SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -

UNITED STATES,)

Petitioner,)

v.) No. 20-444

MICHAEL ANDREW GARY,)

Respondent.)

- - - - - - - - - - - - - - - - - - -

Pages: 1 through 57

Place: Washington, D.C.

Date: April 20, 2021

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -

UNITED STATES,)

Petitioner,)

v.) No. 20-444

MICHAEL ANDREW GARY,)

Respondent.)

- - - - - - - - - - - - - - - - - - - -

Washington, D.C.

Tuesday, April 20, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

JONATHAN Y. ELLIS, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JEFFREY L. FISHER, ESQUIRE, Stanford, California; appointed by the Court, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 20-444, United States versus Gary.

Mr. Ellis.

ORAL ARGUMENT OF JONATHAN Y. ELLIS

ON BEHALF OF THE PETITIONER

MR. ELLIS: Mr. Chief Justice, and may it please the Court:

The Fourth Circuit's automatic vacatur rule for forfeited Rehaif plea colloquy errors is flatly inconsistent with this Court's repeated recognition that even the most fundamental rights can be forfeited and that a court of appeals should recognize a forfeited claim only on a case-by-case basis in exceptional circumstances.

The Court should reverse for two principal reasons. First, Rehaif errors are not automatically or even generally prejudicial. Being convicted of a felony is not the sort of life event that one is ordinarily unaware of or forgets. In the mine-run of cases, as it is here, it would be implausible that a defendant

who pleaded guilty to possessing a gun as a felon would have insisted on going to trial if he'd only known that the government would have to prove that he knew he was -- had previously been convicted of such a serious crime.

And, second, there's no exception from plain-error review for claims that were foreclosed by circuit precedent at the time of the district court's proceeding. This Court's decisions in Puckett and Johnson rightly recognize that the Court lacks authority to create such an atextual exception out of whole cloth, and those holdings equally apply here.

Plain-error review is not an absolute bar to relief. As demonstrated by the experience of every other court of appeals in the wake of this Court's decision in Rehaif, courts can and should grant relief under that standard in cases where a Rehaif error has truly worked an injustice.

The Fourth Circuit's per se rule would thus only serve to undermine the careful balance between judicial efficiency and fairness established by the Federal Rules and to provide a windfall to defendants like Respondent, whose

convictions were and remain fundamentally fair.

The Court should reverse the decision below, hold that forfeited Rehaif plea colloquy claims are subject to the same case-specific plain-error review as any other forfeited claim, and make clear that Respondent cannot make that showing.

I welcome the Court's questions.

CHIEF JUSTICE ROBERTS: Mr. Ellis, under the government's theory, does it matter which element a district court omits during the plea colloquy, or does the omission of an element never constitute structural error?

MR. ELLIS: We don't think the omission of an element ever constitutes structural error. And we don't think that -- that any omission of an element would -- would warrant a per se approach to plain-error review. We think the Court's decision in Henderson v. Morgan and Bousley are pretty -- are instructive on that point.

Now the -- the nature of the element might -- would inform both the prong 3 analysis as to whether the defendant can show prejudice and per se -- and the prong 4 analysis, so we

don't think it justifies a -- a per se rule.

CHIEF JUSTICE ROBERTS: So, if a judge -- a district court advises the defendant during the plea colloquy that murder is a strict liability offense and, you know, it doesn't matter whether he has the intent to kill or not, you think that -- you don't have a per se rule there, in a situation like that, that that would be structural error?

MR. ELLIS: No, Your Honor, we don't think that would be structural error. I think that is pretty analogous actually to the -- the facts at issue in the Henderson v. Morgan case, where the defendant -- the court didn't inform the -- the -- the defendant that he had to have the intent to kill for a second-degree murder conviction. And even there, the court didn't grant relief without noting that it was -- couldn't be harmless beyond a reasonable doubt.

The structural errors are -- are a limited class, and they are those errors that really go to the overall structure of the proceeding and not a discrete error within it. And that includes -- serious errors don't qualify as structural errors. That doesn't mean

a defendant can't show prejudice on a case-specific basis, but it does mean that -- that it should be required to do so.

CHIEF JUSTICE ROBERTS: What if it's just not one element but two elements, three elements? Does it matter?

MR. ELLIS: So, you know --

CHIEF JUSTICE ROBERTS: There's no -- no structural error if, you know, there are four elements of the offense and the judge leaves out three of them?

MR. ELLIS: So, you know, this Court's decision in Dominguez Benitez at Footnote 10 suggests that there might be some structural errors in the plea colloquy context. It pointed there to the decision in Boykin v. Alabama. You know, that -- that's pretty far afield of what we have here. It's not even just an element problem.

In that case, the defendant pleaded guilty without being asked a single question about the nature -- to make sure he understood the nature of the charges or the consequences or the rights he was giving up. We do think, you know, that -- that that might rise to a

structural error.

Something short of that, you know, it's going to be a harder case than the one here. I think the Court grappled with the same sort of problem in Neder, where Justice Scalia made a similar argument in dissent. And what the Court said there was, you know, we're -- we're not going to go take this "penny in for a penny in per pound" approach. We're not going to categorize all element errors as structural errors just because there might be hard cases at the margins.

And the last thing I'd say about that is we haven't seen cases that sort of press that line to date, and I think there's good reason for that. As you get more and more egregious errors, it's just not going to matter if you label it structural or not. A defendant's going to be able to show -- make a prejudice showing.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Counsel, would you briefly comment on

Respondent's harmless-error review approach to this case?

