in custody, and been arrested on a state-law felon-in-possession charge—could not meet his burden to show a "reasonable probability," *Dominguez Benitez*, 542 U.S. at 83, that he would have forgone his plea had he been informed that he could quixotically contest knowledge of his felon status at trial. This Court should accordingly grant certiorari and reverse the decision below.

A. The Decision Below Is Incorrect

This Court has repeatedly held that a defendant may not obtain appellate relief for an error that he failed to "br[ing] to the [district] court's attention," Fed. R. Crim. P. 52(b), unless he shows a clear or obvious error

that both prejudiced him by "'affect[ing] [his] substantial rights'" and also "'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings'" more generally. *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)) (third set of brackets in original). Respondent provides no sound defense of the court of appeals' disregard for those plain-error requirements here.

1. As the petition explains (Pet. 9-18), relief for the omission from a guilty-plea colloquy of the knowledge-of-status element announced in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), requires the typical showing of prejudice for an omission from a guilty-plea colloquy—namely, "a reasonable probability that, but for the error, he would not have entered the plea," *Dominguez Benitez*, 542 U.S. at 83. In contending otherwise, respondent largely just repeats the court of appeals' mistakes.

Like the court of appeals, respondent errs in suggesting (Br. in Opp. 20-21) that in the course of applying that very prejudice requirement to guilty-plea-colloquy omissions that violate Federal Rule of Criminal Procedure 11, this Court's decision in *Dominguez Benitez*, *supra*, exempted omissions like his. The Rule 11 requirements include, as well as supplement, the constitutional ones. See Fed. R. Crim. P. 11(b). And as discussed in the petition (Pet. 18), the Court's footnote distinguishing *Boykin* v. *Alabama*, 395 U.S. 238 (1969)—in which the plea-colloquy record was devoid of essentially *any* required advisement—has no application to the discrete error here. See *Dominguez Benitez*, 542 U.S. at 84 n.10; *Boykin*, 395 U.S. at 239, 243. Also as discussed in the petition (Pet. 16-17), the Court's grant of habeas relief to a state prisoner in *Henderson* v. *Morgan*, 426 U.S.

637 (1976), does not support an automatic-vacatur rule in this context. Respondent's reliance on *Henderson* depends, among other things, on implausibly reading *Henderson*'s express determination that the error in that case was not "harmless beyond a reasonable doubt," *id.* at 647, as entirely gratuitous. See Br. in Opp. 19.

Tellingly, respondent himself appears to acknowledge that a showing of prejudice is required for plain-error relief where a district court "misdescrib[es] one of the elements of the offense." Br. in Opp. 21 (citing *Bousley* v. *United States*, 523 U.S. 614, 616-617 (1998)). The error here—describing the knowledge element as applying only to possession rather than to both possession and felon status, see Pet. App. 3a—would fit that paradigm. It is, in fact, indistinguishable from the error that respondent cites (Br. in Opp. 21) as an example of a "misdescri[ption]": failing to explain that the "use" element of 18 U.S.C. 924(c) (1988 & Supp. II 1990) required not just possession of a firearm but active employment. See *Bousley*, 523 U.S. at 617-618. Respondent does not explain his amorphous distinction, let alone justify differential treatment under plain-error-prejudice analysis.

Respondent similarly cannot rescue the court of appeals' conclusion that *Rehaif* error is "structural" and does not require a showing of prejudice at all. See Pet. 14-15. Unlike certain situations that involve overriding a defendant's expressed choice, see Br. in Opp. 21-22 (discussing *Faretta* v. *California*, 422 U.S. 806 (1975), and *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018)), omitting an advisement from a plea colloquy does not infringe a defendant's autonomy interest. Cf. *Bousley*, 523 U.S. at 622 (distinguishing between a claim of an "involuntary * * * coerced" plea and a claim of a "not

intelligent" plea based on "erroneous" advisements). Nor can respondent explain why it is "'impossible,'" Br. in Opp. 23 (citation omitted) to apply the same prejudice analysis that applies to other plea-colloquy omissions to *Rehaif*-related omissions as well—like every other court of appeals does. See Pet. 14. Respondent similarly fails to support his assertion that *Rehaif* errors "'always result[] in fundamental unfairness,'" Br. in Opp. 24 (citation omitted), when—as the decisions of those other courts illustrate—defendants routinely cannot show a reasonable probability that the error affected the plea decision.

Moreover, even if the error here were classified as "structural," that would not obviate the need for a defendant on plain-error review to show that it affected substantial rights. See Pet. 15-16. Respondent's contrary contention (Br. in Opp. 24-25) rests on the flawed syllogism that because preserved structural errors foreclose a showing of harmlessness for purposes of harmless-error review under Federal Rule of Criminal Procedure 52(a), unpreserved structural errors necessarily establish prejudice for purposes of plain-error review under Rule 52(b). That syllogism ignores a key difference between the two forms of review. While the prosecution bears the burden of establishing harmlessness for preserved errors under Rule 52(a), a defendant bears the burden of showing effects on substantial rights from unpreserved errors under Rule 52(b). See *Olano*, 507 U.S. at 734. Although the concerns implicated by structural errors preclude the government from carrying its burden under Rule 52(a), *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (citation omitted), that does not mean that they categorically carry every defendant's affirmative burden under Rule 52(b).

