Certiorari granted by Supreme Court, January 8, 2021

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4578

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MICHAEL ANDREW GARY,

Defendant – Appellant.

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)

Argued: December 11, 2019 Decided: March 25, 2020

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

Vacated and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Floyd and Judge Thacker joined.

ARGUED: Kimberly Harvey Albro, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Columbia, South Carolina, for Appellant. Alyssa Leigh Richardson, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee. **ON BRIEF**: Sherri A. Lydon, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

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

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

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.

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.

[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.

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*, 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

[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, 443–44 (4th Cir. 2016), *abrogated on other grounds by United States v. Stitt*, 139 S. Ct. 399 (2018).

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