MR. ELLIS: So I think you're -- you're referring to the Respondent's argument that he shouldn't have to satisfy plain-error review?

JUSTICE THOMAS: Yeah.

MR. ELLIS: So that is obviously an issue that he didn't raise below and is raising for the first point -- first time here. We think the Court has discretion to reach it, and we -- we think it's flatly contrary to the Court's decision in Johnson.

The Court in Johnson and Puckett recognized both that the Court doesn't have authority to create exceptions to the text of 52(b), and the text of 52(b) doesn't admit of any exception for a futile exception. In Johnson, the Court -- there was near universal circuit precedent against the decision at the time when the error was waived, and still the Court subjected it to -- to plain-error review.

The way it --

JUSTICE THOMAS: I --

MR. ELLIS: -- accounted for that in

-- in Johnson was, at the second prong of plain-error review, it said that the -- the Court's going to analyze the plainness of the error based on the -- the law at the time of appeal. And that means that even in a -- in a -- in a circumstance like that, where you forfeited a claim that was barred by circuit precedent, you can still get relief under plain-error review. You just have to satisfy the third and fourth prongs.

We think that's the right -- the balance, and the Court should reaffirm that approach here.

JUSTICE THOMAS: Can you think of -- I may have missed this in your discussion with the Chief Justice, but can you think of any error that would -- would require automatic vacatur under plain error?

MR. ELLIS: Under plain error? No, Your Honor, the Court hasn't identified one. And what it has said repeatedly in Young and in Puckett is that the -- that a per se approach to plain error is flawed.

You know, the -- the -- the -- the rules of plain error are intended to set up a

system where you are encouraged and incentivized to raise your claims in a timely manner and then provide a safety valve for courts of appeals to exercise their discretion to recognize a forfeited -- a forfeited claim when there has been a showing of prejudice and when there -- it would undermine the fairness and integrity of judicial proceedings not to do so. But we don't think there's a per se rule for -- for any type of error.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: No. Thank you very much. I have no questions.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: If we were to rule for Mr. Gary in this case, do you have an estimate of the number of cases pending in the courts of appeals or before this Court that would be affected?

MR. ELLIS: So we -- we noted in our brief there's -- there are 80 courses -- cases being held, about 82 cases being held out of the Fourth Circuit, the only circuit to not apply

the normal plain-error standards here, that would be affected.

That's -- obviously, the Court's decision would have broader effect across the board, and we don't have a -- I can't give you an estimate of that number of cases.

What I -- what I can point out is that 922(g) prosecutions are among the most common in the federal system. In 2019, we cited a study on page 42 of our opening brief, there were -- they accounted for nearly 10 percent or, actually, I think at least over 10 percent of all federal prosecutions, that was 7500 cases.

And -- and so, you know, the -- the -- Gary's rule here was -- would require automatic vacatur of all those claims in which they're asserted on direct appeal. I'd also point out that, you know, whatever the burden is as a matter -- a quantitative matter, qualitatively, it just doesn't make any sense.

The other circuits, in the ordinary principles of plain-error review, allow defendants who are actually harmed by a Rehaif error to get relief under plain-error review. And so, really, the Fourth Circuit's per se rule

has the -- the effect of just catching those cases where a defendant can't make a plausible claim, like this one, that it would have made a difference in the proceeding.

JUSTICE ALITO: Well, the Respondent suggests that automatic vacatur in cases like this one pose a significant burden on the judiciary because most defendants will readily plead guilty again. Is that true?

MR. ELLIS: It's hard to predict what defendants will do. I guess the fact that they're asserting it on appeal suggests that they're not intending to do the exact same thing they did the first time, even if, had the error been raised, they would have.

You know, I -- I think that as far as concerns about counsel raising a -- a litany of futile objections, I'd say two things. The first is that Johnson already dealt with that. As I noted, that very argument was made in Johnson. The Court agreed that it was a legitimate concern but held that the right approach was to make plain error -- the second prong of plain error turn on the law at the time of appeal.

And that means that you're not foreclosed entirely when there's a change of law, but you still have to make a prejudice showing. And in the wake of that, we haven't seen a litany of futile objections being raised. I think that's good reason.

Defense counsel have -- have all the incentive to focus on claims that might actually make a difference, and they can know that even for forfeited claims where there's a change of law, they can -- their client can get relief if it made -- under plain-error review if it really made a difference in working an injustice.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, this is a very different kind of case than our other plain-error cases because, in our other cases, the defendant had a reason for putting forth a defense. So whether it was Neder, the defendant knew that someone had to find materiality. It was the same thing in Johnson.

But this is the kind of case where no defendant knew that there could be an actual

defense at all. So why wouldn't we find that a structural error? You're omitting the requirement of an offense at all. And even if we found it to be structural error under prong 3, why wouldn't you win under prong 4?

Because assuming that a court can look at the entire record under prong 4, here, the defendant admitted to the probation officer that he -- and to the court, I believe, that he knew he was a felon. So don't you win either way?

MR. ELLIS: We do. We agree that we win either way. I think Johnson and Cotton make crystal clear that even if you decide this kind of error is a structural error, that it still has to satisfy prong 4, and -- and I agree entirely with the premise of your question, Your Honor, that the defendant here would lose on prong 4.

That said, I -- I don't think it is right to call this a structural error.
You know, you alluded to the fact that -- that the -- the Respondent's argument that he wouldn't have an opportunity or incentive to challenge the -- the -- the evidence here as to his knowledge. I don't think that's just --

that's accurate as a -- a general matter.