2. In any event, even if the prejudice requirement were somehow automatically satisfied, plain-error relief for an unpreserved *Rehaif* error would still require a *further* showing that declining to correct it would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. 732 (brackets and citation omitted); see, *e.g.*, *Johnson*, 520 U.S. at 469-470. This Court has instructed courts to apply that requirement "on a case-specific and fact-intensive basis," *Puckett*, 556 U.S. at 142, but the court of appeals dispensed with any such application here. Instead, it held that omission of the knowledge-of-status element from a plea colloquy necessarily satisfies this requirement for essentially the same reasons that it satisfies the prejudice requirement, without regard to the facts of any particular case. See Pet. App. 21a-22a.

That approach was erroneous, see Pet. 18-21, and respondent does not meaningfully defend it. Instead, he appears to suggest that this Court should ignore the government's reliance on this plain-error element precisely *because* it is "case-specific and fact-intensive." Br. in Opp. 25 (quoting Pet. 20). But any such suggestion is directly contrary to what this Court's decisions demand. See, *e.g.*, *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1909 (2018) ("[A]ny exercise of discretion at the fourth prong of *Olano* inherently requires 'a case-specific and fact-intensive' inquiry.") (citation omitted). The overarching flaw in the court of appeals' analysis is that it eliminates the very analysis this Court has said is essential to preserving a balance between efficiency and fairness in evaluating unpreserved claims. That legal error is clear, essentially undefended, and important.

3. Finally, respondent seeks to defend the decision below on the alternative—and novel—ground that plain-

error review "should not apply under the circumstances here at all," Br. in Opp. 10, because the courts of appeals had unanimously rejected a knowledge-of-status element prior to *Rehaif*. See *id.* at 11-14. Respondent has never before raised that argument; it lacks any meaningful support in this Court's precedent or lower-court authority; and in any event it provides no basis for declining to review a decision that applies different erroneous reasoning.

In *Johnson* v. *United States*, *supra*, this Court found plain-error review appropriate even though, at the time of trial, "near-uniform precedent both from this Court and from the Courts of Appeals" was contrary to the defendant's legal argument. 520 U.S. at 467-468. Following *Johnson*, the courts of appeals have consistently rejected arguments that plain-error review is inapplicable where circuit precedent would have foreclosed the unpreserved claim. See, *e.g.*, *United States* v. *Johnson*, 979 F.3d 632, 637 (9th Cir. 2020); *United States* v. *Keys*, 133 F.3d 1282, 1284, 1286 (9th Cir. 1998); *United States* v. *Knoll*, 116 F.3d 994, 1000 (2d Cir. 1997), cert. denied, 522 U.S. 1118 (1998). Respondent argues (Br. in Opp. 14) that a different approach is necessary when that circuit precedent accords with uniform precedent in other circuits, on the theory that raising a claim in such circumstances would truly be futile. But *Rehaif* itself demonstrates otherwise, and respondent identifies no court that has accepted his proposed distinction.

Respondent's reliance (Br. in Opp. 13) on *Reed* v. *Ross*, 468 U.S. 1 (1984), is misplaced. This Court held there that a state prisoner can establish "cause," for purposes of excusing failure to comply with a state rule requiring exhaustion of claims, by showing that the claim had "no reasonable basis in existing law" at the time of the state-court proceedings. *Id.* at 15. But the

Court also recognized that the prisoner needed to make a *separate* showing of "actual prejudice." *Id.* at 11-12 (citations omitted). It is that latter aspect of the inquiry—which respondent does not discuss—that would be analogous to the issue here, involving the case-specific components of plain-error review.

The circuit decisions cited by respondent (Br. in Opp. 12-14) similarly involve a different issue with no application here. They conclude that a defendant need not continue to reassert a claim "when 'the district court is aware of the party's position and it is plain that further objection would be futile, where [the] litigant's position [was] clearly made to the district court.'" *United States* v. *Algarate-Valencia*, 550 F.3d 1238, 1243 n.4 (10th Cir. 2008) (brackets in original; citation omitted), cert. denied, 556 U.S. 1227 (2009); see *United States* v. *Uscanga-Mora*, 562 F.3d 1289, 1295 (10th Cir.) (Gorsuch, J.) (applying plain-error review after noting that the district court there, "unlike the court in *Algarate-Valencia*, did nothing to indicate that it was no longer open to discussion"), cert. denied, 558 U.S. 911 (2009); see also *United States* v. *Kyle*, 734 F.3d 956, 962 n.3 (9th Cir. 2013) (collecting cases concluding that a defendant did not waive an objection by failing to renew it after the district court had already rejected it). But respondent does not claim to have ever suggested to the district court that a felon-in-possession conviction requires proof of knowledge of felon status; this case accordingly does not implicate whether and in what circumstances a defendant is required to *reassert* an argument for purposes of preservation.