You know, the evidence we're relying on here is from the PSR in sentencing, his own statement, as you point out. You know, defendants have --

JUSTICE SOTOMAYOR: Do you have --

MR. ELLIS: -- every incentive --

JUSTICE SOTOMAYOR: Excuse me, counsel. Do you have the same answer to the questions posed earlier about the defendant who really didn't know or have an opportunity to create a record?

Do you agree that we should look at those cases, even in a guilty plea, as different than in the normal situation that a defendant should be able to proffer evidence before the appellate court?

MR. ELLIS: So we haven't gotten into the record questions here. I -- I would say a couple things about that.

First, we know at least with regard to the record before the district court, that's -- that's entirely open on --

JUSTICE SOTOMAYOR: No, no, I'm not --

MR. ELLIS: -- in a case like this --

JUSTICE SOTOMAYOR: -- I'm not asking you that because it never gets back to the district court unless the appellate court says that there was an error that sends the case back. I'm asking the question as if a defendant didn't know and didn't put into the record a plausible defense.

Do you agree with your colleague in -- in Greer that that defendant could proffer that in the appellate -- to the appellate court?

MR. ELLIS: Yes, Your Honor. We have -- we have no objection to a -- a -- a defendant offering that up, proffering that on the first instance to a court of appeals in that instance.

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Ellis, when you were answering the Chief Justice's hypotheticals earlier, you said that structural errors really all go to the overall structure of the proceeding and that's why none of the hypotheticals he gave you were, in fact, instances of structural error.

But I had thought that there was a different category of structural error where what we were looking at was some interest that was unrelated to whether there was an erroneous conviction and, in particular, a category where we were concerned with autonomy interests, with the ability of a defendant to make his own choices.

And in some of those hypotheticals that the Chief Justice was giving you, I would have thought that there was no such ability to make your own choices, that you have so little information in cases like that that the autonomy interest is raised to a very high level.

So I'm -- I'm curious as to your response to that.

MR. ELLIS: Sure, Your Honor. So I -- I agree with you that the Court in -- in Weaver in particular identified as one reason why a case -- an error might be a structural one is that it protects an error different than the -- the conviction, and -- and it specifically flagged autonomy.

I'd say first that, you know, what Weaver went on to say is that that sort of error

is still not the kind that should remove -- relieve a defendant of his requirement to show prejudice and certainly wouldn't go to the fourth prong.

Now, as to whether this kind of error is an autonomy -- protects an autonomy interest, I think -- I think not. I think the Court -- where the Court's found autonomy-based structural errors, been pretty narrow circumstances. So think about McCoy, where the Court held that a defendant's autonomy interest was violated where their counsel conceded guilt over their objection.

But, in McCoy, the Court distinguished that instance from where counsel conceded guilt without an objection.

JUSTICE KAGAN: Well, go back, Mr. Ellis, to the Chief Justice's hypothetical, then maybe to a couple of -- of -- of different ones. You know, suppose a defendant pleaded guilty without being informed of any of the elements of the offense. He didn't really even know what crime he was pleading to.

Would that be structural error because it interfered with his autonomy interest?

MR. ELLIS: So our view is no, that autonomy -- those sort of autonomy interests as those seen with McCoy are really ones where the -- either the court or the counsel has taken an interest over the express objection of a -- of a defendant in a case.

JUSTICE KAGAN: Well, how would he even know what to object to if he -- if he didn't know anything about what the crime was? I mean, how can a defendant make the choice to plead guilty if he doesn't know what he's pleading to? I would have thought that that's pretty non-autonomous decision-making.

MR. ELLIS: I -- I -- I'm not disputing the fact that there is some autonomy here when you're not being made -- a completely knowing choice. The problem with taking that sort of a view of a structural error is that it would -- it would suggest a sort of unique error in the plea colloquy context, and informing of -- a defendant of his knowledge would risk being an autonomous -- a structural error.

Either way, I think, Your Honor, what I was saying before, I think what Weaver says is that even in that case, you're going to need to

show prejudice, and we know from Johnson and Cotton that you're going to need to show the fourth prong. So I don't think you have to definitively answer that question here.

I also think even if you think there are some plea colloquy errors, as I noted to the Chief Justice, that would be structural, be it for autonomy reasons or others, we're not getting close to that here. And -- and we -- we don't think it's really evident on this --

JUSTICE KAGAN: Thank you, Mr. Ellis.

MR. ELLIS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: I have no questions at this time.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: No additional questions.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: None from me either.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Ellis.

MR. ELLIS: Thank you, Mr. Chief Justice.

So, as I was just discussing with Justice Kagan, I think there -- there are -- we acknowledge there are hard questions here in this case about precisely where to draw the line between discrete plea colloquy errors, like the one here, and a more fundamental breakdown in the process where relief should be available under even plain-error review.

But wherever one might draw that line, this case falls far short of it. When Respondent possessed the weapons at issue here, he'd been convicted of seven different crimes punishable by more than a year in prison, he'd spent multiple years in prison, he'd been released months before. He knew that he was not supposed to possess a gun.

And in that respect, Defendant -- or Respondent's circumstances are not atypical of 922(g)(1) defendants across the country. Every other court of appeals has been able to apply the ordinary principles of plain-error review to distinguish between cases like this one, where relief would do nothing but award a windfall to

a defendant whose conviction is fundamentally fair, and those rare circumstances, where Rehaif error has worked an injustice.

All we're asking is the Court reaffirm that well-settled approach.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE RESPONDENT

MR. FISHER: Thank you, Mr. Chief Justice, and may it please the Court:

The due process error here requires automatic reversal for two reasons, first, because the error is structural. A core aspect of the autonomy every defendant must be afforded is the ability to decide whether to contest the government's allegations or, instead, to relinquish one's physical liberty without trial and submit to a term of imprisonment.

Failing to advise a defendant of the complete charge against him necessarily deprives him of the ability to make that grave choice knowingly and intelligently. Indeed, it would trample the framers' vision of free will to

enforce a guilty plea where the only facts the defendant admitted do not even constitute a crime and, where having now been advised of the true nature of the charge, the defendant wants to contest it.

Second, the plain-error doctrine does not stand in the way of rem -- of remedying the fundamental constitutional defect here. For starters, the plain-error doctrine should not even apply.

But even if Olano's test does apply, the result would be the same. Structural errors necessarily satisfy Olano's third prong as a matter of plain text analysis, and in the words of the fourth prong, it would seriously affect the fairness, integrity, and public reputation of judicial proceedings to allow a guilty plea to stand without fair notice of the charge. And that is especially so where the only reason for withholding relief would be that the defendant failed to make a pointless, totally formalistic objection.

That leaves the government's complaint about the practical consequences of having an automatic vacatur rule here. They would be

slight. Our rule would do nothing more than return an average of one Section 922 case to each district judge, as the government's own statistics demonstrate. That seems a small price to pay for honoring what this Court has long called the first and most universally recognized rule of due process: fair notice of the alleged conduct for which the government seeks to put one of its citizens behind bars.

I welcome the Court's questions.

CHIEF JUSTICE ROBERTS: Mr. Fisher, I -- I want to talk just a moment about your unanimous -- you know, the proposed futility exception. What -- what does it take to satisfy that? Unanimous view of the circuits but only three circuits?

MR. FISHER: Well, Mr. Chief Justice, obviously, all you would need to say in this case is you -- is the unanimous view of the circuits.

CHIEF JUSTICE ROBERTS: Yeah, Mr. Fisher, you understand that, you know, I'm not talking about this case but a general rule.

MR. FISHER: Fair enough. We're -- we're -- we're -- we're making alternative

suggestions to the Court. I think the first suggestion is that the Court could say plain error does not apply when the unanimous view of the circuits was against the defendant.

CHIEF JUSTICE ROBERTS: So two -- two --

MR. FISHER: That is a situation --

CHIEF JUSTICE ROBERTS: -- two circuits is unanimous. I mean, is that enough?

MR. FISHER: Oh, I'm sorry. Forgive me. What I mean is every single court with criminal jurisdiction --

CHIEF JUSTICE ROBERTS: Oh, I see.

MR. FISHER: -- because that is a situation where it is true futility. There's no circuit split to put the defendant on notice that the -- the judge on notice that the issue is arguable, and there's no possibility that any other court would adopt the alternative view. And so, here, you have the truly unique situation that the Court has never faced before of true futility.

And my alternative submission, Mr. Chief Justice, is that even if you don't think that the plain-error doctrine should be set

aside here, at the very least, the futility of the -- of the objection should be considered as part of the prong 4 analysis. As the conversation this morning in the first case demonstrated, and I think the government's position in our case also demonstrates, that is a broad prong that looks at fundamental fairness and the reputation of proceedings, and so, at the very least, we think it would be unfair and would bring disrepute on the judiciary to deny relief in a situation where the defendant had no reason to object and, in fact, it would have been utterly pointless and formalistic to do so.

CHIEF JUSTICE ROBERTS: You know, the cases where we've held that it's not structural error, I think, if you put them side by side with yours, it's hard to say that yours is necessarily stronger. You know, the judicial improper participation in the negotiations, the government's actual breach of the plea -- plea agreement, if those aren't structural, why -- why is the error in this case?

MR. FISHER: The thing that sets this case apart, Mr. Chief Justice -- well, actually, there are two things.

The first is what Justice Kagan mentioned, which is the autonomy interest at stake. The Court has said that where the defendant is deprived of a choice to make the fundamental decisions about his own defense, that is a different sort of error. And that is the essence of what you have here, which is a defendant who is unable to even decide whether to challenge the government's case in a knowing and intelligent manner.

And that leads to the second reason that this is set apart, which is the first and most elemental aspect of due process is fair notice of the charge, and when that is deprived, then everything else that follows cannot be trusted.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: I have no questions, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Yeah. What -- what -- what is the difficulty of -- of making what

-- you made all these arguments. Fine. So the lawyer for the defendant says to the appeals court or the district judge, you know, we wouldn't have pled guilty. Now you have to make -- you know, you have to make it plausible or reasonable, or if it wouldn't happen, then that's the end of it. You win. I mean, why call it a structural error? Why not just say the plain error shows that it was likely it would have made a difference, end of case?

But, in a case where there's an element, you know, it wasn't known about, et cetera, dah, dah, dah, but it's obvious it wouldn't have made any difference whatsoever, you lose? I mean, why is that a tough system to work?

MR. FISHER: I think for two reasons, Justice Breyer. The first relates to the answer I gave to the Chief Justice, which is that when you have a -- a violation of the defendant's own autonomy to decide whether to challenge the government's case and -- and submit to a conviction without any trial whatsoever, the bare minimum when you have a plea guilt -- a guilty plea is that the defendant understand the

charge.