B. The Question Presented Warrants This Court's Review In This Case

Respondent separately contends (Br. in Opp. 5-17) that any error in the court of appeals' decision does not warrant review in this case. That contention is groundless.

1. Respondent does not dispute that the question presented concerns one of the most frequently prosecuted federal offenses and has, over the last 18 months, explicitly or implicitly been at issue in published opinions in nearly all of the regional courts of appeals. See Pet. 21. Nor does respondent dispute that every other court of appeals to consider the question directly has rejected the Fourth Circuit's approach. See *ibid.* But respondent nevertheless suggests that this Court decline review on the ground that the decision below will have "minimal practical import." Br. in Opp. 5 (emphasis omitted). That suggestion is insupportable.

The numerous decisions involving this issue in the courts of appeals—and the more than two-dozen pending petitions raising the question in this Court—are proof enough of the frequency with which the issue arises. Beyond that, a survey of the U.S. Attorneys' Offices within the Fourth Circuit indicates in that circuit alone, plea-colloquy *Rehaif* errors are at issue in more than 80 pending appeals, many of which have been stayed pending a final decision in this case. And many defendants—like respondent—either plead guilty without an agreement or otherwise do not have applicable appeal waivers.

Respondent predicts (Br. in Opp. 9) that "the Government will easily procure guilty pleas on remand" in those cases. But if prevailing on a claim like respond-

ent's were truly as inconsequential as respondent suggests, respondent himself—let alone the many other similarly situated defendants—would not have bothered to raise one. Respondent ignores the effect of the years-long delay between the original guilty plea and any eventual *Rehaif*-based vacatur. Defendants are unlikely to try to persuade juries that they were unaware of their status as a felon—but they may hope that dimmed memories and stale or misplaced evidence may leave the government unable to establish one of the other (previously admitted) elements of the offense. Or defendants may hope that a new trial will be enough trouble for the government that it will drop the charges, or that a do-over of the proceedings will result in a lighter sentence.

Respondent also fails to substantiate his assertion (Br. in Opp. 5) that the court of appeals' plain-error analysis "has no ongoing significance" beyond the "closed set of cases" involving *Rehaif* claims. Respondent observes (*id.* at 9) that *Rehaif* was unusual in that it "declared that lower courts unanimously had overlooked an entire element of an offense," but he points to nothing in the plain-error reasoning of the decision below that would limit its application to that circumstance, as distinct from, say, a circuit's meaningfully narrowing the scope of a federal statute.

2. Respondent separately suggests (Br. in Opp. 14-17) that review is unwarranted here because he could in fact satisfy the case-specific requirements for plain-error relief. But he has never explicitly claimed that "but for the error, he would not have entered the plea," *Dominguez Benitez*, 542 U.S. at 83. And even if he had, such a "*post hoc* assertion[]," *Lee* v. *United States*, 137 S. Ct. 1958, 1967 (2017), would not carry his burden to show a reasonable probability that he would in fact have

done so in the circumstances here. See *Shinn* v. *Kayer*, No. 19-1302 (Dec. 14, 2020) (per curiam), slip op. 6 ("A reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result.") (citation omitted).

Respondent does not dispute that at the time of his offense conduct, he had been convicted of multiple felonies, been sentenced on separate occasions to terms of imprisonment of eight and three years, and at one point been held in continuous custody for 691 days. See Br. in Opp. 14-15 & n.5; Pet. 4. And the second offense here occurred just five months after respondent had been arrested on state-law felon-in-possession charges. See Presentence Investigation Report (PSR) ¶ 10.[*] Given that background, respondent cannot show a reasonable probability that he would have forgone a plea (and the likely acceptance-of-responsibility sentencing adjustment under Sentencing Guidelines § 3E1.1) and instead attempted to persuade a jury that he had forgotten about the three- and eight-year sentences and thought his 691 days of confinement somehow did not count, see Br. in Opp. 14-16. Indeed, even the court of appeals appears to have recognized as much. See Pet. App. 19a (holding relief appropriate "[r]egardless of evidence in the record that would tend to prove that [respondent] knew of his status as a convicted felon"). Respondent is accordingly not entitled to plain-error relief, and this

---

[*] Respondent observes (Br. in Opp. 1 & n.1, 16-17) that he was eventually indicted for possessing a firearm in violation of S.C. Code Ann. § 16-23-20 (2015), which does not turn on one's status as a felon. As the presentence report correctly indicated, however, respondent was *arrested* on charges of being a felon in possession of a pistol. See PSR ¶ 37 (citing arrest warrant reflecting charge for "Felon in Possession of a Pistol").

Court should grant certiorari and reverse the decision below.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

DECEMBER 2020