And that may sound like a formalistic rule, but, remember, guilty pleas are themselves an innovation the framers were not even aware of, and so, when you're going to introduce something -- a conviction without trial, the defendant should at least have fair notice. And so that's -- that's -- that's the primary.

And the second reason is that you simply cannot trust whatever record may have been constructed at the guilty plea colloquy where the defendant has no reason to know that the missing element has any salience at all, and then -- and then, when you get to the defense proceeding, the defendant has the opposite incentive.

The government said earlier this morning that the defendant would have an incentive to challenge a missing mens rea element at sentencing. But, as we cite on page 33 of our red brief, courts have held exactly the opposite, which is that if the defendants at sentencing, having pleaded guilty to what they think is a strict liability defense, turn around and say, well, you know, I didn't know what I

did was wrong, judges then hold that against the defendant and deny acceptance of responsibility and give them bigger sentences.

So it's a -- so it's just not a record that you can trust on appeal to do any sort of plain error --

JUSTICE BREYER: No, but it was in the briefs. I mean, he says, look, judges in the appeals court, hey, I didn't know that there was this element, obviously. If I had known, I wouldn't have pled -- pled guilty. And then you put in a general description of -- of what makes that plausible, reasonable to think in the circumstance. You don't have to go into some big record. You just have to explain it and back it up.

MR. FISHER: Well, Justice Breyer, two things. One is I -- I think I made an argument that you shouldn't have to do that because the Fourth Circuit correctly held that the error is structural and that prong 4 is satisfied in this situation. But --

JUSTICE BREYER: But I'm asking --

MR. FISHER: -- if we didn't have to do that --

JUSTICE BREYER: -- why shouldn't you have to do it?

MR. FISHER: The reason why you shouldn't have to do that are, number one, because it's structural error for the reasons I've said, and that satisfies prong 3 because an error that affects substantial rights is necessarily structural.

Secondly, prong 4 is satisfied because the autonomy violation, the fundamental fairness violation themselves satisfy prong 4. And even if they didn't, the futility of the exception should -- the futility of an -- an objection should be taken into account, and that would show that it would be fundamentally unfair to deny relief.

But, Justice Breyer, I want to add one last thing, which is we do argue in this case that Mr. Gary would not have pleaded guilty had he known of the element, and we give the reasons why he would have a defense to the mens rea element in Rehaif. It's just that that is not an issue in front of this Court.

If we had to make that argument on remand, we would, and we do have an argument

that's laid out at the very tail end of our red brief, but we just don't think that's in front of the Court.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: Mr. Fisher, would your autonomy argument mean that every misstatement and every material omission made by a district judge at the Rule 11 proceeding requires -- is structural error?

MR. FISHER: No, Justice Alito. We focus just where the Court itself focused in Bousley and Dominguez Benitez on errors that -- that omit the elements and so the defendant does not have an understanding of the nature of the charge. And the Court has distinguished in both those cases other sorts of errors that go to things like the strength of the government's case or the consequences of a guilty plea or the like.

JUSTICE ALITO: Well, why wouldn't the autonomy argument apply to any misstatement or omission, that at the Rule 11 proceeding, the judge explains to the defendant the rights that the defendant is giving up and what the government would have to prove if the case went

to trial, and the defendant presumably makes a decision about whether to go to trial or plead guilty based on that understanding of what is at stake?

And so, if the judge mis-describes what is at stake, it seems to me the same autonomy interest is implicated. No? What's wrong with that?

MR. FISHER: The difference, Justice Alito, is that the autonomy interest here and the only autonomy interest, I think, fairly recognized in the Court's cases is understanding the nature of the charge and understanding whether you are agreeing that you -- the wrongful conduct you are agreeing that you committed.

If you just isolate the element here, Justice Alito, maybe put it this way, which is the defendant has an autonomy interest in whether to admit guilt and subject himself to imprisonment, and Mr. Gary is here today telling the Court, I want to challenge the mens rea element in Rehaif.

And so the -- the issue in front of the court is whether he gets to make that choice

or whether the court makes it for him without him ever being able to make it for himself. And that's a different sort of a choice and a different sort of autonomy violation than technical rule -- violations of Rule 11 like you dealt with in Dominguez.

JUSTICE ALITO: On the issue of futility, if I understand the chronology, at the time when your client pled guilty, Judge Gorsuch's separate opinion in the Tenth Circuit on this issue had been issued and, in fact, had been on the books for a number of years, and Judge Gorsuch had become Justice Gorsuch.

So why would it have been -- why was it futile to raise the issue at that time in the district court? Had that been done, we might be talking about Gary cases as opposed to Rehaif cases.

MR. FISHER: Well, I think that's the best argument for why the defendant should have raised the -- the -- the -- the objection, but -- but we don't think you can distinguish a situation where there was a single dissent out there from many other situations like where justices of this Court have said, I think we

should reconsider this precedent or the like.

If you're going to hold defendants to require them to object in all of those circumstances, the defenders tell you in the amicus brief and the judges themselves, district judges tell you themselves in their brief, what you're going to be requiring is an omnibus motion at the beginning of every criminal case and objections throughout that are all based on perhaps single judge opinions or single justice dissents that are just going to clog up the machinery of criminal justice.

And remember Rule 2 tells you that you should construe the rules and apply them to -- to -- to seek efficiency, fairness, and simplicity. And the government's position here would -- would -- would give you the opposite.

JUSTICE ALITO: All right. Thank you. Thank you. My time is up.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Mr. Fisher, even assuming that this was structural error under prong 3 for the reasons that you stated or just narrowly because there was no reason for him to

know that anyone would have to find this element and so no reason to proffer -- to consider this defense at all, don't you still have to meet prong 4?

And I don't want you to argue Mr. Greer's case, but assuming that on prong 4 all evidence in the record could be looked at, tell me what defenses are plausible that your client could raise. You mentioned they may have been in your red brief. I just don't remember seeing what they were.

MR. FISHER: Three things, Justice Sotomayor. First, I agree that we have to satisfy prong 4 if -- if the plain-error doctrine applies. And so we have an argument that it doesn't apply, but, if it does apply, we have to satisfy prong 4.

And then the argument that I'm making to the Court here --

JUSTICE SOTOMAYOR: No, those are not --

MR. FISHER: -- is that we ought --

JUSTICE SOTOMAYOR: -- the arguments I'm looking for. I'm looking for a factual defense to knowledge.

MR. FISHER: Right. So --

JUSTICE SOTOMAYOR: Here is a man who was convicted seven times, multiple separate jail terms, vastly exceeding one year, and I think he had been let out of his last conviction months before he was arrested on this charge.

So what would have made it -- what factual defenses to knowledge would he have plausibly had?

MR. FISHER: So I'm going to answer your question, Justice Sotomayor, but if you forgive me one -- one quick thing I want to make sure I reserve, which is we do not think this issue is in front of the Court. Our -- our -- our argument is that he automatically satisfies prong 4 because of the nature of the error and the futility.

But what our argument would be on the facts on remand is that -- is that even though he has seven convictions, none of them were convictions where he served one year -- more than one year of imprisonment following that conviction.

And so the only conviction the government really put in front of the Fourth

Circuit is a 2014 burglary conviction. There, he served more than a year of pretrial detention, but he was let out on a suspended sentence after the guilty plea.

And so he reasonably would -- would have -- might have thought that pretrial detention has no relationship, as the Court knows, to what the ultimate sentence could be --

JUSTICE SOTOMAYOR: How about his --

MR. FISHER: -- and that because he served --

JUSTICE SOTOMAYOR: -- admission that he knew he was a felon and that's why he was hiding?

MR. FISHER: So that was not his admission, Justice Sotomayor. What his admission was, and I'm going to quote here, was that he was aware he was not supposed to have a weapon. He did not say anything about his felon status.

And remember, at the outset of this case, he was charged under a state law that prohibited carrying guns without certain, you know, job titles, like a policeman or a fire fighter or the like, or a fisherman, and so that

-- that alone would have told him he couldn't carry a gun for reasons having nothing to do with any felon status.

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Fisher, like Justice Alito, I'm also trying to get a handle on what you think is autonomy-infringing and why.

So, if we could think about the error in Bousley, there, the Court advises the defendant that using a firearm in connection with a drug crime requires only gun possession. But that's not right. In fact, it requires active employment of the firearm.

Is that structural?

MR. FISHER: I think probably, Justice Sotomayor, for the -- I'm sorry, Justice Kagan, for the same reasons I've described. I -- it's obviously a little bit different because I think that would be thought of as a mis-description of an element and not a total omission, but remember that -- I think it's telling that the government itself was unwilling to offer you or

the Chief Justice any limiting principle.

And I think that's the problem, is that we're offering the Court a rule that says it is structural error because it violates the autonomy if the defendant does not have true notice of the charge against him --

JUSTICE KAGAN: So a mis-description --

MR. FISHER: -- when he pleads guilty.

JUSTICE KAGAN: -- or omission is not your -- your dividing line. So, for example, if the Court had told your client that a felon was someone convicted of a crime that carries a sentence of six months, that would be just as autonomy-infringing, is that right?

MR. FISHER: I do not think it would be quite as autonomy-infringing, Justice Kagan. I think you could draw that line, but you wouldn't necessarily have to.

I think you have to draw a line somewhere. And all we're asking the Court to do here is say at least where an element is omitted, then you cannot fairly say that the -- the -- that the -- the defendant made a free and voluntary choice to plead guilty.

JUSTICE KAGAN: Right. But, when you move back from that --

MR. FISHER: That is a violation of autonomy.

JUSTICE KAGAN: -- I mean, I could imagine cases where an element being omitted is of considerably less importance to anybody's decision to plead as another case where there's been a mis-description of an element.

MR. FISHER: Again, I -- I -- I will concede that I think that you can put those two cases together, and where you would think about laying down a principle in the long run, I think those cases may go together.

But just remember this swings the other direction too, and the government is here saying, even if two elements are omitted, even if three elements are omitted, that's not structural error. Somewhere it has to be structural error.

JUSTICE KAGAN: And is your --

MR. FISHER: It just seems --

JUSTICE KAGAN: I'm -- I'm sorry.

MR. FISHER: Go ahead.

JUSTICE KAGAN: Is -- is -- is your

view that this has nothing to do with the question of prejudice? I mean, imagine a case where we think, in light of the nature of the omission or in light of the nature of the mis-description, I mean, every defendant in his right mind would still have pleaded guilty.

In that case, we're just not allowed to say that?

MR. FISHER: That is my argument today, Justice Kagan, because that is the nature of the error. I mean, I think what you just said is very much what the Court said in the Faretta line of cases, which is no matter how ridiculous it was for the defendant to represent himself or no matter how guilty he may have been, if we violated that right as a -- as a court system, the defendant gets automatic relief.

And McCoy holds the same thing. And so we just ask the Court to recognize that this is the molten core of due process, which is understanding what you are charged with before you submit yourself to prison without a trial.

And in that situation, even if it appears formalistic on the surface, it is such a

deeply fundamental right not just on an autonomy level but fundamental fairness for the third prong of structural error that you should give automatic relief.

JUSTICE KAGAN: Thank you, Mr. Fisher.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Mr. Fisher, I'm -- I'm still trying to get my hands around your futility argument. The contemporaneous objection rule is heavily embedded in tradition and also in the Federal Rules. And Rule 51(b) speaks expressly to the question, and it says that there's no need for an objection if a party does not have an opportunity to object.

That -- that's the test. It's not some sense of how many circuits have ruled against it or whether it's likely to lose or how likely it is to lose in front of the district court or in the court of appeals. It's an opportunity.

And how do you -- how do you reconcile your argument with that language in Rule 51?

MR. FISHER: Justice Gorsuch, the way that we construe the text is to -- is to apply

the canon that where the court incorporates a term of art with prior accumulated legal meaning, that it -- that that term carries the old soil with it. It's just --

JUSTICE GORSUCH: Yeah, I -- I -- I just haven't seen any of that from your brief. You mentioned a Second Circuit opinion, but there's nothing from this Court that's ever construed an opportunity to object to mean a likelihood of success on that objection.

MR. FISHER: No, but what the Court has done is had -- it has decades of cases leading up to 1944 where this rule -- where the rules were codified in this respect that held that where there's an intervening decision that the defendant would have had no reason to see coming, that plain error does not apply. And so that is the --

JUSTICE GORSUCH: Oh, an intervening decision, but -- but, here -- here, again, there -- there -- there was plenty of notice that this was an available argument out there. It may not be a likely -- one that the Eleventh Circuit was likely to have adopted, but --

MR. FISHER: Again, I -- I --

JUSTICE GORSUCH: -- why -- why -- why -- why wasn't -- you know, even if we're going to play the -- the -- the -- the sufficient notice game rather than the opportunity game, why wasn't there sufficient notice?

MR. FISHER: I -- I don't deny there was sufficient notice, but that was never the test the court applied. The case I would most readily direct you to is the Hormel decision at 341.

JUSTICE GORSUCH: So hold on. So you agree that there was sufficient notice now?

MR. FISHER: No, I think, obviously, your opinion was -- was on the books, and so there was notice in -- in -- of that. I -- I was talking earlier about no notice of the true charge against him because of what the district judge said. He -- that the defendant had no notice that --

JUSTICE GORSUCH: So there was notice and he did have an opportunity?

MR. FISHER: There was no notice of the mens rea element truly being present -- part of the charge.

JUSTICE GORSUCH: There was notice

that it was an available argument?

MR. FISHER: You could -- you might say that, but, again --

JUSTICE GORSUCH: Okay. And -- and --

MR. FISHER: -- the court said that --

JUSTICE GORSUCH: -- and -- and there was nothing that prevented -- the district court didn't prevent him; there was no restriction of his opportunity. You'd agree to that too?

MR. FISHER: I -- I can accept that, Justice Gorsuch. But, if you let me just point you to one case, which is right before Rule 52 was codified, the Hormel decision, which itself is cited in Olano. The Court said that because the --

JUSTICE GORSUCH: Yeah, that's Rule 52. I was asking about Rule 51, but my time's expired. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

And welcome, Mr. Fisher. Just to zero in on this particular case and the precise issue in this case, I think you're saying that it's

unfair to defendants to have their conviction by trial or plea when the government wasn't required to prove that the defendant knew he was a convicted felon.

And the Fifth Circuit said, well, convicted felons typically know they're convicted felons. Judge Wilkinson said felony status is simply not the kind of thing that one forgets.

So, from that premise, it seems odd to throw out all the convictions if you accept that premise. So do you accept the premise that convicted felons typically know they're convicted felons?

MR. FISHER: I think that may be true, Justice Kavanaugh, but -- but one thing is you said pleas and trials. We're focused here just on the plea situation in this case, of course.

JUSTICE KAVANAUGH: Right.

MR. FISHER: And the question has never -- the question should not be whether defendants are typically aware of the -- of -- of the element or the element is typically satisfied. The -- the question should be whether the defendant, when he pleads guilty,

understood that that was part of the charge and, therefore, was given an opportunity to exercise his own free will in deciding whether to challenge that element.

I mean, obviously, in Rehaif, seven justices of this Court thought that the element was quite important, and, in fact, it separated wrongful from innocent conduct. And so another way to put our submission is that the defendant should at least have the opportunity to decide for himself whether to agree to wrongful conduct and submit to a term in prison even if it's unlikely he would satisfy that.

I mean, you could take a case, Justice Kavanaugh, where there's a videotape of the crime or the defendant later wrote a book about the crime, as Justice Alito was positing this morning, or any number of other things, and we simply cannot allow a system where the defendant is never given an opportunity either to understand the charge and agree to it or to challenge the government's allegations at trial. One of those two things must take place.

JUSTICE KAVANAUGH: Thank you, Mr. Fisher.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Good morning, Mr. Fisher. So should the defendant have to represent to the court of appeals that he wouldn't have entered the plea had he known, say, about Rehaif?

MR. FISHER: I think, Justice Barrett, there's two ways to -- I can understand that question. You know, the answer is no if you're asking do we have to satisfy the Dominguez test, but I think the answer is yes if you're saying -- if -- if you're just saying, you know, should the defendant represent that he wants to withdraw his guilty plea and challenge the government's case. I mean, that's the reason why Mr. Gary is here.

You know, we -- there were some questions earlier about statistics, and we've done our best to figure that out on our own end, and it's only, I think, fewer than 10 percent of the defendants who were on direct review after Rehaif that have made a claim like Mr. Gary's. So it's not like every defendant is making this kind of a claim, and there's no windfall to be

gained by making it. The defendants may end up being convicted and getting a longer sentence.

Rather, what the defendants like Mr. Gary have decided is that they would like to challenge the government's allegation and they would like to put on a defense on that element. So that's why they're bringing these appeals.

JUSTICE BARRETT: And so do you think that's kind of a natural weed-out mechanism for the point that Judge Wilkinson was making, that, you know, felon status is not the kind of thing that you were going to forget, so their -- the likelihood that they would succeed if, indeed, they won on appeal and went back and put the government to its proof is itself a deterrent against a flood of cases?

MR. FISHER: I think so. I think that that's one thing that actually does naturally serve that -- that interest, and you might want to call it a practical interest in that respect.

And -- and, remember, these are not decisions that defendants like Mr. Gary make lightly because, once you vacate the guilty plea, the case starts over, and -- and -- and you just go back to square one, where you were

before, and the -- the government could seek a longer sentence, the government could say he no longer deserves acceptance of responsibility if he's convicted, et cetera.

JUSTICE BARRETT: Thank you, Mr. Fisher.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Fisher.

MR. FISHER: Thank you.

I think because we've become so accustomed to our system of guilty pleas that I -- I understand the temptation that the Court may have to think of this case as involving a request for relief based on a violation of something of a formalistic requirement of criminal procedure.

But, in fact, this case involves the most fundamental of principles and the most sensitive of practices: a conviction without a trial. Indeed, because of the stakes involved for individuals and the fear of government abuse, as the Court knows, the concept of a guilty plea itself was largely unknown to the framers.

So we're obviously not asking the

Court to second-guess the modern development of the guilty plea system, but what we are saying is that an indispensable requirement of a conviction obtained in this matter is fair notice of the true charge and especially of any element like the mens rea element here that separates wrongful conduct from innocent conduct.

So a defendant can at least make an intelligent decision whether to surrender his liberty without even putting the government to its proof. However hazy that principle may appear in the mire of procedural debates about prong 3 and prong 4, et cetera, that we've had today, no constitution designed to secure freedom can function without -- without honoring that fair notice concept.

So we ask the Court to confirm -- to affirm the Fourth Circuit's automatic vacatur rule. If, however, the Court thinks that the defendant needs to show some sort of prejudice, then we'd ask the Court to remand to the Fourth Circuit so we can make those arguments in the first instance to the court of appeals.

We -- with that, we'll submit the

case.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Ellis?

REBUTTAL ARGUMENT OF JONATHAN Y. ELLIS
ON BEHALF OF THE PETITIONER

MR. ELLIS: Thank you, Mr. Chief Justice. Just a few points.

First, I think what the Respondent's time at the podium this morning makes clear is that he's either offering a highly gerrymandered rule in this case or one that would affect a sea change in both plain error and structural error.

On -- as to the gerrymandered nature on futility, he argues that there should be an exception only where the circuit precedent was universal. But, if what we're worried about is the district court being able to credit an objection, then all it takes is contrary circuit in that defendant's -- in the -- contrary precedent in the defendant's circuit. And if we're worried about letting the court or the parties do something to aid in appellate review, like build a factual record or in -- enter a contingent guilty plea, that can happen just as

often as it can where there's universal circuit precedent as when there's near universal circuit precedent or anything less.

On structural error, it's not clear, as Justice Kagan pointed out, why a mens rea element like this one would be more important to a defendant than the right at issue in Vonn, which was the right to counsel at trial, or the -- the -- the error in -- in Dominguez Benitez, which was informing the -- the district -- the defendant that he didn't -- he couldn't withdraw his plea if the Court didn't agree with the government's recommendation for a safety valve, which made the difference between a mandatory minimum of 10 years or only 70 months, could be only 70 months in prison.

Even the gerrymandered nature, though, of the rule that he offered doesn't work. On futility, the Court is -- the futility exception is flatly contrary with Johnson. I think it's worth pointing out in that case the error that was -- was -- was forfeited was one that the Court in Gaudin had to overrule its own precedent in order to recognize. So it's not clear why that was any more futile in that case

than it was here.

And -- and -- and as to the structural error, the -- the Respondent's argument that any element left out is structural and not susceptible to prejudice analysis is -- cannot be squared with this Court's decision in Henderson or in Bousley, and so we ask the Court to reject that on those grounds as well.

Finally, Respondent's counsel ended with his -- with a plea that even if the Court reverses the Fourth Circuit and says that an automatic rule isn't appropriate, it should remand for the Fourth Circuit to have another crack at it.

We'd urge the Court not to take that approach. The Fourth Circuit did have a chance to pass on prong 3 and prong 4. It did. It just badly erred. So just as this Court did in Cotton, just as it did in Rosales-Mireles, we'd urge the Court to -- to reach those prongs, to resolve it and provide guidance to the Fourth Circuit on how it should apply. And we'd ask the Court to reverse.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:55 a.m., the case was submitted.)